

INTRODUCTION

Once the UK has left the European Union on 31 January 2020, it will operate its own independent trade policy including with regards to trade defence, a sector in which the UK has traditionally been reluctant to act. The UK will have to decide which of the 113 EU trade remedies currently in place (95 anti-dumping measures, 15 countervailing measures and 3 safeguard measures) will be maintained or varied and which will be revoked.¹

During the implementation period, currently set to last until 31 December 2020, all EU trade remedies, including those adopted by the Commission during the implementation period, will continue to apply to imports into the UK.

MEASURES "OF INTEREST TO THE UK"

Following a consultation to examine the relevance of the EU trade remedies for the UK economy, in February 2019 the UK government identified 44 EU measures that were "of interest to the UK".

There were 63 measures that did not meet the pre-requisites (i.e. UK producers accounting for a defined market share expressing an interest in the measures continuing) and these measures will no longer apply at the end of the implementation period.²

The 44 measures identified as "being of interest to the UK" will be subject to a transition review by the Trade Remedies Investigations Directorate (TRID) (until the establishment of the Trade Remedies Authority (TRA)) to determine whether they should continue and at what level. Until the completion of this review, measures will be maintained at the level initially set by the EU Commission.

EU measures adopted before the end of the implementation period which are not reviewed by the TRID during the initial consultations will be subject to the same test to determine whether they are of interest to the UK.

UPDATE ON THE ESTABLISHMENT OF THE TRADE REMEDIES AUTHORITY

The creation of the TRA is one of the elements of the government's proposed 2019-2020 Trade Bill, announced in the Queen's Speech on 19 December 2019. The TRA was supposed to be created by enacting the 2017-2019 Trade Bill but it failed to pass through the legislative process before the end of the last parliamentary session. The date for the second reading of the new Bill is not yet defined and it may be some time before it is enacted. In the meantime, the functions of the TRA continue to be carried out by the TRID within the Department for International Trade (DIT) and it will be the TRID which will handle the transition reviews until such time as the TRA is formally established.

¹ DG Trade, 2019 Report on Trade defense instruments.

² There are a number of measures that have been adopted by the EU Commission since August 2018 but not yet assessed by the UK authorities.

TRANSITION REVIEWS

The UK transition reviews are a hybrid of the EU expiry and interim reviews through which EU measures, potentially of interest to the UK, will either become distinct UK-specific measures or will no longer apply in the UK. In the same way as the EU Commission would in the context of an expiry review, the TRA will assess whether the termination or expiry of a measure would be likely to result in a continuation or recurrence of the unfair trade practice and injury to UK industry. The TRID will also conduct the "economic interest" test, essentially a balance of the benefit of protecting UK business by imposing the relevant measure against the additional costs to downstream UK actors.

The notable difference compared to EU expiry reviews is that during the UK transition review, the TRA will assess not only whether the measures should be maintained or not, but also the appropriate level of the UK measure. If the authority concludes that the measures are necessary but is not able to calculate their appropriate level (e.g. in the absence of cooperation by exporters / relevant exports) it should propose to maintain the level of the EU measures.

PROCEDURE: SIMILAR BUT DIFFERENT

UK and EU businesses already familiar with EU trade defence proceedings will not be overly surprised by the procedure the UK has adopted for the transition reviews. They may however be pleased to know that the TRID is in the latter stages of developing a digital interface which should significantly ease the formalities of the proceedings and allow for the efficient exchange of information between parties.

To initiate a review, the TRID will publish a notice calling interested parties to register and complete questionnaires (possibly after a sampling process), the response to which will be subject to on-site verification by the TRID. Interested parties will also be able to request hearings and, before issuing its final determination and recommendation to the Secretary of State, the TRID will release a statement of essential facts on which interested parties will be given a period of time to comment.

Once the investigation is completed, the TRID will make a recommendation to maintain, vary or revoke the measure to the Secretary of State who will decide whether to accept or reject the recommendation. It is at this stage that the Secretary of State will carry out the UK-specific "public interest test" which goes beyond the more technical economic interest test.³

Unless determined otherwise, the measures adopted at the end of the transition should remain in place for 5 years and will be subject to the normal regime of UK trade measures.

