INTRODUCTION

Preparations are continuing to enable the United Kingdom to comply, on Brexit, with obligations imposed by the World Trade Organisation, notably Article 13 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the **WTO Anti-Dumping Agreement**).[1] This note provides an update on progress made so far and offers some practical observations on how the UK new regime[2] differs from that adopted by the EU under Regulation 2016/1036.

It is important to note upfront that the new UK regime is not a mere copy-paste of the EU one. One may even consider that the UK regime is somehow reflecting the position the UK Government adopted for many years within the EU. This is particularly the case for the so-called 'public interest' test which was developed by Sir Leon Brittan, European Commissioner for Trade as from 1995. This test seems reinforced in the UK rules by explicitly setting two types of 'public interest' test, one in the hands of the administrative body (TRA) and one in the hands of the political body (Secretary of State). It remains to be seen whether the absence of definition of the scope of the political level 'public interest' test will not lead to situations where the imposition of measures, aiming at restoring a level playing field, becomes too aleatory for UK producers suffering injury from subsidised or dumped imports. In any event, the implementation of the new UK rules should encourage all parties concerned (whether producers, but also exporters, importers or users) to be inspired by EU (and WTO) case law to defend their case before the TRA.

OVERVIEW OF THE UK REGIME

Trade Remedies Authority Investigations

Nearly a full complement of staff has been recruited to work at the Trade Remedies Authority (**TRA**) which will be tasked with carrying out investigations and recommending trade defence measures to be imposed by the Secretary of State for International Trade (**Secretary of State**).[3] The UK has adopted many of the rules and procedures currently applied by the EU.

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[1] Article 13 requires WTO members to maintain independent judicial, arbitral or administrative tribunals or procedures to review administrative actions relating to anti-dumping measures.

[2] The following statutory instruments came into force on 3 June 2019: the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019 (SI 2019/910) (**RA Regs**), which establish interested parties' right to seek reconsideration of any decision of the TRA and appeal a reconsidered decision to the Upper Tribunal; and, the Tribunal Procedure (Amendment) Rules 2019 (SI 2019/925) which facilitate the Upper Tribunal hearing appeals against decisions of the TRA or the Secretary of State in relation to trade remedies.

The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 (SI 2019/450) (**DS Regs**) and the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019 (SI 2019/449) (**II Regs**) came into force on 6 March 2019.

[3] If the UK leaves the EU before the Trade Bill 2017-2019 is enacted, the TRA's functions will be carried out by the Trade Remedies Investigations Directorate (**TRID**), which has already been established within the Department for International Trade; references to the TRA are intended, if exit day occurs before the Trade Bill receives the Royal Assent, to refer to the TRID (until such time as the Trade Bill is enacted).

The TRA will initiate an investigation by publishing a notice and opening a period during which an interested party may make itself known to the TRA in order to provide information and request hearings during the investigation.

[There] are valuable opportunities for an interested party to supply information early in the TRA's investigation, on issues such as whether dumping / subsidisation has in fact occurred and the existence (or absence) of harm to UK industry.

The TRA is obligated, *"as far as practicable"*, to issue a questionnaire to an interested party (or a sample of interested parties who have made themselves known to the TRA during the registration period). During the investigation, the TRA must have regard to information supplied by an interested party, subject to the information being verifiable and certain conditions of form and timing. Any interested party has the right to request a hearing during the investigation and if the TRA decides to hold a hearing, it must allow an interested party to attend and present its views by written and oral statements.

These are valuable opportunities for an interested party to supply information early in the TRA's investigation, on issues such as whether dumping / subsidisation has in fact occurred and the existence (or absence) of harm to UK industry. The DS Regs and II Regs provide for information submitted to the TRA to be kept confidential, subject to certain conditions and to permitted disclosure in domestic or international disputes.

If the TRA ultimately determines that harm is being caused to UK industry and that countermeasures are in the UK's 'economic interest', the TRA will recommend to the Secretary of State the imposition of provisional measures (a guarantee) or definitive measures (anti-dumping / countervailing amounts or safeguard measures); the Secretary of State will then determine whether the TRA's recommendations should be implemented in the 'public interest'.

'Economic interest' test

The TRA's assessment of whether countermeasures are in the UK's 'economic interest' is equivalent to the EU 'Union interest' test.[4]

The EU Commission may refuse to impose trade defence measures, even if the conditions of dumping / subsidisation / injury are met, if it would be against the Union's interest taking account of the injury caused to EU industry and the benefits of removing that injury.

