MODERNISATION OF EU TRADE DEFENCE INSTRUMENTS (MTDI)

UK PROPOSALS PACKAGE

CONTENTS

MODERNISATION OF EU TRADE DEFENCE INSTRUMENTS (MTDI)

UK PROPOSALS PACKAGE

Introduction

The UK welcomes the EU trade defence (TD) modernisation process. We will give strong and active support to the Commission in conducting an open, inclusive and constructive process.

We support the use of trade defence instruments as a legitimate trade policy tool to address genuinely unfair and trade-distorting practices. It is however over 15 years since the last substantive review of the EU's trade defence regime. During this time the complexity of the global economy has increased significantly. The way business is done has changed. The EU trade defence regime must respond to those changes.

The changes to TD decision-making post-Lisbon reinforce the need for a modern and relevant EU regime that commands the respect and support of all business and other economic interests affected by its operation.

We accept that any package of modernisation measures which is to command the support of Member States and the European Parliament must be balanced. There are a number of areas where, in our view, modernisation is required but, recognising the need for such a balance, we are ready to give constructive consideration to all suggestions.

The UK also recognises the pragmatic approach being taken by the Commission in this exercise. We have taken heed of Commissioner De Gucht's statement at the MTDI Conference on 10 May that the focus for the exercise is on the 'practical rather than the ideological'. While such an approach misses the opportunity for a more fundamental review of EU TDIs we are ready to work with the framework established by the Commission's Public Consultation questionnaire and the six broad themes identified.

Priority Issues

In the UK view there are three priority areas for consideration in the MTDI process:

1. **the importance of reflecting the global economy in which EU business operates** – this includes the issue of global supply chains, to which the Commissioner has given particular emphasis, and the evaluation of what constitutes the 'Union industry/production'.
2. **taking a full and active account of all EU economic interests in the Commission approach to and evaluation of the Union Interest (UI)** – an issue touched on in part in the questionnaire.
3. **providing a higher level of transparency in the operation of the regime.**

All of these we believe should be addressed within the Commission's first broad theme of Transparency and Predictability.

Detailed proposals

(references are to the Consultation questionnaire)

1. Transparency and Predictability

The UK congratulates the Commission on the significant improvements made in this area over the last two years or so. However, like the Commission itself, we believe – and feedback from UK business interests suggests that - there is more which can be done for the benefit of all interests.

Beginning with the UK priority issues.

Union Industry

Annex A sets out the case for addressing the Commission's approach to analysing Union industry. This puts forward a number of options for addressing the issue. Although we believe modernisation of the definition of Union industry is necessary we recognise that this is likely to be considered beyond the framework which the Commission has established for this exercise. We therefore strongly urge that, at the very least, the analysis of Union industry should be an additional subject for **guidelines** which the Commission suggests for other areas where transparency and consistency are desirable.

Union (Public) Interest

Decision-making on EU TD measures must give appropriate weight to the interests of all relevant economic players. This includes not only the important interests of producers located in the Union but also, EU companies that produce globally, users, traders, retailers and consumers. And it also includes, in our view, employees and trades unions. This requires a more

balanced and proactive approach to the Union interest evaluation in investigations.

We welcome the suggestion in the questionnaire (2.1.7) for guidelines covering the Commission's approach to the Union interest test. In developing such guidelines the Commission should focus not just on past cases but take into account and reflect the impact which TD measures increasingly have on a wide range of EU economic interests. The guidelines should include a clear indication of how the different interests are assessed and weighted in assessing the overall Union interest.

We propose that this is one important area in which specific and explicit attention should be given to the impact that **global supply chains** have on EU interests. Due weight/recognition should be given to the value-added activities of all companies located in the EU. How this will be done should be set out in the guidelines.

Amongst other possible avenues, the suggestion (2.6.7) to clarify that the UI investigation covers all EU producers offers a first step for taking this forward. However, we believe that the Union interest test should also take into account the views of those companies who, because of their importing activities, are deemed ineligible for consideration as Union producers under Article 4.1a of the AD Regulation.