TRAFFIC JAM

With over 40 transition reviews to manage, the TRID will review in priority the EU measures which are due to expire during the implementation period or shortly thereafter. If an EU measure expires before initiation of a transition review, the measure will also expire in the UK. However, as for EU expiry reviews, once the investigation is initiated, the measures should continue to apply at least until the conclusion of the investigation. The transition reviews are set to last between 12 to 15 months. The activity of the TRID / TRA may also be impacted by (potentially numerous) requests for interim review lodged by exporters, challenging aspects of

³ Gide, Client Alert, "UK Trade defence update", July 2019.

the measures not covered by the transition review. There is also the possibility that exporters will try to challenge the conversion of EU measures into UK measures without full reinvestigations in accordance with WTO rules. This could be one of the first issues that the Upper Tribunal is required to deal with in its role as the judicial body charged with hearing appeals against decisions of the TRID / TRA and Security of State.

CONFIDENTIALITY

Transparency has been a watchword from the beginning of the development of the UK's trade defence procedures. In the 2017 White Paper, "Preparing for our future UK trade policy", the DIT placed particular emphasis on accessibility of information and accountability for decision-making:

"Transparency - balancing the need to protect commercially confidential data whilst ensuring that relevant information about cases is accessible to interested parties, and that there is accountability for decision-making"⁴

In the EU system, non-confidential information is accessible only to the parties to the investigation and solely for the purpose of the investigation. However, the UK rules provide for a wider access to the investigation file as the TRID / TRA will be required to establish and maintain a file *"open to the public (a "public file") containing information, other than confidential information, which the TRA considers material to the investigation"*.⁵

The Regulations provide that information should be kept confidential only when parties demonstrate to the TRA good cause as to why the TRA must treat such information as confidential⁶ and it may be that parties will seek to rely on the definition of "information that is by its nature confidential".⁷ However, even if information is considered confidential, interested parties will be required to submit a non-confidential summary of the information for the public file (or, in exceptional circumstances, a statement of reasons why it is not possible to summarise the information).

EU industry may initially be alarmed by the UK's approach. However the TRID has issued guidance that suggests that in the first instance, the TRID / TRA will contact the interested party if they think the information has been incorrectly identified as confidential.⁸ Ultimately, if the interested party and the TRID cannot agree on an acceptable non-confidential summary, the TRID may disregard the information submitted and the information will not be disclosed in the public file. It remains to be seen how the TRID will apply the Regulations and its own Guidance in practice.

⁴ DIT, "Preparing for our future UK trade policy", October 2017.

⁵ Regulation 44 of The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019.

⁶ Regulation 45(1)(c) of The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019.

⁷ See Regulation 45(2) of The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019:

"For the purpose of paragraph (1)(b)(i), information that is by its nature confidential includes information which, if disclosed, would—

(a) be of significant competitive advantage to a competitor of the person supplying the information;

(b) have a significant adverse effect on—

(i) the person supplying the information; or

(ii) any person from whom the person supplying the information had acquired it."

⁸ TRID Guidance, "Trade remedies: investigating dumped or subsidised goods" published on 15 March 2019, updated 24 April 2019.

NEXT STEPS

The priority for the TRID, and interested parties, is to prepare for the transition reviews of the EU measures that are set to expire during the implementation period. The table included in Annex 1 shows the 44 EU measures that will be transitioned into the UK in the order that they will expire.⁹

Beyond transitioning existing EU measures, the TRID will also be responsible for conducting independent investigations requested by UK industry in respect of unfair trade practices causing injury in the UK.

The authors are available to EU and UK industry actors planning to engage in UK trade remedies investigations.

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⁹ The Bioethanol (AD580) and Ironing boards (AD506) measures were identified as "of interest to the UK" but have since expired. It is unclear if and how these measures will be transitioned into the UK.

