



Law Society
of Scotland

Consultation Response

Response to the International Trade Committee's UK
Trade Remedies Authority Inquiry

April 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Committee, Trade Policy Working Group and Competition Law Committee welcome the opportunity to consider and respond to the International Trade Committee's UK Trade Remedies Authority inquiry.¹ The Society has the following comments to put forward for consideration.

Response

What is existing best-practice with respect to the structure and operation of non-departmental public bodies?

We note the Cabinet Office guidance on *Non-departmental public bodies: characteristics and governance* which can be found here: <https://www.gov.uk/government/publications/non-departmental-public-bodies-characteristics-and-governance>.

Clause 6 of the Trade Bill imposes an obligation on the TRA to “provide the Secretary of State with such advice, support and assistance as the Secretary of State requests in connection with [various matters relating to trade]”. In terms of the guidance for non-departmental government bodies referred to above, this therefore suggests that the TRA might fall within the category of Advisory NDPB.² However, the guidance document refers to the fact that such bodies do not usually have staff and are likely to be deemed part of

¹ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/international-trade-committee/inquiries/parliament-2017/uk-trade-remedies-authority-17-19/>

² See Chapter 2 at 7.2, available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/690946/Public_Bodies_-_a_guide_for_departments_-_chapter_2.pdf

the Crown. However, Schedule 4 of the Trade Bill specifically states that the TRA is not to be regarded as the servant or agent of the Crown and under Schedule 4, paragraph 24 it may appoint employees. It seems, therefore, that the TRA falls within the exceptional category of Advisory NDPB's established through primary legislation, which have their own legal personality and in terms of governance and accountability are akin to Executive NDPBs.

Furthermore, its functions as set out in the Taxation (Cross-border Trade Bill), seem to go beyond those of an Advisory NDPB.

To what extent does the TRA's proposed structure and operation comply with best practice?

The Trade Bill and Taxation (Cross-border Trade) Bill contain provisions relating to the proposed structure and operation of the TRA, although we consider that these could be more clearly set out. In particular it would be helpful to clarify the overarching objectives and remit of the TRA and scope of issues which it will be tasked to deal with.

Furthermore, Part 2 grants the TRA power to investigate whether goods have been dumped or subsidised. With the recent announcement that the CMA will take over State Aid duties in addition to its competition enforcement powers, it would be helpful to have clarification as to how the TRA's duties and responsibilities would intersect with those of the CMA. While the general view of commentators seems to be that the TRA will deal with foreign subsidies and the CMA will be tasked with regulating domestic state aid provision, we are not aware of any official confirmation on this point. In particular, if there are areas where overlap might arise, it would be helpful to set out how the two bodies might work together in investigating suspected infringements. More generally, there may also be opportunities for sharing of intelligence and best practice but there should be a clear allocation of powers and responsibilities.

Does the TRA possess the correct level of independence from the Secretary of State to perform its functions adequately?

The analysis of the correct level of independence is contingent on the precise scope and nature of the proposed TRA's duties and functions. As a general principle, we emphasise the importance of ensuring a high level of transparency so that stakeholders have confidence in proposed body. At the same time, there may be circumstances where particular facts will need to be kept confidential to protect the legitimate interests of commerce.

We are concerned that the arrangements proposed might not ensure the correct level of independence from the Secretary of State, particularly where the TRA is carrying out functions which are not purely advisory in nature.

In particular we note the power of the Secretary of State to appoint and remove non-executive members of the TRA, including the Chair. In evidence on the Trade Bill to the Public Bill Committee we advised that fixed term limits for tenure should be introduced for the Chair and members of the TRA. We consider this would reinforce the important elements of independence and impartiality.

As stated more generally in relation to the Taxation (Cross-border Trade) Bill, it is important that any assessment of impact of particular trade measures takes into account a wide range of stakeholder interests. This should involve balancing the interests of producers and consumers, which may sometimes be directly opposed, as well as consideration of the wider public interest.

It might also be appropriate to consider whether criteria or qualifications should be set out to determine eligibility for appointment to the TRA or whether particular skill sets or expertise should be represented eg members with experience of economics, trade law, etc.

Finally, we note that there is no indication as to how the board would take decisions in governance terms.

Is the division of responsibilities between the Trade Remedies Authority and the Secretary of State in the Trade Bill and Taxation (Cross-border Trade) Bill workable and appropriate?

See comments above.

What further regulations, if any, are required under the Trade Bill or Taxation (Cross-border Trade) Bill to ensure the Trade Remedies Authority operates effectively?

We note that in an EU context, the Commission has an obligation to report to the European Parliament on trade matters. It could be helpful to include a similar reporting duty to assist parliamentary scrutiny of the way in which trade remedies are operating following withdrawal from the EU.

Another issue which should be addressed is whether and what the appropriate appeal mechanism would be. At present the Bill merely grants power to the Secretary of State to make appropriate regulations, meaning that judicial review would be the most likely remedy if the TRA's recommendations were rejected. However, if the TRA's recommendations were accepted, there might be a "gap" as the TRA's recommendation could not be appealed and the minister's decision, having followed the correct decision-making processes, could not be judicially reviewed. We would therefore support further consideration of an appeal mechanism. As was noted by George Peretz in evidence before the Public Bill Committee on the

Trade Bill in January 2018,³ the standard of review to be applied in the context of an appeal is a particularly important consideration. We support the view that the basis of appeal should be dealt with in primary legislation. Furthermore we agree that a robust form of appeal mechanism can encourage more robust and transparent decision-making by the regulator at the initial stage, which ensures greater clarity for all stakeholders.

We also note that clause 6 indicates that the TRA's remit would include an advice function. Further detail as to what this role would entail should be included in the Bill. This would ensure that any action taken by the TRA could be assessed against the scope of its powers. There could also be concerns regarding resourcing if the TRA does not have sufficient or appropriately trained staff in order to carry out additional functions.

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³ See [https://hansard.parliament.uk/commons/2018-01-23/debates/5478903d-81c4-48c8-a43d-08af41998335/TradeBill\(SecondSitting\)](https://hansard.parliament.uk/commons/2018-01-23/debates/5478903d-81c4-48c8-a43d-08af41998335/TradeBill(SecondSitting))