Guidelines

The UK strongly supports the concept of guidelines to provide information on the Commission's approach to important issues not always well known, and where transparency and consistency are desirable beneficial to all interests. In addition to the suggestions above, the UK supports the Commission on the issues which the Consultation questionnaire poses as possible areas for guidelines, i.e. injury margin (2.1.5), analogue country (2.1.6), Union interest test (2.1.7) and expiry reviews (2.1.8). In all of these areas the opportunity should also be taken to review the Commission's approach in the light of developments over the last decade or so. In our view this applies to all issues suggested as appropriate for guidelines, for example, how to ensure that injury caused by factors other than dumping is correctly identified and taken into account when calculating the injury margin.

Such guidelines would need to be reviewed periodically with a clear process for updating and adaption to take account of new circumstances arising in cases as well as development in interpretation arising from WTO Dispute findings and European Court judgements. While accepting that such guidelines would be the Commission's responsibility, they should be developed in consultation with Member States.

The Anti-Dumping and Anti-Subsidy Committee (ADC)

In our view – and that of a number of UK stakeholders - there are a number of ways in which the operation of the ADC should be made more transparent. To

a very large extent this is to ensure equality of information between those able to afford well connected Brussels representation and those, especially SMEs, which are not.

In our view this should include:

- clear information on how the ADC operates and decisions are reached (particularly important after the new comitology rules enter into force),
- a list of Member State contact points (telephone and email) – the frequency with which delegates are lobbied by interests in particular cases demonstrates that the list already has a wide circulation among some interested parties,
- the publication on the DG Trade website of final ADC agendas (already known to most Brussels-based interests),
- brief information on the outcome of ADC discussions (we accept that raises a number of issues which would need to be addressed)
- subject to commercial confidentiality considerations, questions submitted by Member States and the Commission's answers should be included in the published Official Journal Provisional and Definitive Working Documents.

Early notice for industry

More needs to be done to alert industry in a timely way when a new anti dumping or anti subsidy investigations, interim, expiry or circumvention reviews are launched and to the outcome of investigations and decisions taken. In our view consideration should be given to appropriate information being included in the EU TARIC. An advance alert is particularly important in cases where imports are subject to registration and there is a possibility that duties can be retrospectively applied. A balance must be struck between the benefits of registration and the needs and interests of EU business as a whole.

We also believe that early notice should be provided to business when measures are to expire without an expiry review. At the present time an inequality of information exists between those able to request such a review and other interests. As these interests can be involved in the import of competing goods the knowledge that an expiry review, and the accompanying extension of measures, is not to take place gives an unfair commercial advantage to one group of companies over another. Increased transparency could be achieved in two ways. First, by setting a date (x) months before expiry for the OJ announcement of impending expiry and invitation to request an expiry review (replacing the current 'at an appropriate time'). And second, a clear date (Y) months before expiry for announcement of whether a review will take place.

Access to information

There are a number of areas on which the Commission has made progress but which need further attention, for example:

- Require the publication of a non-confidential version of the **complaint** document after initiation to allow interested parties an early opportunity to challenge allegations of dumping and the supporting data for these. This would help those against whom AD/AS allegations have been made to properly prepare their case.
- There should be a definition of what constitutes "commercially sensitive" data so that everyone understands the kind of information that is being withheld from disclosure documents and parties can challenge the non-inclusion of information that might enable them to defend their interests.

Shipping Clause

The UK welcomes the suggestion for a shipping clause which would increase certainty and facilitate business planning. However, it is important that the period set should be consistent with average shipping times from our major trade partners. Many stakeholders maintain that three weeks is insufficient.

An alternative approach to advance notice of measures (and taken in the Safeguard Regulation) would be to exclude from goods in transit at the time the measure comes into effect. And, in a similar vein, consideration should be given to AD duties not being payable on goods in a Customs Warehouse on the date of implementation of the relevant measure, where those goods subject to contract concluded before that date. These provisions would be particularly valuable to SMEs.

