AN ENHANCED ROLE FOR THE DG TRADE HEARING OFFICER
AS A COUNTERWEIGHT TO THE BROAD DISCRETIONARY POWER OF
THE COMMISSION STAFF IN EU TRADE DEFENCE PROCEEDINGS

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The EU trade defence proceedings are characterized by a high degree of
discretionary power on the part of the EU institutions. The provisions of the anti-
dumping and anti-subsidy regulations are susceptible of multiple interpretations.
The EU case handlers enjoy broad latitude in the conduct of investigations and
have the power to take decisions that may have far-reaching consequences for
the companies concerned, for example, when they determine that a company
has not adequately cooperated with the investigation and may therefore be
subject to the use of the best information available. Of course, final
determinations made by the EU institutions in anti-dumping and anti-subsidy
cases are subject to judicial review. The problem, however, is that the EU judicial
process is very slow – proceedings before the General Court may sometimes
take up to 4 or even 5 years to be completed – and the EU Courts tend to grant a
broad margin of discretion to the EU institutions in the handling of trade defence
proceedings.

In view of this highly discretionary context, it is interesting to note that steps
have been taken by the Commission itself to introduce some checks and
balances within its decision-making process, in the form of a hearing officer who
may intervene in the proceeding at the request of the parties.
The possibility to request the intervention of a hearing officer was first introduced in 1992 in an effort to respond to the criticism about the lack of sufficient procedural guarantees in the EU anti-dumping system expressed by the Court in the *Al-Jubail Fertilizers* judgment\(^1\). However, since the hearing officer was generally a head of unit of the Directorate-General for Trade whose impartiality could be questioned, interested parties rarely requested the presence of a hearing officer. In January 2007, in response to requests for enhanced transparency and greater impartiality, a permanent post for a hearing officer was created within the Directorate-General for Trade. The hearing officer is a Commission official who is experienced in trade defence issues. He works independently from the Commission services and reports directly to the Director General for Trade.

The hearing officer’s task is to guarantee the proper exercise of the rights of defence. In that context, he ensures the respect of the right of interested parties to be heard both in writing and orally, guarantees that all relevant arguments and facts are duly considered, and ensures the right of interested parties to have access to the file, together with the respect of rules concerning treatment of confidential information and protection of business secrets. The hearing officer has also an advisory role. He advises, where appropriate, the Director General for Trade on issues related to due process and good administration, and he presents observations on any matter arising out of trade proceedings.

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\(^1\) Case C-49/88, *Al-Jubail Fertilizer Co. (Samad) and Saudi Arabian Fertilizer Co. (Safco) v. Council*, 1991 E.C.R. I-3187, at paragraph 16, where the Court of Justice stated: *W*ith regard to the right to a fair hearing, any action taken by the Union institutions must be all the more scrupulous in view of the fact that, as they stand at present, the rules in question do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems.
The hearing officer essentially acts as an interface between interested parties and the Commission services. He facilitates communication and mediates on procedural issues. For example, under normal circumstances, the hearing officer will not attend routine oral hearings between an interested party and the Commission services. However, interested parties can request his presence, if they feel that their procedural rights are not fully respected. The hearing officer himself can also organize hearings or adversarial meetings, either *ex officio* or upon request of interested parties, and may hold preparatory meetings with the parties concerned and/or the Commission services, in order to identify and clarify the questions which will be the subject of the hearing.  

Hearings or adversarial meetings where the hearing officer is present are be followed up by minutes setting out the arguments put forward by the parties, responses and/or questions of the Commission and comments/questions of the hearing officer. In the context of the right to be heard, the hearing officer also deals with requests pertaining to the admission as an interested party to the proceedings, the extension of the time limits for replying to questionnaires, or the submission of comments following the disclosure of documents.

Any interested party can request the intervention of the hearing officer, including the authorities of any third country concerned, the Commission services or Member States. This can be done as soon as the investigation is initiated or at any stage during the investigation, until a final decision is adopted. The hearing officer can also intervene *ex officio* if there is serious reason to believe that the rights of defence of the interested parties have not been respected. The Commission has adopted the policy of providing interested parties with the opportunity to request a hearing with the hearing officer in all cases where the

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2 For example, in *Fasteners* (China), 2009 O.J. (L 29) 1, the hearing officer organized, *ex officio*, an adversarial meeting with regard to the product scope of the proceeding. The reason for this was that interested parties had expressed significantly opposing views on the product scope of the investigation and the comparability of Chinese and Union products.
Commission has informed the interested parties of its intention to use Article 18 of the Regulation.

Even though the hearing officer can be contacted informally, it is advisable to request his intervention in writing and in due time to ensure that there is sufficient time for him to examine the issue concerned, and to propose adequate remedial actions.

Pursuant to the working document accompanying the 27th annual report from the Commission to the European Parliament on the Union’s anti-dumping, anti-subsidy and safeguard activities, SEC(2009) 1413, the Hearing Officer received 19 requests for hearings in 11 anti-dumping proceedings (including one undertaking) and held 16 hearings in 2008. In three cases, the Hearing Officer resolved the issues without holding a hearing. Most of the hearings were individual hearings chaired by the Hearing Officer between an interested party and the Commission investigation services. The Hearing Officer also held two adversarial meetings.

The most frequent reason for interested parties to refer to the Hearing Officer appeared to be a need for more detailed explanations, in particular when the claims or the arguments of these parties were rejected. A number of interested parties also addressed the quality of the non-confidential files. Six of the 16 hearings held related to objections to the party being considered non-cooperating pursuant to Article 18 of the Regulation. The Hearing Officer intervened on a number of requests to review MET/IT conclusions and on arguments concerning injury and Union interest. In two cases, the product scope of the investigation was put into question.
In the majority of the cases (about 70%), the Hearing Officer organized a hearing within two to five days after the request. This was partly due to the fact that the Hearing Officer’s intervention was requested at the very last moment in the proceeding. Nevertheless, in most of the cases, the intervention of the Hearing Officer helped the parties to identify the main problems and receive additional explanations from the investigation services. In two cases, the consideration of some additional arguments of the parties led to substantial changes to the situation of the parties concerned. The analysis of the Hearing Officer’s interventions, however, showed that the latter are more effective if the Hearing Officer is involved at an earlier stage of an investigation.

It is important to note that the adoption of a Commission decision on the terms of reference for the Hearing Officer of DG Trade is currently being discussed, and that such a decision will be based on the experience gained during the first two years and would provide a formal legal basis enhancing the role of the Hearing Officer.