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The UK's New Trade Remedies Regime

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Overview

One aspect of the UK's departure from the European Union (**Brexit**) that has been somewhat overshadowed by recent events is the creation of an independent trade remedies regime. Perhaps this is understandable given that the immediate focus for business is on the terms of any withdrawal agreement and what a future trade agreement between the EU27 and the UK may look like. However, this new regime has the potential to be used as both a powerful shield and sword in decades to come as UK businesses rightly look at how an independent trade policy can be used to better protect their interests.

In this bulletin we examine:

- the different forms of trade remedies currently available to the UK through its membership of the World Trade Organisation (the **WTO**) and the European Union (the **EU**);
- the legal and practical steps that the UK Government is taking to prepare for Brexit in this important area of economic policy;
- what the UK's trade remedies landscape may look like after Brexit; and
- some of the risks and opportunities presented by Brexit in this area for British businesses.

What are Trade Remedies?

Trade remedies are a key part of the toolkit of measures used by States to protect their domestic industries against disruptive trade flows. The WTO rules provide that trade remedies are an exception to the most-favoured-nation and national treatment principles, which essentially means that States generally cannot discriminate against their trading partners. Ordinarily, trade remedies or "trade defence measures" take the form of protective tariffs levied on the import of particular products from specified countries in addition to customs duties.

The Three Types of Trade Remedies

Three types of trade remedies are provided for in WTO law:

- anti-dumping measures: anti-dumping measures address instances where the products of one WTO member are introduced into the domestic market of another WTO member at less than the normal value of the product, thereby causing, or threatening to cause, "material injury" to a domestic industry in the importing country;

- anti-subsidy measures: anti-subsidy measures (which are also referred to as "countervailing duties") may be imposed on imports into a State's domestic market in an amount up to the value of the subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in its country of origin or exportation. As with anti-dumping measures, no countervailing duties may be imposed unless there is a determination that the subsidy has caused, or threatens to cause, "material injury" to a domestic industry; and
- safeguarding measures: safeguarding measures may be imposed to protect a specific domestic industry from an unforeseen increase in imports of any product which is causing, or which is likely to cause, "serious injury" to the domestic industry. Contrary to the other two trade remedy measures, no dumping or distorting subsidy must be proven.

The EU and the UK have ratified all of the WTO agreements that provide for these types of trade remedies.

The UK's Current Arrangements For Trade Remedies

At present, for the UK (and as with all other EU Member States), trade remedies are an area of exclusive EU competence. This means that the UK has no legal capacity to legislate independently on trade remedies. Instead, the European Commission is responsible for investigations and decisions on trade remedies affecting the UK.

After consultation with the European Council, the European Commission imposes trade remedies and EU Member States can only veto the imposition of trade remedies by a vote on a qualified majority basis.

The Impact of the Transition Period

As matters stand, Brexit will take place on 29 March 2019. If there is a "no-deal" Brexit, the UK's independent trade policy will therefore commence on that date. However, the UK and the EU are in the process of negotiating the EU-UK Withdrawal Agreement (the **Agreement**) which is intended to come into force on 30 March 2019. The Agreement covers a wide range of areas such as citizens' rights and the financial arrangements flowing from Brexit. Importantly, it also provides for a transition period after the UK leaves the EU until 31 December 2020, during which EU law will continue to be applicable to and in the UK (the **Transition Period**).

Assuming that the Agreement is successfully concluded, there will be no change to the UK's trade remedies position immediately upon Brexit as EU trade remedies will continue to apply in relation to the UK during the Transition Period.

The New UK Regime and Investigating Authority

The UK Government's stated aim after the end of the Transition Period is for the UK to have an independent trade remedies policy. To that end, the UK Government has introduced two Bills into Parliament that are intended to provide the new legal framework for the UK's future independent trade remedies regimes.

At present, the Trade Bill provides for the establishment of an independent UK Trade Remedies Authority (the **TRA**) and deals with various constitutional matters such as the appointment of its board members, funding and its accounts. It also provides that the Secretary of State (the **SoS**) may give the TRA general guidance on how to discharge certain aspects of its responsibilities, but the SoS may not give the TRA guidance in relation to specific and ongoing investigations.

