ARTICLE

The Better Is the Enemy of the Good

Ensuring Transparency in the EU's Trade Defence Investigations through the Non-confidential File: Recent Developments

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Ensuring transparency in trade defence proceedings is a major challenge because such proceedings process an important amount of confidential data. Both the World Trade Organization (WTO) Anti-Dumping Agreement and Community law contain a number of mechanisms that ensure transparency. The investigating authority's duty to maintain a meaningful non-confidential file is a key element in this context. In June 2009, the European Commission has launched a policy initiative that aims not only at improving the quality of the non-confidential file but also at a number of other procedural ameliorations. The implementation of this initiative does not necessitate a legislative change nor does it touch on the balance between importing interests and interests of Community producers. Improvements that are applicable right from the launch of this initiative comprise inter alia guidelines as to how non-confidential summaries should be drafted and an index to the non-confidential file. An improved web page and electronic access to the non-confidential file are scheduled for the foreseeable future.

1. Introduction

There is probably no other area of trade policy that provokes as much controversy as governments' use of trade defence instruments (TDI), that is, anti-dumping,[1] anti-subsidy,[2] and safeguard measures.[3] All three instruments have their basis in World Trade Organization (WTO) law and are a necessary part of the international regulation of trade. They are recognition of the fact that domestic trade and international trade are carried out within two fundamentally different frameworks, and that TDI are necessary in view of the segregation of markets which is possible under WTO rules (customs duties, lack of effective competition policies and authorities at international level, and so forth).

In transposing these instruments into its internal legal order, the EU has built in a number of checks and balances, which go considerably beyond the minimum requirements with which the relevant WTO Agreements discipline WTO Members' use of TDI. These mechanisms ensure that the use of TDI in the EU is limited to situations where they are strictly necessary. The European Commission in June 2009 launched an important initiative on transparency that, while maintaining the aforementioned equilibrium, introduces a number of procedural improvements for all parties to TDI investigations, notably in relation to the non-confidential file.

The at times passionate debate about TDI is fuelled by a number of reasons. First, there are many misconceptions as to the purpose and functioning of TDI.

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1 Regulation (EC) No. 384/96 of 22 Dec. 1995 on protection against dumped imports from countries not members of the European Community, OJ L 56, 6.3.1996, 1, as last amended by Regulation (EC) No. 2117/2005 of 21 Dec. 2005, OJ L 340, 23.12.2005, 17 ('Basic AD Regulation').

2 Regulation (EC) No. 2026/97 of 6 Oct. 1997 on protection against subsidized imports from countries not members of the European Community, OJ L 288, 21.10.1997, 1, as last amended by Regulation (EC) No. 461/2004 of 6 Mar. 2004, OJ L 77, 13.3.2004, 12 ('Basic AS Regulation').

3 Regulation (EC) No. 260/2009 of 26 Feb. 2009 on common rules for imports (codified version), OJ L 84, 31.3.2009, 1 ('Basic SFG Regulation').

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There is notably a wide gap between the TDI-related discourse in many economic textbooks (e.g., that the anti-dumping instrument should be limited to predatory pricing) and the design of these instruments in the WTO legal system that in turn is the basis of the corresponding laws of WTO Members.[4]

Second, TDI often involve conflicts of interests between, on the one hand, domestic producers and their upstream suppliers and, on the other hand, importers and downstream users. The existing laws have set the parameters within which these conflicts have to be solved. Yet, economic operators tend to put these parameters into question, at least in economically important cases.

A further type of criticism against TDI revolves around the issue of transparency. TDI are often criticized as being notoriously intransparent. Ensuring transparency in TDI investigations is a considerable challenge not only for the investigating authority but also for all parties concerned. This is due to the fact that each investigation processes by definition company-specific confidential information like detailed cost of production data per product type, domestic and export sales listings including the names of the customers, prices charged, rebates given, and so forth. Both WTO law and EU law provide for the full protection of such commercially sensitive data. But they also contain mechanisms to ensure transparency such as the need to make non-confidential summaries open to all parties concerned, providing for disclosure and so forth so that all parties can effectively defend their interests.

This article examines recent developments in this complex area of transparency, mainly by presenting recent improvements of the non-confidential file in TDI investigations. It will first consider the wider context of reviewing and updating the EU's TDI, notably the European Commission's June 2009 Transparency Initiative (*infra* 2). It will then turn to the relationship between confidentiality and transparency, two principles that need to be reconciled in each and every TDI investigation (*infra* 3). The article will then present the features of the improved non-confidential file as designed by the European Commission's June 2009 Transparency Initiative (*infra* 4). The final chapter looks beyond this initiative, that is electronic filing and online access (*infra* 5).

