EXPLANATORY MEMORANDUM TO

THE TRADE REMEDIES (DUMPING AND SUBSIDISATION) (EU EXIT) REGULATIONS 2019

2019 No. 450

AND

THE TRADE REMEDIES (INCREASE IN IMPORTS CAUSING SERIOUS INJURY TO UK PRODUCERS) (EU EXIT) REGULATIONS 2019

2019 No. 449

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.

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

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 EU. This instrument specifies how the UK system will operate in the event that we leave the EU without a withdrawal agreement, and how relevant EU measures in force at that point will be transitioned into the new system.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

3.1 These Statutory Instruments ("the Regulations") are being laid in breach of the 21-day rule. The Regulations are part of the package of legislation needed to ensure the UK has its own trade remedies system once it operates its own independent trade policy. The TCBTA is one part of that package, as are provisions currently contained in the Trade Bill, which will establish the Trade Remedies Authority (TRA), the body that will operate the trade remedies system.

3.2 The TCBTA anticipates the existence of the TRA as a body investigating the case for the imposition and maintenance of trade remedies in the UK. However, as the Trade Bill is still subject to Parliamentary scrutiny, Government has concluded that it is the interest of UK industry to put in place trade remedies legislation immediately. This is to provide business with the necessary confidence that they will continue to receive appropriate protection against injury from unfair trade or unforeseen surges in imports and to review measures applicable in our domestic regime. In particular, the UK intends to conduct the necessary preparatory work to ensure that we are ready to commence investigations as soon as we leave the EU.

3.3 The TCBTA confers trade remedy investigatory functions on the TRA. In order to put a trade remedies system in place for the period until the TRA is legally established we have temporarily conferred these functions on the Secretary of State. We have sought to lay the Statutory Instruments as soon as possible.

3.4 The Regulations draw from both the relevant WTO Agreements (ie the General Agreement on Tariffs and Trade, Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures and the Agreement on Safeguards), and are similar in many regards to the EU regulations which have applied throughout our membership of the EU. It therefore follows that the process provided for in the Regulations will not be wholly unfamiliar to UK industry, but they will welcome the certainty of having the regulations in force before we leave the EU; they have previously stressed the importance of having regulations in place sooner rather than later.

3.5 Government recognises the 21-day rule is designed to ensure that Parliament is given the opportunity to properly scrutinise, before it comes into force, legislation made by the executive under delegated powers. The Government remains committed to observing this rule wherever possible but in the circumstances, it was considered that breaching the 21-day rule was less undesirable than to leave UK business without the certainty that there was a system in place ahead of exit day. However, no trade remedy measures will be imposed before EU exit.

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)

3.6 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 under the TCBTA 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 Organisation (WTO) Agreements[1] enable members to apply trade remedy measures where domestic industry is suffering from injury caused by imports that are being dumped (exported at prices below the selling price in the exporter's

[1] 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), the Agreement on Subsidies and Countervailing Measures (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).

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 The EU currently imposes trade remedies on behalf of the UK. EU Regulations 2016/1036 (in respect of dumping)[2], 2016/1037 (in respect of subsidies)[3] and EU 2015/478 (in respect of safeguards)[4] reflect the WTO Agreements. 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 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 provides for the detail to be set out in secondary legislation. The framework is intended to be compatible with the standards and requirements set out in the WTO Agreements, while also meeting Government's commitments to creating a system that is impartial, proportionate, efficient and transparent. The framework is also very similar to the current EU rules, although changes have been made to ensure that it works for the UK.

6.4 Section 13 provides for Secretary of State to impose provisional or definitive measures, or suspend, vary or revoke existing measures, in relation to anti-dumping, countervailing or safeguards pursuant to Schedules 4 and 5 to the Act, by a public notice.

6.5 Schedule 4 deals with the dumping of goods or foreign subsidies causing injury to UK industry, and provides powers for the Secretary to State to make regulations. These regulations are made pursuant to those powers and therefore provide the detail of how the TRA will, among other things: determine whether goods are dumped; whether imports into the UK have been subsidised; whether such goods have caused or are causing injury to UK industry; initiate and conduct an anti-dumping or anti-subsidy investigation; determine the level of any such measures; review measures imposed to determine whether their continued application is justified or whether they should be terminated, varied or suspended. The regulations are intended to reflect the principles established under the WTO Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures, and are similar to EU Regulations 2016/1036 and 2016/1037.