The Taxation (Cross-border Trade) Bill (the **Customs Bill**) provides the legislative framework within which the TRA would operate. In outline, the Bill envisages that:

a) the UK will have access to the suite of trade remedies provided for in the WTO agreements (anti-dumping, anti-subsidy and safeguards) that are currently available in the EU; and

b) in terms of the process for the imposition of trade remedies:

i) UK businesses or the SoS may request that the TRA initiates a trade remedies investigation;

ii) the TRA will conduct its investigation, determine whether the legal conditions for the application of remedies are met, and calculate the duty that may be imposed;

iii) if the legal conditions are met, and unless it finds that the remedy would not be in the economic interest of the UK, the TRA must then make a recommendation to the SoS on the application of remedies and the level of duties; and

iv) the SoS can then decide whether to impose remedies. However, if the SoS is satisfied that it would be against the UK's public interest, he/she can reject the TRA's recommendation.

Significant details still need to be fleshed out in secondary legislation. For example, precisely how the amount of subsidy is determined, what constitutes a "material injury" to a domestic industry and how the investigatory and appeals mechanisms will operate all need further elaboration, although it is expected that WTO rules and precedents will greatly influence the UK regime. We also expect that the SoS's guidance will be critical in shaping the TRA's work.

It is likely that the mechanics of the UK's trade remedies regime will be similar to the current EU model as the UK Government and UK industry will be most familiar with that approach. Aspects of policy and best practice from Canada, Australia and New Zealand are also likely to be drawn upon.

Indeed, the unified investigative structure envisaged for the TRA, where it will be responsible for considering the questions of both dumping and subsidisation and whether the dumping or subsidisation has caused injury, is similar to current EU practice and different to the US and Canadian bifurcated model where those tasks are conducted by different bodies.

Similarly, the Customs Bill, again consistent with current EU practice and contrary to typical US practice, provides for the application of the "lesser duty rule". That rule, which is recommended by Article 9 of the WTO Anti-Dumping Agreement, limits the amount of duty that may be imposed to the amount needed to remove domestic injury, even if the "dumping margin" is greater.

Establishing the TRA

Clearly, a crucial part of the preparations for the establishment of an independent UK trade remedies regime is the successful establishment of the TRA. This work continues despite the slow progress of the Trade Bill and Customs Bill through Parliament. A ministerial direction on spending on the TRA before the Trade Bill becomes law has been granted and recruitment for a variety of roles at the TRA has been underway since August 2017. However, as the House of Commons International Trade Committee has observed,[1] there are a very large number of obstacles to the TRA being functional on 31 March 2019, particularly owing to the complexity and multi-disciplinary nature of its work.

The Effect of the Current Political Uncertainty

Domestic political controversy over the UK's potential post-Brexit membership of a customs union with the EU has complicated the Parliamentary passage of the two Bills, and the Government's slim majority in the House of Commons means that the content of those Bills is in flux. At the time of writing, the Bills are both currently awaiting their second reading in the House of Lords.

Furthermore, the politics concerning the UK's future relationship with the EU is highly fluid, especially due to the complexities caused by the UK-EU27 border between Northern Ireland and the Republic of Ireland. This all means that the future of the UK's trade remedies arrangements, particularly vis-à-vis the EU27, is highly uncertain at this time.

[1] https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/743/74306.htm

The UK's Position on Existing Trade Remedies

Precisely which of the EU trade remedies currently in force will be maintained on Brexit or at the end of the Transition Period is still unconfirmed. This uncertainty flows from the legal tests that must be applied in order for trade remedies to be put into place. Under EU law, the decision to impose trade remedies will have followed a pan-EU assessment of the alleged injury to EU industry. Consequently, it may be unlawful under WTO law for the UK to "grandfather" the EU's trade remedies as the impact on UK industry may not be the same as the impact on EU industry.

To address this issue, in November 2017, the UK's Department for International Trade (the **DIT**) issued a call for evidence to identify which UK businesses produce goods that are currently subject to EU anti-dumping or anti-subsidy measures. As part of that process, the DIT confirmed that, if an EU trade remedy measure does not receive an application to be maintained, or does not meet the required criteria, it will be terminated. If, however, an application is received in relation to an EU trade remedy which does meet the required criteria, that trade remedy will be maintained by the TRA until it carries out a full review based on UK-specific market data. This review will decide the level at which all maintained measures should be set once the UK begins to operate its own independent trade remedies framework.

The DIT has also confirmed the process in relation to EU trade remedies which are put in place after the closure of their call for evidence and before the UK begins to operate its independent trade remedy framework. For any such new measures, the DIT has said that it will approach interested parties to ascertain whether there is an interest for such measures to be maintained.