The UK supports the **other suggestions** in the questionnaire, i.e.:

1. Pre-disclosure/advance notice of provisional measures;
2. Advance notice of the non-imposition of provisional measures – where a decision not to impose provisional measures is taken, that decision, coupled with the reasons for the decision, (e.g., more time needed to investigate or complaint has been withdrawn should be published at the earliest opportunity;

2. Fight against retaliation

The UK recognises the concerns about **retaliation** (2.2.1) by countries whose exporters are subject to EU trade defence actions.

However, we are not convinced that greater use by the Commission of its powers to launch AD and AS investigations on an *ex-officio* basis is an effective response to these concerns. We do not believe that such action will prove a deterrent to countries which are prepared to retaliate. Moreover, the Commission's use of its ex-officio powers should remain exceptional; AD/AS investigations should primarily be launched in response to substantiated industry complaints. Echoing some of the comments made at the MTDI conference, any ex-officio action should be subject to very clear criteria/parameters in terms of evidence and EU producer support and there should be an obligation on the Commission to consider Union interest before

launching such actions. If the suggestion is to be pursued we would suggest this would be another issue for guidelines.

We understand too the arguments made to establish **an obligation to cooperate** in *ex-officio* investigations (2.2.2). However we are concerned that such an obligation, with understandable robust confidentiality provisions, would undermine the right of defence of other EU parties. We do not favour fines for non-cooperation. As with –ex-officio investigations themselves, we believe this is an issue on which the Commission needs to give further thought.

3. Effectiveness and Enforcement

Lesser duty rule

The strongly held UK view is that the EU's use of the lesser duty rule is one of the elements of the TDI regime which contributes to its being recognised as one of the most progressive global trade defence systems. Furthermore, it enhances the economic coherence of European TD actions as imposing tariffs no higher than that level needed to offset the injury caused by dumping / subsidy is entirely consistent with restoring fair competition. We have fully supported the Commission's efforts to encourage FTA partners to adopt the lesser duty rule in their regimes. It would be a retrograde step to remove its position as a central part of the EU regime (2.3.3). The UK therefore strongly opposes the suggested removal from anti-subsidy and circumvention cases.

Origin Certification

Where imports have been certified as originating in one country under one of the EU's preferential trade agreements or autonomous trade preferences, it should not be possible to treat these as being of different country of origin or consignment under Anti Circumvention provisions. In our experience, traders find it very difficult to understand how an import can be deemed to originate in one country for the purposes of, for example, GSP and be awarded preferential treatment, and then be penalised with the imposition of AD duties because the Commission deems that the same imports represent circumvention from another country. If Anti Circumvention measures are to be imposed, the authenticity of the GSP certificate should be investigated.

Time Taken To Introduce TDI Measures

During the MTDI Conference a large number of business interests referred to the time taken to introduce TDI measures in the EU. The UK would be prepared to consider, in the context of a balanced package, a proposal that provisional measures should be introduced routinely after a period of less than nine months, rather than the present nine months. This has of course implications in terms of, for example, evidential support at this point and the period for introduction of definitive measures. In the interests of business certainty and planning however, this could be combined with a Commission

commitment not to introduce provisional measures or retroactive application of measures during the first (X) months of an investigation.

Other Effectiveness and Enforcement points

Recognising that the primary aim of AD measures is to counter the effects of genuine distortions to international trade, investigation reports should also set out ways in which the Commission can identify the **distortions which underlie the dumping** found, including actual or quasi subsidies, dual pricing, export restrictions and a protected home market. We believe such an analysis would help give credibility to the case, build consensus within the EU, help set the remaining Union interest assessment in context and send appropriate signals to our trade partners.

In respect of the other issues raised under this theme in the questionnaire, the UK can support the suggestion for ***ex-officio* anti-circumvention investigations** (2.3.1). The suggestion for **longer verification visits** (2.3.2) is essentially for business to comment on. If the suggestion goes ahead it would be helpful if the Commission could clarify the practical effect this change might have. Visits should in any case only be extended where this is necessary e.g. to avoid having to resort to best available information.

Finally, we suggest that the duration of anti-dumping measures should be aligned with the duration of anti subsidy measures and when both are to be pursued they should be initiated in parallel.