ANNEX 1

EU MEASURES SET TO BE TRANSITIONED BY THE UK GOVERNMENT

Product	Case ID	Countries investigated	Status
Bioethanol	AD580	USA	Expired
Ironing boards	AD506	China	Expired
Ammonium nitrate	AD330	Russia	Ongoing expiry review
Continuous filament glass fibres	AS603	China	Ongoing expiry review
Welded tubes and pipes of iron or non-alloy steel	AD523	Belarus	Ongoing expiry review
Welded tubes and pipes of iron or non-alloy steel	AD523	China	Ongoing expiry review
Welded tubes and pipes of iron or non-alloy steel	AD523	Russia	Ongoing expiry review
Rainbow trout	AS606	Turkey	Expiring in Feb. 2020
PSC wires and strands	AD529	China	Expiring in June 2020
Biodiesel	AD531	USA (extended to Canada)	Expiring in Sept. 2020
Biodiesel	AS532	USA (extended to Canada)	Expiring in Sept. 2020
Grain orientated flat-rolled products of electrical steel (GOES)	AD608	China	Expiring in Oct. 2020
Grain orientated flat-rolled products of electrical steel (GOES)	AD608	Japan	Expiring in Oct. 2020
Grain orientated flat-rolled products of electrical steel (GOES)	AD608	Korea	Expiring in Oct. 2020
Grain orientated flat-rolled products of electrical steel (GOES)	AD608	Russia	Expiring in Oct. 2020
Grain orientated flat-rolled products of electrical steel (GOES)	AD608	USA	Expiring in Oct. 2020
Wire rod	AD530	China	Expiring in Oct. 2020
Rebar (high fatigue performance steel reinforcing bars)	AD619	China	Expiring in July 2021
Cold rolled flat steel products	AD620	China	Expiring in Aug. 2021
Cold rolled flat steel products	AD620	Russia	Expiring in Aug. 2021
Aluminium road wheels	AD541	China	Expiring in Jan. 2022
Heavy (quarto) plate	AD631	China	Expiring in Feb. 2022
Continuous filament glass fibres	AD549	China	Expiring in April 2022
Hot-rolled flat products of iron, non-alloy or other alloy steel	AD630	China	Expiring in April 2022
Hot-rolled flat products of iron, non-alloy or other alloy steel	AS634	China	Expiring in June 2022
Stainless steel bars and rods	AS556	India	Expiring in June 2022

Hot-rolled flat products of iron, non-alloy or other alloy steel	AD635	Brazil	Expiring in Oct. 2022
Hot-rolled flat products of iron, non-alloy or other alloy steel	AD635	Iran	Expiring in Oct. 2022
Hot-rolled flat products of iron, non-alloy or other alloy steel	AD635	Russia	Expiring in Oct. 2022
Hot-rolled flat products of iron, non-alloy or other alloy steel	AD635	Ukraine	Expiring in Oct. 2022
Ceramic tiles	AD560	China	Expiring in Nov. 2022
Cast iron articles	AD637	China	Expiring in Jan. 2023
Corrosion resistant steel	AD639	China	Expiring in Feb. 2023
Steel (wire) ropes and cables	AD384	China (extended to Korea and Morocco)	Expiring in April 2023
Tyres	AD640	China	Expiring in Oct. 2023
Tyres	AS641	China	Expiring in Nov. 2023
Biodiesel	AS644	Argentina	Expiring in Feb. 2024
Chamois leather	AD496	China	Expiring in Feb. 2024
Ceramic tableware / Kitchenware	AD586	China	Expiring in May 2024
Organic coated steel	AD584	China	Expiring in May 2024
Organic coated steel	AS587	China	Expiring in May 2024
Aluminium foil in small rolls	AD582	China	Expiring in June 2024
Polyethylene terephthalate	AS426	India	Expiring in July 2024
Ironing boards	AD548	China	Expiring in Oct. 2024

NEW MEASURES ADOPTED BY THE EU, NOT ASSESSED BY THE UK

Product	Case ID	Countries investigated	In force since
New and retreaded tyres for buses or lorries	AD640	China	October 2018
New and retreaded tyres for buses or lorries	AS641	China	November 2018
Bicycles (electric)	AD643	China	January 2019
Bicycles (electric)	AS646	China	January 2019
Biodiesel	AS644	Argentina	February 2019
Urea and ammonium nitrate	AD649	Russia, Trinidad and Tobago, USA	October 2019
Steel road wheels	AD652 (prov.)	China	October 2019
Biodiesel	AS650	Indonesia	December 2019

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