2. The Wider Context

Since 2008, the European Commission's services have been carrying out a comprehensive review of the management of TDI cases with a view to further improve certain aspects of investigations, many of which are linked to the issues of transparency, quality, and reliability (e.g., the non-confidential file, disclosure to interested parties of the European Commission's findings in individual investigations, the European Commission's website as a tool to facilitate information of the interested public about TDI investigations, and the Hearing Officer). This review also coincided with discussions in the Council's Working Party on Trade Questions (hereinafter 'Commercial Questions Group'), which started under the French presidency in the Council of the European Union during the second semester of 2008 and were later conducted under the Czech presidency. TDI stakeholders (industry, importers, users, and retail interests) were associated to both the European Commission's review and the discussions in the Commercial Questions Group.

Transparency proved to be an important issue in these discussions and there was an emerging consensus that this issue merits to be pursued. Based on the results of these two processes, the European Commission launched therefore at the beginning of June 2009 an initiative containing an important number of steps with a view to enhancing transparency in TDI investigations, that is:

- Improved non-confidential files.
- A more informative and user-friendly TDI website.
- More help for small- and medium-sized enterprises (SMEs).
- Examination of the possibility of simplified questionnaires for exporters and Community producers alike.
- Improved information collection from importers, users, retailers, and consumer organizations.
- Improved disclosure.
- Formalizing and enhancing the role of the Hearing Officer.

The common denominator of all these steps is that they can be implemented without changing the Basic AD or Basic AS Regulation; the June 2009 Transparency Initiative has found widespread support from Member States. The timeframe envisaged for implementing the above steps is ambitious. It is planned to implement most of the above steps by autumn 2009 and the rest progressively during the remainder of 2009.

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4 Wolfgang Müller, Nicholas Khan, & Tibor Scharf, *EC and WTO Anti-Dumping Law – A Handbook* (Oxford: Oxford University Press, 2009), paras I.06 et seq.

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3. Transparency and Confidentiality: Uneasy Twins

TDI investigations are quasi-judicial proceedings in the sense that there are strict rules governing the information collection process and parties' procedural rights. One of the particularities of these investigations is the fact that they involve the processing of large amounts of commercially highly sensitive data from individual economic operators with adverse interests.

In a typical Court proceeding, all parties to the dispute normally have access to the documents and submissions made available to the Court and can express their views thereto. It is not only possible to transpose to TDI investigations the concept of transparency practiced in Court proceedings but also in many administrative proceedings because of these confidentiality issues. Both WTO and EU law recognize this constraint (see for instance Articles 6.1.2 and 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter 'WTO Anti-Dumping Agreement (ADA)') and Article 19 of the Basic AD Regulation).

WTO law offers two solutions to this problem. First, it stipulates that confidentiality has to be respected. However, to ensure transparency it imposes on Members a duty to maintain for each and every investigation a non-confidential file. This file must contain all non-confidential submissions made by parties. It must also contain meaningful non-confidential summaries of submissions which parties made in confidence to the investigating authority. WTO law recognizes that, in exceptional circumstances, information submitted in confidence is not susceptible to a non-confidential summary. In such a case, parties will be required to submit a statement of reasons why summarization is not possible. The law also defines the criteria that qualify information as confidential, and it also sets up minimum requirements in relation to the quality of the non-confidential summaries ('[t]hese summaries shall be sufficient to provide a reasonable understanding of the substance of the information submitted in confidence'). This system implies that parties can only up to a point cross-check the facts on which the investigating authority bases its findings. Non-confidential summaries are a second best solution in terms of transparency.

WTO law also provides for the possibility of an additional albeit not mandatory mechanism of transparency, the so-called administrative protective order (APO) system.[5] The United States have developed the APO system. It is also used in Canada and Mexico. The core feature of an APO system is that the legal representatives of parties to a TDI investigation are entitled to see all confidential submissions of all parties but they are not entitled to share this confidential information with their clients. Lawyers who violate their obligations arising out of the APO are subject to severe sanctions. The APO system improves undoubtedly transparency[6] as compared to the non-confidential file system that the vast majority of investigating authorities including the EU apply. However, there is also an important cost associated with the APO system which, in the opinion of the author, seems to outweigh its advantages. This article can only touch briefly and superficially on this complex issue. The following problems spring immediately to mind and this list is by no means exhaustive: It would undoubtedly increase the cost of TDI investigations for interested parties because their representation through a lawyer would become necessary from a practical point of view to participate successfully in TDI investigations. This would make these investigations more costly and thus put a further obstacle to cooperation in TDI, at least for SMEs on both sides of the fence, that is, both exporters and producers in the importing country. Furthermore, one should not lose sight of the international dimension. TDI are used by a wide variety of countries with hugely varying levels of development. A sufficiently homogeneous and highly professional bar as well as a uniform system of sanctions in case of breach of confidentiality is *conditio sine qua non* for such a system and this prerequisite cannot always be considered as a given. Moreover, many respondents already feel uncomfortable today to submit the necessary confidential information to the investigating authority. Their hesitations would increase considerably if they were obliged to share their business proprietary information with the legal representatives of their overseas competitors.

