The impact of Brexit on Trade Defence Instruments

INTRODUCTION

On 24 December 2020, the European Union ("EU") and the United Kingdom ("UK") concluded a "Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part" ("EU-UK Trade and Cooperation Agreement" or "TCA").

The TCA was ratified by the UK on 31 December 2020. The EU started to apply the TCA on a provisional basis on 1 January 2021. The European Parliament and the European Council of Ministers will have to ratify it by the end of February 2021.

The TCA defines the specific terms of the relationship between the EU and the UK, following the end of the transition period, which was governed by the Withdrawal Agreement, and therefore the departure of the UK from the EU Single Market (comprising the free movement of persons, goods, services and the freedom of capital) and the EU customs union. The TCA establishes a free trade area between the EU and the UK by ensuring no tariffs or quotas on trade in goods that have preferential origin of either party. However, as of 1 January 2021, the EU and the UK form two distinct markets each governed by its own rules, including those relating to trade defence instruments (TDIs).

THE EU-UK TRADE AND COOPERATION AGREEMENT

Under the TCA, each party maintains the right to apply trade remedies under the WTO agreements (Article GOODS.17). In general, the TCA does not add to the substantive rights already provided in the WTO agreements.

Adoption of TDIs between the Parties

Each party retains the right to apply anti-dumping and countervailing measures pursuant to its own legislation, provided that the measures fully comply with the relevant WTO Agreements. Due process rules have to be fully respected, including the obligation to grant interested parties the opportunity to defend their interests (Articles GOODS.17.3-4). For the application of trade remedies, the originating status of goods for the application of trade remedies will be determined on the basis of each party's non-preferential origin rules. Article GOODS.17.2 expressly provides for the non-application of the specific (preferential) rules of origin set forth by the TCA.

In determining the level of the duty, the Parties have the possibility to resort to the lesser duty rule, which sets the duty at a level lower than the margin of dumping if this level is adequate to remove injury (Article GOODS.17.5). In this regard, the EU system provides that, in determining whether a lesser duty should be applied, distortions on raw materials should be taken into account. By contrast, the UK's legislation does not provide this provision.

On the other hand, Article GOODS.17.6 mandates each Party to consider the information provided relating to whether the adoption of an anti-dumping or countervailing duty would not be in the public interest. This is an important principle as the evaluation of public interest is not incorporated in the relevant WTO Agreements. The recognition of the need to take into consideration grounds of public interest in order to impose a trade remedy measure appears to leave the door open to non-technical arguments of an economic or political nature in the investigations between the EU and the UK.

Finally, the provisions of the TCA relating to trade remedies are excluded from the scope of the dispute settlement mechanism introduced by the TCA (see Article INST.10). The parties remain free to challenge the TDIs adopted by either party at WTO level.

Relationship between TDIs and provisions on subsidy control

Pursuant to the TCA, the EU-UK relationship will have to ensure a level playing field for open and fair competition and sustainable development (Title XI).

In particular, the TCA lays down a comprehensive set of rules dealing with the control of subsidies granted by the Parties to "economic actors" (Article 3.1.1(a)). Each Party must put in place an effective system of subsidy control to ensure that subsidies are not granted where they have or could have a material effect on trade or investment between the parties (Article 3.4).

Specific remedies are available in case of a violation of the TCA rules on subsidy control. In particular, according to Article 3.12, a Party may request consultations regarding a subsidy that causes, or there is a serious risk that will cause, a significant negative effect on trade or investment between the Parties (Art. 3.12.1). In the absence of an agreed solution, one Party may unilaterally after 60 days take "appropriate remedial measures" (Art. 3.12.3), which must be restricted to what is "necessary and proportionate" to remedy the significant negative effect caused, or to address the serious risk of such an effect (Art. 3.12.8). The Party granting the subsidy at issue can challenge before an arbitration tribunal the determination of a significant negative effect, and the necessity and proportionality of the remedial measures (Art. 3.12.9). This challenge must relate to a level of suspension of obligations under the TCA or a supplementing agreement not

exceeding the level equivalent to the nullification or impairment caused by the application of the remedial measures, if the remedial measures were found to be inconsistent with TCA and are not withdrawn (Article 3.12.10-12).

Interestingly, Parties cannot invoke the WTO Agreement, including the SCM Agreement, to preclude the other Party from taking remedial measures or countermeasures (Article 3.14.13). As a result, the SCM Agreement cannot provide a direct defense when a party invokes the rebalancing clause.

Moreover, Article 3.12.14 establishes that in determining whether imposing or maintaining remedial measures on imports of the same product is restricted to what is strictly necessary or proportionate, due account should be given to countervailing and antidumping measures applied or maintained pursuant to Article GOODS.17(3).

Therefore, it appears that the TCA does not explicitly rule out the possibility to adopt remedial measures where countervailing duties targeting the same subsidy are already applicable. By contrast, Article 3.12.15 provides that the "remedial measures" cannot be applied simultaneously to "rebalancing measures" under Article 9.4, to remedy the impact on trade or investment caused directly by the same subsidy.