6.6 Similarly, Schedule 5 provides powers for the Secretary of State to make regulations in respect of the imposition of safeguard measures against unforeseen surges in imports that are causing, or threatening to cause, serious injury to UK producers. These Regulations are made pursuant to those powers and provide for, among other things, how the TRA will determine whether: there has been an unforeseen surge in imports; whether as a result UK producers are suffering, or have suffered, serious injury; the processes for initiation of safeguard investigations, including the requirement for adjustment plans; the recommendation (or otherwise) of provisional and/or definitive measures. They are intended to reflect the principles established under the WTO Agreement on Safeguards, and are similar to the provisions in EU Regulations 2015/478.

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1036
[3] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1037
[4] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0478

6.7 Section 51(1) enables the Secretary of State to make regulations to transition existing EU trade remedy measures into new UK measures as a consequence of the withdrawal of the UK from the EU. Regulations providing for this are included in the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 and the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019.

6.8 Section 56 enables the Secretary of State to make regulations for transitory purposes, where appropriate. The Secretary of State has exercised this power to make contingency provisions to confer trade remedy functions on the Secretary of State until the TRA is legally established. These temporary arrangements are set out in Part 13of the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019, and Part 10 of to the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019. The same power has been used to make necessary modifications of the relevant provisions of the TCBTA.

6.9 As far as possible, the temporary arrangements set out in the Schedules follow the procedures which will apply once the TRA is established. The main area of difference is in relation to the imposition of measures. When the TRA is responsible for operating the trade remedy system, it will conduct investigations and, where relevant, make recommendations to the Secretary of State on the imposition of measures. Under the modified provisions, it will be for the Secretary of State to carry out the investigation and to make a decision on whether to impose measures and, as such, there will be no need for a recommendation stage.

6.10 The WTO Agreements, being multilateral, negotiated international text, are such that a number of concepts are left undefined, and they use language and terminology that are not usually found in UK domestic legislation. Our approach in relation to certain concepts has been to copy out the language of the WTO Agreements to reflect the UK's international obligation and other trade remedies systems, including the EU's, in the Regulations to ensure alignment with our WTO obligations. This is similar to the approach adopted by the EU in their trade remedies regulations, and is intended to ensure compliance with WTO rules.

7. Policy background

What is being done and why?

7.1 The WTO provides a rules-based system to support free and fair trade globally. WTO Agreements set out the basis on when and how Members may step in and protect domestic industry against injury caused by dumped or subsidised goods, or unforeseen surges in imports, by imposing measures (usually an additional amount of 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. As the UK leaves the EU, and assumes responsibility for its own trade policy, it needs to have the ability to investigate cases and impose measures to ensure that domestic industry continues to be able to compete on a level playing field. These regulations will provide for the UK to operate its own trade remedies system on the event we leave the EU without withdrawal agreement.

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. However, within these rules, there is flexibility for Members to design a system that takes account of their particular domestic situation and objectives. In the Trade White Paper[5], 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 UK producers have experience using the EU system, and therefore many of the elements of the UK system will be familiar to them. However, the UK system differs from the EU system in certain respects, to meet the above principles. The system will be operated by the Trade Remedies Authority (TRA), a new, independent, body being set up under provisions in the Trade Bill. The TRA will have the independence and technical expertise to determine complex issues, such as the calculation of dumping and injury margins.

7.4 Where the TRA concludes the conditions for measures to be imposed are met, it will make independent recommendations to the Secretary of State, who will decide whether to accept the recommendations. Where the Secretary of State rejects recommendations to impose duties because they consider they are not in the public interest, they are required to make a statement to the House of Commons setting out their reasons.

7.5 Where duties are imposed, they will be set at the level needed to address injury to UK industry in order to level the playing field without causing unnecessary costs to downstream users and consumers. The Economic Interest Test (EIT), set out in the TCBTA, requires the TRA to consider whether duties would have a disproportionate impact on a particular area of the UK or on particular groups in the UK. Ministers will, along with consideration of the public interest, consider whether the TRA's assessment under the EIT is one that was reasonably made.

7.6 Government has committed to ensuring that UK industry will continue to be protected from injury caused by unfair trade or unforeseen surges in imports when the UK begins to operate its independent trade remedy system, and that existing EU measures which matter to UK industries will be maintained. These instruments will enable this, as well as provide for those existing EU measures to be further analysed with a view replacing them with new, UK-specific measures (or simply revoked where the requirements for the measures are not met), in order to meet our WTO obligations. The temporary transfer of functions to the Secretary of State is to allow UK industry to be protected until the TRA is legally established.