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5 See footnote 17 of the WTO ADA that reads: 'Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order system may be required.' Footnote 42 of the Agreement on Subsidies and Countervailing Measures ('WTO ASCM') is identical.

6 Note however that transparency is not a panacea against unfair results of a TDI investigation. See for instance the Appellate Body report WT/DS294/AB/RW of 14 May 2009, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing'), Recourse to Art. 21.5 of the DSU by the European Communities, AB-2009-1, paras 415 et seq. In this case, the United States' Department of Commerce made a calculation error (which is not disputed between the parties) and in addition applied zeroing in a dumping calculation. The removal of both the calculation error and the zeroing would bring the EC exporter below the *de minimis* level and hence outside the scope of the measure. The United States however refused to correct the calculation error and the EU had to try to seek redress of this issue before the compliance panel.

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In sum, TDI investigations have to scrupulously respect two conflicting but equally important principles, that is, the principle to respect confidentiality and the principle to ensure the maximum of transparency. The implementation of the principle of confidentiality does not pose any particular problems in the EU. However, the principle of transparency is an area that was subject of intensive reflection with the view to increasing its weight in TDI investigations. The issues, in so far as they are related to the content and the management of the non-confidential file, are discussed in detail in the next chapter.

4. Improved Non-confidential Files

The European Commission's June 2009 Transparency Initiative covers essentially three actions aiming at improving the non-confidential file. First, the non-confidential file will have an index of documents. Second, the non-confidential file will also contain summaries reflecting the Commission's gathering of oral information in an investigation like non-confidential records of hearings, records of information submitted orally, and so forth. Third, the Commission has prepared guidelines for all parties as to how non-confidential summaries should be prepared in a meaningful way.

4.1. Index of the Non-confidential File

In the past, all non-confidential documents and non-confidential summaries of confidential documents received by parties have been put into the non-confidential file, classified by type of party concerned (exporters, importers, Community producers, users/consumers), and within each group in chronological order. However, there was no index. As neither WTO law nor EC law stipulates as to how the non-confidential file is to be presented, this does not create a legal problem.[7] However, this is not user friendly. A party that consults the non-confidential file will have to invest some time to be able to determine its content. Moreover, the absence of an index is not convenient to assess at a glance as to when and what updates have been made. This inconvenience has now come to an end. Henceforth, there will be a detailed index that is updated whenever there is a new addition to the non-confidential file.

4.2. Non-confidential Summaries of Information Collected by the European Commission

Typically, the findings made in an anti-dumping investigation are based on facts submitted in writing by interested parties, notably via their replies to the Commission's questionnaires, which are subsequently verified by means of an on-spot verification visit[8] or whose accuracy is checked by European Commission staff in other ways in the course of the investigation. In certain circumstances, the European Commission also obtains information orally from interested parties. Information obtained in hearings with the TDI Services[9] falls under this category. Normally, parties that have obtained a hearing often provide voluntarily a post-hearing brief although the Basic Regulations do not contain a legal obligation to do so.[10] The European Commission's June 2009 Transparency Initiative has closed this legal lacuna. If no post-hearing brief is received, the European Commission services will prepare themselves a non-confidential summary. The same applies from now on if information is submitted orally, for example, over the phone.

An important element in any investigation is the communication by the Commission to interested parties. This can comprise deficiency letters in relation to questionnaire replies, other letters detailing information requirements, exchanges with regard to organizational issues like the fixing of the dates of verification visits, and so forth. It also covers disclosure documents at the provisional and definitive stage of any investigation.[11] Last but not least, it can cover documents prepared by the European Commission in particular at the early stages of the investigation that set out a preliminary view of the Commission services on a specific topic such the representativity of a sample. The purpose of the latter documents is to invite parties to comment so that the European Commission services can better steer the investigatory process in the light of the comments received. This approach has also the advantage that parties are not for the

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7 Panel Report, WT/DS337/R of 16 Nov. 2007, EC – Anti-Dumping Measure on Farmed Salmon from Norway, para. 7.770.