Having received a number of responses to their call for evidence, the DIT published their provisional findings on the UK interest in existing EU trade remedies in July 2018. In total, 42 existing EU measures have been deemed to meet the relevant criteria and will consequently be maintained (albeit pending further review to determine the appropriate level of the duty) once the UK begins to operate its independent trade remedies framework. The EU measures currently slated to be maintained include those on certain types of steel, steel products, ceramic tiles, biodiesel, citrus fruits and other agricultural products. By contrast, 72 existing EU measures – including measures on certain steel, aluminium, paper and glass products, as well as on certain other products such as bikes, solar glass and solar panels – have been deemed not to meet the criteria, and will consequently not be reviewed or kept in place in the first instance.

The DIT has stated that it will assess any further relevant evidence that was submitted to it by 24 August 2018, and will publish a final list of measures which will be maintained and reviewed by the end of the year in preparation for the commencement of the UK's independent trade policy. Importantly, the DIT has also stated that, once a decision has been made about which measures will be maintained, there will be an opportunity to appeal the decision, although such appeals will only consider the information submitted to the DIT prior to 24 August 2018.

The Impact of the UK's Future Relationship with the EU

The landscape of the UK's trade remedies policy will undoubtedly be profoundly affected by the nature of its future relationship with the EU27. A number of different models for the UK's future relationship with the EU, particularly as regards its customs arrangements, are being considered. Those terms remain subject to negotiation with the EU on the final end state of the UK's relations with the EU27. Please see our other Brexit papers which are available at www.allenovery.com/brexit for further details on the models available for the EU27/UK's future relationship.

If the UK enters into a customs union with the EU, that does not necessarily mean that the imposition of trade remedies will be prohibited. At this stage, the possibility of trade remedies being imposed on trade between the EU27 and the UK cannot be ruled out. Indeed, there are a number of precedents for this in the EU's current relations with its closest economic partners.

- Under the Agreement on the European Economic Area (the **EEA Agreement**), trade remedies cannot be imposed on areas governed by its terms. This means that trade remedies cannot be imposed on the vast majority of trade between the EU Member States and Iceland, Liechtenstein and Norway, but it does not prevent the imposition of anti-dumping duties and countervailing measures on products that lie outside of its scope (e.g. fish products). If the future relationship agreement between the EU27 and the UK has similar limitations on its scope, and this model is followed, trade remedies could therefore be imposed in any areas of trade not covered by the agreement.
- Similarly, the Free Trade Agreement between the EEC and Switzerland of 1972 provides that anti-dumping and safeguarding measures can be imposed between the parties, although Switzerland has never imposed anti-dumping duties on the EU.
- Under the EU-Turkey Customs Union, trade remedies in relation to agricultural products are governed by the WTO rules. Trade remedies on other goods are subject to review by the EU/Turkey Council of Association but, in principle, are permissible. In practice, there is limited coordination of trade remedies between Turkey and the EU and, as of March 2014, Turkey had actual or proposed trade remedies that could affect up to US$1 billion in annual imports from the EU and the EU had trade remedies under consideration with the potential to affect nearly US$500 million in annual imports from Turkey.[2]

Whilst it is likely that both the EU27 and the UK would wish to avoid trade remedies being imposed, this possibility cannot be ruled out and the legal framework to provide for this needs to be ready in light of the final deal agreed between the UK and the EU27.

The outcome of the negotiations in this policy area is likely to depend on the overall package related to the UK's customs arrangements with the EU, as well as, potentially, its acceptance of EU state aid and competition rules, as the application of those rules creates a trading environment in which trade remedies are less likely to be required.

The Impact on UK Industry

As is apparent, much of the detail of the UK's post-Brexit trade remedies regime remains to be decided. This provides the opportunity to influence and shape a critical element of future UK policy. Currently, a number of UK industries particularly benefit from, or may be penalised by, EU trade remedies, including the steel, ceramics, chemicals, paper, glass and fertiliser industries with, for example, the EU's trade remedies imposing additional tariffs of up to 73.70% in the case of heavy plate steel imports from certain Chinese companies.

As of June 2018, the EU had 97 provisional and definitive anti-dumping measures and 13 provisional and definitive countervailing measures in force, so a wide range of UK industries have been enjoying the protection afforded by the EU's trade remedies or experiencing their effects. UK industry should therefore be assessing the extent to which it may be impacted by the loss of those measures.

Actions between Now and Brexit

We anticipate that the UK's post-Brexit trade remedies regime will present opportunities for UK business to use trade remedy measures in ways that it cannot now, as judgments will be UK- (not EU-) centric. Therefore, UK industry should be engaging on these issues with the DIT and the TRA at the earliest opportunity. This should also be a key part of your scenario planning, whether the UK experiences a soft or hard Brexit.

[2] See paragraph 76 of the following World Bank report: http://www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf

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