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

8.1 This instrument is not being made under the European Union (Withdrawal) Act 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.

[5] Trade White Paper: our future UK trade policy (https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy).

9. Consolidation

9.1 Not applicable.

10. Consultation outcome

10.1 Government held a series of meetings during Spring 2018 with bodies representing interested parties, ie UK producers, downstream users and consumers, to understand their specific concerns and to 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.

10.2 The Government also ran a Call for Evidence from 28 November 2017 to 30 March 2018 to identify which existing EU trade remedy measures should be maintained when the UK begins operating its own independent trade remedies system. Companies which produce goods in the UK were invited to inform the Department whether they produce goods which are subject to EU trade remedy measures, and to state whether they supported, were neutral or opposed the maintaining of those measures. Using information received from respondents, officials assessed whether the application met the government's criteria for maintaining a measure. The provisional list of measures to be maintained was published on 24 July 2018, with a closing date of 24 August 2018 for respondents to submit views, or provide further relevant information of measures to be maintained. The final results[6], setting out which measures will be transitioned into the UK system, was published on 25 February.

11. Guidance

11.1 The Secretary of State will issue guidance to the TRA as provided for in the Trade Bill to assist it in carrying out its functions. The guidance will focus in particular on those elements of the UK framework that are not covered by WTO Agreements – such as the Economic Interest Test and transition of EU measures - for which there is therefore no jurisprudence on which the TRA can draw. Guidance will also provide assistance to the TRA on interpreting particular terminology and concepts, incorporated into the regulations as a consequence of direct copy-out of language in the WTO Agreements, for example "special circumspection". The guidance will be published on the TRA web page on Gov.uk.

11.2 The TRA will be responsible for providing guidance to UK industry and other interested parties on the trade remedies system. This guidance will be available on the TRA web page on Gov.uk.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies. The impact of the trade remedy system on business, charities or voluntary bodies was assessed in an Impact Assessment[7] accompanying the TCBTA. This instrument

[6] https://www.gov.uk/government/consultations/call-for-evidence-to-identify-uk-interest-in-existing-eu-trade-remedy-measures/outcome/final-findings-of-the-call-for-evidence-into-uk-interest-in-existing-eu-trade-remedy-measures

[7] https://publications.parliament.uk/pa/bills/cbill/2017-2019/0128/IA17-013.pdf

provides the specific detail on how the UK system will operate. These additional details do not change the previous assessment of the impacts and do not place any additional burdens on business, charities or voluntary bodies.

12.2 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. This consisted of the cost of setting up and running the TRA. Again, as this instrument simply provides more detail on how the UK system will operate, it does not change the previous assessment of the impacts.

12.3 An Impact Assessment has not been prepared for this instrument because the expected impacts of the UK trade remedies system have already been assessed in the Impact Assessment accompanying the TCBTA. This covered the expected impact of the key policy decisions taken. The additional details included in this instrument do not change the previous assessment and therefore no further meaningful assessment can be made at this stage. As described previously, impacts on business will only come about following a complaint from domestic industry and the opening of an investigation. It is not possible to predict the nature and extent of these complaints and investigations, and therefore to assess their exact impacts. Any involvement of businesses in the investigations is voluntary though it is likely to be in their interest to participate where the investigations concern them.

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 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise the regulatory burden on small businesses. The WTO Agreements require Members to demonstrate that imported goods are being dumped and/or subsidised, and causing injury to domestic industry, in order for trade remedy measures to be imposed. They do not mandate differential treatment between small business and other businesses. Applications for investigation must meet WTO standing requirements, and be supported by producers whose output constitutes at least 25 percent of total UK production of the like good; this may include small businesses. Similarly, small businesses may be asked to provide information to enable the TRA to determine whether, and at what level, the imposition of trade remedy measures should be recommended.

13.3 In setting up the UK trade remedies system, we have taken steps to minimise the cost to business by ensuring a clear, streamlined process, underpinned by an on-line platform to allow UK producers to submit information. Additionally, support will be provided by the TRA before an application is made to assist the applicant. This may mitigate against unnecessary costs being incurred by businesses.

14. Monitoring & 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 is

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 Xinru Li at the Department for International Trade Telephone: 0207 215 2078 or email: Xinru.li@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.