THE UK TDI REGIME

The UK's new trade remedies regime is set out in a legislative framework composed of primary and secondary legislation. The overall framework is provided for in the Taxation (Cross-border Trade) Act 2018 (the "Taxation Act"), which covers the functions of the TRA and the Secretary of State, while the detailed rules and procedures are set out in three regulations made under the Taxation Act. The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019, which deal with anti-dumping and anti-subsidy measures, and the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019, which deal with safeguards, cover the procedures for investigations and reviews, as well as the requirements to apply the different measures. The Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019 cover the reconsideration and appeal of trade remedy decisions.

Investigating authority and procedure

The Trade Remedies Authority ("TRA") will administer the new UK trade remedies regime, along with the Secretary of State for International Trade ("Secretary of State"). Given that the TRA will only be established after the UK Parliament approves the Trade Bill 2019-21, the Secretary of State has established the Trade Remedies Investigations Directorate ("TRID") to carry out the functions of the TRA until it is established. All the

acts adopted by the TRID up until when the TRA is formally established will be regarded as having been taken by the TRA.

The competences of the TRID/TRA and those of the Secretary of State are organised as follows:

- the TRID/TRA conducts the investigation and submits a recommendation to the Secretary of State (unless it decides to terminate the investigation);

- the Secretary of State adopts the recommendations and issues the final decisions. The Secretary of State can reject the recommendation only if he/she has grounds to believe that the "economic interest test" is not met.

This model based on shared competences has an ancillary consequence. The determinations of the investigating authority are subject to an administrative review (i.e. the "reconsideration" procedure). Only after that review can the decision be challenged before UK Courts (the Upper Tribunal (Tax and Chancery Chamber)). By contrast, the decisions of the Secretary of State can be challenged directly before UK Courts.

Substantive rules

The following differences characterise the UK TDI regime as opposed to the EU system:

- Like in the EU system, complaints must be supported by producers accounting for at least 25% of all UK production (standing requirement). However, the UK legislation also requires that the share of the UK industry accounts for at least 1% of the market. Both requirements aim at avoiding investing resources in investigations which are unlikely to result in the adoption of measures.

- In the EU system, proceedings shall not be initiated against countries whose imports represent a market share of below 1%, unless such countries collectively account for 3% or more of Union consumption (negligibility threshold). In the UK system the negligibility threshold is met when the exporting country accounts for less than 3% of total imports (7% when the investigation targets several countries). In case of anti-subsidy investigations targeting developing countries, the thresholds are further increased to 4% and 9%.

- UK legislation has not reproduced the EU provision on "market distortions", which allows the Commission to disregard domestic prices and costs in the exporting country if they are affected by State intervention. However, UK legislation allows the TRID/TRA to adjust the cost of production if a "particular market situation" exists in the exporting country.

- The UK has not followed the EU's approach as regards the possibility to waive the application of the lesser duty rule when the raw material costs are distorted (provided that certain conditions are met). The UK will thus apply the lesser duty rule without exceptions.

Finally, in the UK system an "economic interest test", which mirrors the "Union interest test", should be met for measures to be adopted. However, the TRID has clarified that where the presence of dumped/subsidised imports causing injury has been established, the economic interest of having the measures adopted is presumed, unless the TRID is otherwise satisfied. In safeguard investigations, there is no such a presumption.

Transition of existing EU AD/CVD measures and steel safeguard measures

The first task of the UK investigating authorities is to conduct transition reviews of existing EU trade remedy measures.

During the transition period, the Department for International Trade ("DIT") assessed which EU trade remedy measures, in force at the end of the transition period, should be transitioned into the UK's trade remedies system. Following a call for evidence, the DIT decided to cease applying 76 EU AD/CVD measures as of 1 of January 2021, and "transition" the remaining 42 EU AD/CVD measures. The transition of a measure allows the UK to continue to apply existing EU measures by incorporating them into its own domestic legislation, until a so-called "transition review" of the measure is completed. To this effect, the Secretary of State published the necessary "Notices of Determination" as well as the corresponding "Taxation Notices". For the EU steel safeguard measure, the DIT identified 19 product categories for which the measures are transitioned. To this effect, the Secretary of State published the necessary Notice of Determination and corresponding Taxation Notice. The remaining product categories, where no UK production exists, were not transitioned and the relevant tariff rate quotas ("TRQs") ceased to apply at 11pm on 31 December 2020.

The UK's transition reviews function similarly to a combination of the EU's expiry reviews and interim reviews. Transition reviews are initiated *ex officio* and are aimed at determining whether the EU measures must be revoked or maintained by the UK and, in this case, whether they should be amended. Transition reviews must be initiated before the relevant EU measures expire. If an EU measure is subject to an expiry review at the end of the transition period, the transition review can still be launched within 30 days from that date. Otherwise, the measure is terminated.

In practice, it is expected that the overall transition process will last years, since some of the EU measures that are being transitioned will only expire in 2024. For the time being, the TRID has only initiated 7 transition reviews (none of which has come to an end),

including the review of the EU safeguard measures on steel products. In order to ensure the transitioned safeguard measures specifically for the UK worked from the first day of operating an independent trade policy, the DIT established UK-specific TRQs, based on the same method deployed by the European Commission.

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