Global Counsel

UK Trade Remedy choices: from internal critic to unilateral disarmer?

Blog post by Senior Director Stephen Adams, 6 July 2018

Over the next few months, the UK is likely to start setting out its detailed plans for the establishment of a UK trade remedies system after it has left the EU. Freed (at least in theory – watch the customs partnership debate) from the obligations of the EU system of which it has long been a critic, the UK will have an opportunity to adopt its own rulebook for the investigation of claims of dumping and subsidy in UK trading partners, and for designing measures to penalise unfairly traded goods.

This has important implications for UK firms currently or potentially reliant on the EU trade defence system who will be looking for the same remedial action from London in the future. The UK's traditional hostility to the trade remedies concept suggests the need for managed expectations. UK firms used to the relative producer bias of the Brussels playbook may not like what they are about to hear. As the UK sets out and refines its preferred methodology there are some important areas to watch.

The first is the treatment of 'non-market economies' and China in particular. The EU has revised its trade defence system over the last three years to remove the previous systematic use of data from other countries to determine the 'true' price of goods produced in China under conditions of market distortion. In its place, it has constructed a methodology that allows for the use of a surrogate 'reference country' to determine fair export prices for goods from any state where there is reason to think that 'significant distortion' is being applied by state policy to production costs.

Designing a new trade remedies rulebook in the UK

Issue	Key UK choices
Non-market economies	Does the UK maintain a methodology for using 'reference' data in cases of significant distortion of local prices by state intervention?
'Lesser Duty' approaches	Does the UK follow the EU in suspending a 'lesser duty' approach in some areas? Or revert to the previous EU approach of applying such an approach in all dumping and subsidy cases?
Injury calculations	What factors does the UK apply in the calculation of injury and 'non-injurious prices'? What does it require exporters to factor into 'reasonable costs' and what level of 'reasonable' profitability does it assume for UK producers in normal circumstances?
Speed and predictability	What obligations does the UK create for its officials to deliver judgements in cases and how quickly can protection be provided? Once in place, how robust are definitive duties likely to be?

If the UK chooses not to retain this approach in some form, it will be breaking from both Brussels and Washington. If it does reproduce it (not least as a bargaining chip with China in future trade negotiations), it will almost certainly end up allying with both the US and the EU in a methodological dispute with China that will be litigated at the WTO level. The detail of the UK's methodology will be important. For example, the EU system provides scope to favour reference countries that come closer than China does to EU levels of labour, social and environmental protection. Will the UK do the same?

The second is in the use of public interest and economic needs tests in the setting of trade defence measures. The UK has always bridled at the design of the EU's 'Union Interest' test in its anti-dumping framework. This test provides that measures on imports can only be imposed when they are deemed to be in the wider interest of the EU, but it contains an explicit bias to interpreting this interest as the imposition of measures designed to eliminate the trade distorting effects of dumping, even where this implies rising costs for importers. This presumption can be trumped in principle, but is not often in practice.

The UK can be expected to produce a framework that is much more explicit on the need to balance consumer/importer and domestic producer interests in determining when and how to act. Again, the detail here will be important, especially if it puts a strong emphasis on consumer impacts, as the UK has tried and failed to do a number of times with the EU rules. The implications for producer attempts to seek border protection on consumer products such as leather shoes, electric bicycles and solar panels (all currently subject to duties or measures at the EU level) are obvious.

The third is in determination and setting of anti-dumping duties themselves. This is a complex area that in the EU and US systems involves calculation of both dumping margins and the extent of injury to local producers. Unlike the US, the EU has a 'lesser duty' approach that requires that border tariff protection be set below the dumping margin if a lower duty is sufficient to remedy injury to local producers. Since 2018 the EU has disapplied this rule for non-market economy dumping cases covering raw material and energy cost distortions and for all anti-subsidy cases. The UK may well revert to the previous EU practice of applying such a rule in all cases.

There are a range of other areas where the UK will make small but important judgements about following the EU approach. For example, the revised EU system determines injury on the basis of minimum levels of 'reasonable' profit for UK producers (6%) and factors in future investment costs and the costs of meeting reasonable social and environmental standards in determining the 'true' cost of prices for exporting producers. The UK could well take a less generous approach (to domestic producers) in both cases.

The fourth is in the speed at which the system delivers border protection for complainants – what the more morbid users of the trade defence system refer to as 'time to bleed' before investigations can be triggered and provisional measures imposed. The EU system has a series of maximum timeframes for the consideration of complaints prior to determining whether to launch investigations and the within which a decision to apply both provisional and definitive duties must be made. It also allows producers to road test argumentation with EU officials before launching cases to compress investigation times. The UK may not adopt these protocols. It may also consider various ways to render it less certain that imposed duties see out their full five year term – suspension reviews and ministerial powers to trigger reviews, for example.

Some of this may seem like arcane stuff. But the sum of choices such as these, will determine how quickly, consistently and robustly the new UK system delivers trade remedies action for UK producers. London has long posed in the EU as a sceptic of the trade remedies system. It now has the opportunity to do things its own way. But the journey from cranky internal critic to unilateral disarmament may not be simple, and certainly will not be uncontested.