The EU's Union interest test has become broader in recent years, balancing the interests of EU industry, importers as well as consumers, and this has led to the Commission deciding not to impose countermeasures where it might have done so if only a narrower set of factors had been taken into consideration. It will be interesting to see to what extent the TRA's approach to applying the economic interest test shadows or diverges from that adopted by the Commission.

'Public interest' test

The Secretary of State may determine not to impose a measure recommended by the TRA if he or she is satisfied that it is not in the public interest to accept that recommendation. The terms of the public interest test are not defined in the CBTA (nor in any other legislation to the best of the authors' knowledge) and as such is likely to leave considerable scope for the Secretary of State to exercise discretion.

[4] Taxation (Cross-border Trade) Act 2018 (**CBTA**), Schedule 4, paragraph 25; Regulation 2016/1036, Article 21.

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At first glance, the UK's 'public interest' test appears to involve an additional (political) step in comparison with the procedure followed by the EU Commission. However, a decision to impose EU countermeasures is subject to a vote of a committee established to assist the Commission, composed of representatives of the Member States and so in reality the process is similar.

Retroactive Imposition of Duties and the Lesser Duty Rule

The WTO Anti-Dumping Agreement provides for the possibility of registering imports during the investigation and imposing definitive measures retroactively, if certain conditions are fulfilled. The EU Commission imposed anti-dumping measures retroactively for the first time in 2016, and their legality has recently been confirmed by the EU General Court's decision in the *Stemcor London* case.[5]

Effectively mirroring the powers adopted by the EU, the CBTA provides that the Secretary of State can require the registration of imported goods and retroactively impose duties, up to a maximum of 90 days prior to the Secretary of State's requirement to give a provisional guarantee.

The UK has also implemented the Lesser Duty Rule: the CBTA provides that a definitive anti-dumping or countervailing amount recommended by the TRA must not exceed the margin of dumping or the amount adequate to remove the injury to UK industry, if lower than the margin of dumping. The approach currently adopted by the UK legislation does not, however, include exceptions equivalent to those applied in the EU (for example, in respect of significant distortions on raw materials), but it may be that this changes over time.

REVIEW, RECONSIDERATION AND APPEAL

If an interested party is dissatisfied with the result of a TRA investigation / recommendation, or a determination by the Secretary of State, there are a number of means of recourse available.

The independent right of appeal against determinations / decisions of the TRA and Secretary of State, required by Article 13 of the WTO Anti-Dumping Agreement, will be to the Upper Tribunal which is a judicial body.[6] However, it is also possible for an interested party to apply to the TRA for 'reconsideration' or for a 'review' of measures imposed if there has been a change of circumstances.

There is no EU equivalent to 'reconsideration', which is a mandatory step before any appeal to the Upper Tribunal. European companies may initially be sceptical about the value of reconsideration, and on its own, reconsideration would not satisfy the WTO requirement to maintain review tribunals or procedures *"independent of the authorities responsible for the determination or review in question".* However, reconsideration by the original decision maker has precedent in the United Kingdom, as a means to narrow the contentious issues before

[5] T-749/16, *Stemcor and Samac v European Commission*, *8 May 2019.*

[6] The one month time limit for appeal provided for in the RA Regs is notably shorter than the two month time limit under Article 263 TFEU and there is no equivalent in the UK procedure to Article 60 of the Rules of Procedure of the General Court (23.4.2015) which provides for an extension of ten days on account of distance.

appeal.[7] With this objective in mind, the RA Regs also give the TRA the power to refer a dispute on a point of law to the Upper Tribunal for a decision, as part of the reconsideration process.

A TRA review is equivalent to the administrative review conducted at EU level to determine the continued necessity, scope and enforcement of any countermeasures that have been put in place. Necessarily, review proceedings can only be instigated a certain period of time after the imposition of the measures (generally, one year in both the EU and UK procedures).

There is no EU equivalent to 'reconsideration', which is a mandatory step before any appeal to the Upper Tribunal.

It is possible that an application for reconsideration may be made in parallel to an appeal to the Upper Tribunal against a decision of the Secretary of State and, if this occurs, the Secretary of State may apply to the Upper Tribunal to stay the appeal pending the outcome of the TRA's reconsideration.[8]

The advantage of the review and reconsideration procedures is that if an applicant is successful, the TRA will make a revised recommendation to the Secretary of State.