4. Facilitating cooperation

Time Limits

The UK fully supports the suggestion in the consultation questionnaire that users should have longer to register as interested parties and to reply to questionnaires *(2.4.1)*. This can only help users in general and SMEs in particular to participate in the process. While we welcome the advances made by the Commission in questionnaires for SMEs it is important that how these work in practice is kept under constant review and further improvements made as experience is gained and feedback received.

Simplification of refund procedures

Requests for refunds seem to have increased over recent years. This may reflect the widening impact of trade defence measures on EU economic operators which the system is not intended to affect. We therefore support any measures to simplify the process (2.4.2***)***. In addition, some UK companies legitimately seeking refunds have found it difficult to provide the documentary evidence required by the anti-dumping regulation (Article 11.8) because of the nature of their trading relationships. We therefore propose that the Regulation should be revised to provide a degree of discretion to the Commission in terms of evidence required and in granting refunds.

In relation to proposal 2.6.2, while we can support this in principle, we would like further clarification from the Commission as to the practical implications of this change, and some examples from cases which illustrate the problem being addressed.

SMEs

The UK supports further efforts to help SME participation in trade defence investigations such as enhancing the helpdesk and holding seminars in Member States (2.4.3). This and more has already been rehearsed and endorsed in the context of the report on problems faced by SMEs which the UK also endorses. Nevertheless, the difficulties for SMEs of being alert to trade defence investigations and then participating in them was a major issue raised in consultation of UK stakeholders.

5. Optimising Review Practice

Expiry Reviews

The UK welcomes the Commission's focus on the review process. We have already proposed that there should be enhanced transparency about the non-initiation of expiry reviews.

We very strongly support the suggestion for reimbursement of duties paid if an expiry review does not result in the renewal of measures (2.5.1). AD/AS measures are introduced for, in most cases, a five year period. It is [inequitable/unfair] that when an expiry review is initiated the measures are automatically extended in force for the 15 months of the review and then a further five years if renewed. Other suggestions for consideration are that any renewal of measures should date from the expiry of the original measures; or that, as was proposed in the context of the Doha Development Agenda Rules negotiations, expiry reviews should be conducted during the term of the original measures.

We support combining expiry reviews combined with interim reviews once measures have been in place for 10 years (2.5.2) as providing a more robust evaluation of the market situation and the need for and level of measures.

We also support the suggestion for automatic *ex-officio* interim reviews when relevant anti-competitive behaviour has been identified (2.5.3).

6. Codification

In respect of the issues raised under this theme in the questionnaire we support the suggestions on:

1. refunds (2.6.2).
2. the suggestion to ensure that exporting producers with a zero or *de minimis* dumping margin are not subject to any review (2.6.3).
3. the possibility of exemption for related parties not involved in circumvention practices (2.6.4).
4. definition of a major proportion of the Union industry in the Union industry section (2.6.5).
5. clarifying that Union Interest covers all EU producers and not just complainants covered earlier (2.6.7).

We remain to be convinced of a need for change to the registration of imports (2.6.1): if proposed we would ask for a detailed justification for the change and its practical implications.

.

Conclusion

The UK welcomes the opportunity to contribute to this public consultation on the modernisation of EU Trade Defence Instruments. We believe that our proposals represent a modernisation to the Regulations and practice which will benefit all interests. In particular, we believe that they will help further the commitment of the Commission and Member States to address the acknowledged difficulties for SMEs in participating in EU trade defence cases.

Trade Policy Unit
Department of Business, Innovation and Skills
United Kingdom
29 June 2012

Annex A

MODERNISATION OF TRADE DEFENCE INSTRUMENTS: Assessing Union Industry - a UK discussion paper

"Value chains have become an essential feature of our economic reality. Today's products and services are not produced in a single location or even by a single company. Rather they are the end result of a highly coordinated series of steps carried out in many countries around the world by many people with many different skills Being part of value chains is a growing reality for European production and therefore European jobs...

