EXPLANATORY MEMORANDUM TO

THE TRADE REMEDIES (INCREASE IN IMPORTS AS A RESULT OF A FREE TRADE AGREEMENT CAUSING SERIOUS INJURY TO UK PRODUCERS) REGULATIONS 2024

2024 No. 519

1. Introduction

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

1.2 This memorandum contains information for the Select Committee on Statutory Instruments.

2. Declaration

2.1 Greg Hands, Minister of State at the Department for Business and Trade, confirms that this Explanatory Memorandum meets the required standard.

2.2 Re Hobley, Deputy Director for Trade Remedies at the Department for Business and Trade, confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Alexander Keeler at the Department for Business and Trade Telephone: 07752778792 or email: Alexander.Keeler@businessandtrade.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument sets out detailed provision as to how bilateral safeguard investigations and reviews should be conducted and provides for statutory appeals to the Upper Tribunal for those investigations and reviews. Schedule 5A to the Taxation (Cross-border Trade) Act 2018 ("TCBTA") sets out the framework in primary legislation for investigating and applying a bilateral safeguard. A bilateral safeguard typically takes the form of additional import duty where an increase in imports under a Free Trade Agreement (FTA) is causing serious injury to domestic industry. The idea is to make imports temporarily less competitive to give domestic industry time to adjust to the new market conditions under the FTA.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland, and Northern Ireland. Trade remedy measures normally take the form of an additional rate of import duty and are therefore a matter of reserved competence.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. Policy Context

What is being done and why?

5.1 Provisions to apply bilateral safeguards are present in nineteen of the UK's FTAs. Bilateral safeguards are a type of trade remedy that can be applied to temporarily protect domestic industry from a damaging increase of imports being traded under an FTA. Typically in the form of a new tariff or tariff rate quota, the application of a bilateral safeguard makes the imported good less competitive, reducing import levels, and provides time for UK industry to adapt and prepare for the return of the FTA's market conditions, which are reapplied when the bilateral safeguard ends.

5.2 Alongside Schedule 5A to TCBTA, this instrument will create a new UK system to investigate, apply and review bilateral safeguards. This instrument also amends the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019 to provide for statutory appeals to the Upper Tribunal for bilateral safeguard investigations and reviews.

What was the previous policy, how is this different?

5.3 The previous process to investigate and apply bilateral safeguards did not allow the UK to effectively protect UK industry. It was uncodified, unclear, did not allow the UK to utilise all our FTA provisions, and not aligned to the UK's trade remedies system. The investigation to advise the Secretary of State if a bilateral safeguard was necessary would also have been carried out by Department for Business and Trade officials, who would not have been best placed to conduct this role.

5.4 This legislation establishes the new UK system to investigate and apply bilateral safeguards and resolves these issues. It provides more detail on the roles and responsibilities of the Department for Business and Trade and the Trade Remedies Authority (TRA). It provides additional powers to both, which can only be done via legislation.

6. Legislative and Legal Context

How has the law changed?

6.1 The framework for the UK's trade remedies system is set out within the TCBTA. Prior to the Finance (No. 2) Act 2023, there was no codified UK bilateral safeguards system. Bilateral safeguard investigations would have been conducted using common law powers of the Secretary of State. Applying a bilateral safeguard would then have been actioned using general powers of TCBTA. Schedule 20 to the Finance (No. 2) Act 2023 made amendments to TCBTA to add Schedule 5A. Schedule 5A TCBTA creates a new UK bilateral safeguards system by:

- expanding the statutory functions of the TRA so that it can undertake bilateral safeguard investigations and reviews;
- ensuring the TRA provides meaningful alternatives within its recommendation;
- providing the power for Ministers to ask the TRA to reassess a determination and recommendation where there is justification to do so;
- providing the power for Ministers to take a different decision to that recommended by the TRA, where there is a justification and evidence base to do so;
- providing the power for Ministers to apply a bilateral safeguard measure by public notice; and

- ensuring both Ministers and the TRA have due regard to the UK's obligations under FTAs.

On 13 May 2024, the Finance (No. 2) Act 2023, Schedule 20 (Bilateral Safeguarding Remedies) (Appointed Day) Regulations 2024 commenced the provisions of Schedule 20 which did not commence upon Royal Assent.

Why was this approach taken to change the law?

6.2 Schedule 5A to TCBTA provides the statutory framework for bilateral safeguard investigations and reviews. This instrument provides the detail on how investigations and reviews will be carried out, and how determinations, recommendations, and decisions regarding bilateral safeguards will be made. These regulations also provide for statutory appeals, when otherwise the only recourse to bring a legal challenge would have been judicial review.

7. Consultation

Summary of consultation outcome and methodology

7.1 The Secretary of State has consulted the TRA as required under section 32(12) of the TCBTA.

8. Applicable Guidance

8.1 The Secretary of State will issue guidance to the TRA relating to bilateral safeguards by the end of June 2024. In line with paragraph 34 of Schedule 4 to the Trade Act 2021, before publishing the guidance the Secretary of State will consult the TRA, as well as have regard to the expertise of the TRA and the need to protect its operational independence and ability to make impartial assessments. The guidance will assist the TRA in interpreting particular terminology and concepts of the new UK bilateral safeguards system. The guidance will be published on gov.uk.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because as outlined in the Impact Assessment accompanying the TCBTA, 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.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies.

9.3 The legislation does impact small or micro businesses, but there are no requirements on small or micro businesses from this legislation.

9.4 There is no, or no significant, impact on the public sector because setting up a new UK bilateral safeguards system only requires minimal additional staff at the TRA.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The instrument does not include a statutory review clause as it is made under the Secretary of State's powers to make regulations relating to tax legislation and is therefore exempt from the requirements under section 28(3) of the Small Business, Enterprise and Employment Act 2015.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 Schedule 20 to the Finance (No. 2) Act 2023 inserts Schedule 5A into TCBTA. Paragraph 1 of Schedule 5A applies Schedule 5 TCBTA with a series of modifications for bilateral safeguards. Schedule 5 TCBTA sets out the framework for UK investigations and reviews into safeguard measures implemented under the World Trade Organization's Agreement on Safeguards ("global safeguards"). Global safeguards are similar to bilateral safeguards, with the latter arising in the context of some of the UK's FTAs. As set out in the preamble to the instrument, it is made using a series of powers in Schedule 5 TCBTA as applied and modified by Schedule 5A. As such, the powers being used to make this instrument are relatively complex, given that the instrument relies on a series of powers which are modified for the particular situation of bilateral safeguards.

11.2 This instrument is subject to a negative resolution procedure. This instrument will be laid to ensure that it sits in Parliament for 21 days following the House of Commons returning from Easter 2024 recess, before the instrument enters into force.

11.3 Regulation 3 sets out transitional provisions. If the Secretary of State starts a bilateral safeguard investigation before the instrument is in force, then the Secretary of State can transfer the investigation to the TRA or continue the investigation otherwise than under the instrument. If it is transferred to the TRA then anything done by the Secretary of State is treated as if it had been done by the TRA, so far as that is required for continuing its effect.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").