Review and reconsideration may also be attractive options if potential applicants are concerned their case may not succeed on appeal. The Upper Tribunal will apply the same principles as would be applied by a court on an application for judicial review. Appellants will be required to establish that there was illegality, irrationality or procedural impropriety in the exercise of the TRA or Secretary of State's powers or the appellants had some legitimate expectation as to how the TRA or Secretary of State would act.

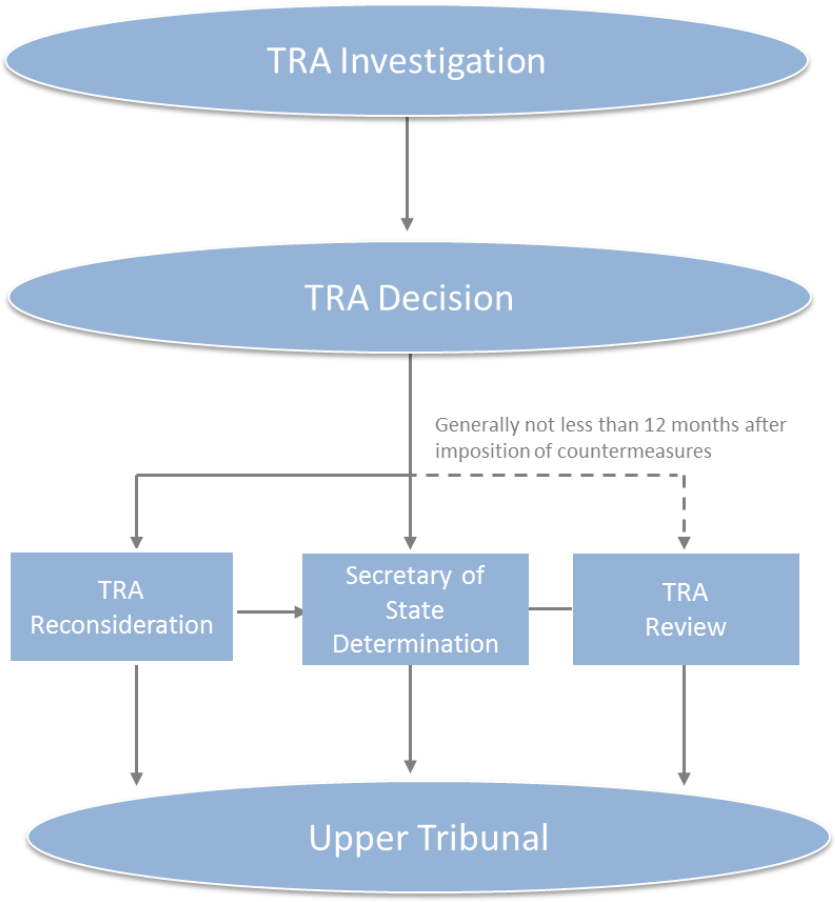
The process equivalent to judicial review at EU level is an action for annulment under Article 263 TFEU. The grounds upon which annulment can be sought are limited to whether procedural rules have been complied with, whether the facts were accurately stated and whether there has been a manifest error of appraisal or misuse of powers.

Recent judicial review decisions of the United Kingdom's Supreme Court have highlighted the influence of European jurisprudence and notably the EU's test for proportionality in public decision making. The scope of judicial review in the UK has therefore broadened beyond rigid, uniform tests of rationality and this should, in theory, create a lower hurdle for applicants at the judicial review stage.

[7] For example: a taxpayer may request HMRC to conduct a 'review' before the taxpayer appeals to the First-tier Tribunal (unlike reconsideration, however, requesting a review is optional rather than mandatory).

[8] 'Consultation on possible changes to the Upper Tribunal Rules 2008 arising from trade remedies appeals' (19 October 2018), paragraph 81; the Secretary of State's application would be under The Tribunal Procedure (Upper Tribunal) Rules 2008, rule 5(3)(j).

An overview of the UK procedures is set out in the simplified diagram below.



WTO DISPUTE RESOLUTION MECHANISM

Ultimate recourse against UK-imposed trade defence measures will be to the Dispute Settlement Body of the WTO. An interested party will be able to apply to a WTO member government to initiate an investigation and, eventually, commence proceedings at WTO level. The main difference is that, after Brexit, WTO actions will be brought either by or against the UK alone, and no longer the European Commission. Domestic remedies are likely to remain the most efficient way to challenge trade defence decisions in the first instance and the UK government continues to implement a system that will allow an interested party, post Brexit, to challenge a recommendation by the TRA or the Secretary of State.

Readers are invited to contact the authors with any questions.

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