However, though we are aware of the rising importance of global value chains, we have so far been unable to properly measure their size, nature and effect. This is because our current statistical apparatus does not capture the domestic activity contained in a traded good or service." Karel De Gucht – April 2012

Introduction

As this statement by Commissioner De Gucht makes clear, the rise of global value chains is a reality for European business, but brings with it a number of complexities of measurement. Judging which companies should form part of the "Union Industry" is an essential part of any trade defence case. But, in a world where firms' activities are increasingly global in nature, this too is beset by these measurement complexities. Recent trade defence cases in the EU highlight such difficulties and suggest the focus on production can be too narrow and there is a lack of transparency and consistency. This paper provides examples of these problems and poses a number of questions which need to be considered in the context of the modernisation exercise.

Issues from recent cases

The main issues arise where EU producers outsource part of their production to, or have parents based in, non-EU countries whose exporters are accused of dumping. The cases raise questions about the criteria used to judge Union Industry issues, about devising appropriate benchmarks and, in particular, about consistency of application across and within cases.

Footwear was an example of a case where many European-based companies had, to a lesser or greater degree, outsourced production. Some companies, not considered part of the Union Industry, had outsourced the final stages of production outside the EU, but retained significant value-added activities, such as design and marketing, in the EU. At the same time, one complainant was included in the Union Industry sample, despite having completely delocalised its production

outside the EU. Other complainants were also deemed to be Union producers despite outsourcing to varying degrees.

No explicit comparison of relative value-added of the respective groups of EU companies was made and it was unclear by which benchmark(s) companies were being judged. The case suggests *too much emphasis on* production and assembly per se, rather than value added, in defining an EU company, and an inconsistency of approach, and an inconsistency of approach. The case also raised questions about the accuracy of injury indicators in markets where outsourcing is commonplace.

In Vinyl Acetate (VAM) outsourcing was not an issue, but the case raised questions in relation to the definition and consistency of application of a "related producer".

The Commission provisionally determined that one EU producer should be excluded from the Union Industry because its US parent, which was accused of dumping, had a decisive role in the producer's key decision making, and this would materially alter the EU producer' behaviour and could shield it from injury caused by dumping. This decision was controversial as the European company was long-established and a major manufacturer of VAM in the EU. The Commission regulation imposing provisional measures gave no information on the size of this company's European production or the share of its EU sales which had been sourced from the US. It was therefore difficult for an outside observer to form a judgement on whether the provisional decision was consistent with decisions in other cases (e.g. light bulbs below) or indeed whether it was reasonable to conclude that the company would indeed be shielded from the injurious effects of dumping.

The Light Bulbs Case: In many ways a positive example, but still highlights difficulties assessing the nationality of companies in the absence of clear information on benchmarks and the weighting assigned to individual criteria used in making judgements. It also suggested inconsistencies in the transparency of Commission assessments of this kind across cases.

In this case, there were four major EU producers, only one of which supported the continuation of measures. The Commission assessed injury indicators only in relation to this supporting company. However, as part of its assessment of Community Interest, the Commission assessed the position of all four companies against a clear set of criteria: location of parent, HQ and R&D; volume of imports from China; share of sales imported from China; import sourcing strategy; and production in the EU.

In many respects, this case was an example of what the Commission should be doing: it listed the criteria and scored each European producer against the criteria. Whether or not these were the correct criteria, the case provided for a welcome and transparent assessment. However, it was less clear what benchmarks were being used, or what weights were being assigned to individual criteria. The relative transparency of this assessment also raises the question of why a similar level of analysis is not presented in other cases.

Questions to be addressed

- How can the analysis of Union Industry appropriately reflect the reality that in many market sectors companies increasingly outsource parts of the production chain?
- What weight, if any, should the Commission give to value-added derived from production/assembly; the motivation for outsourcing; the level of control and direction by a non-EU parent.
- Is the Union industry analysis the best place to consider these issues or might they be more appropriately considered in the Union interest assessment?

Options for action

1. Revise the current definition of Union producer,
2. Develop Commission guidelines to provide transparency for business on the Commission's approach,
3. Maintain the current case-by-case approach with expanded coverage in Commission reports.

This publication is also available on our website at http://www.bis.gov.uk
Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN 12/972