8 Article 16 Basic AD Regulation; Art. 26 Basic AS Regulation.

9 Article 6(5) Basic AD Regulation, Art. 11.5 Basic AS Regulation, Art. 6.5 Basic SFG Regulation. It is appropriate to distinguish these hearings that are more geared towards information gathering from hearings before the Hearing Officer where the focal point is the respect of the party's rights of defence.

10 Note however, that Art. 6(6) Basic AD Regulation and Art. 11(6) Basic AS Regulation stipulate that oral information presented in a confrontation hearing will only be taken into account insofar as it is subsequently confirmed in writing.

11 See Art. 6.9 WTO ADA, Art. 12.8 WTO ASCM.

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first time confronted with the European Commission's points of view at a comparatively late stage in the investigation, that is, when provisional or definitive disclosure is normally scheduled.

If the European Commission itself prepares the non-confidential summary, care has to be taken that such summary fully respects the confidentiality of any information received. For all practical purposes, it will often be useful to allow the party that has submitted such oral information, a possibility to comment so that confidential information is not divulged inadvertently.

As far as mission reports are concerned, the WTO ADA provides for two alternative options: 'Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9 [of Article 6 of the WTO ADA], to the firms to which they pertain and may make such results available to applicants.'[12] Community law has not explicitly reproduced this provision so that Community law does not explicitly provide for a separate disclosure of the results of the on-spot verification. Therefore, the Commission will communicate the results of the verification visit in the disclosure given to the interested parties pursuant to Article 20 Basic AD Regulation/Article 30 Basic AS Regulation.

4.3. Guidelines on How to Prepare Non-confidential Summaries in a Meaningful Way

The preparation of a non-confidential summary is not always easy and companies may have difficulties in understanding what they are required to do in this respect. The questionnaires sent out by the European Commission to interested parties have anticipated this problem and have given some advice as to how a company could accomplish this task, in particular in relation to numerical information. If for instance the confidential information consists in the development of a certain cost over a number of years, parties should use indices in their non-confidential summaries. If the confidential information consists of isolated figures, the party preparing a non-confidential summary could indicate a figure within a certain percentage range (usually 10% up and down) of the actual figure. For example, if the confidential figure is EUR 300, any figure between EUR 270 and EUR 330 might do the trick.[13] Finally, if a certain piece of information is not confidential but the source is, the non-confidential summary could simply omit the source (e.g., '[one of my customers] pointed out that the actual prices charged by company *XYZ plc* are 15% lower than our prices').

This type of guideline is helpful in many respects, but it was felt that more could be done to enhance transparency. Although questionnaires may vary slightly from one investigation to another due to the particular circumstances of the case, the bulk of the information required from interested parties is very much standardized. In the context of the June 2009 Transparency Initiative, the Commission has therefore developed a more user-friendly approach in this respect. It now sends out together with the questionnaire detailed guidelines that explain whether or not any item is susceptible to non-confidential summary and if so, how such summary should be prepared. The guidelines follow the structure of typical questionnaires for Community producers, exporters, and their related importers as well as the claim form for exporters in countries with an economy in transition wishing to receive market economy treatment.[14] Summarization is not required for transaction by transaction listings of domestic or export sales and information linked thereto (e.g., credit notes), customer lists, and so forth. These guidelines also ensure a more coherent approach to non-confidential summaries because everybody works on the basis of the same instructions.

It should finally be stressed that these are only guidelines and not mandatory rules because in exceptional cases the information may indeed not be susceptible to summary.

4.4. Conflict Resolution with Regard to the Non-confidential File: The Role of the Hearing Officer

Since 2007, the European Commission's Directorate General for Trade (hereinafter 'DG Trade') has a Hearing Officer reporting directly to the Director-General, that is, organizationally he is not within the structure of DG Trade's trade defence services that constitute one Directorate of DG Trade.[15] His function is to offer

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12 Article 6.7 WTO ADA. Similar Art. 12.6 WTO ASCM.

13 These guidelines are set out in an annex to the questionnaire.

14 An exporter in a non-market economy country or an exporter in a country with an economy in transition who wishes to receive individual treatment pursuant to Art. 9 (5) of the Basic AD Regulation will have to fill in part of the claim form.

15 See <http://trade.ec.europa.eu/doclib/docs/2008/june/tradoc_139312.pdf>.

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parties concerned by trade investigations improved guarantees for the full exercise of their rights of defence. Since the non-confidential file is one of the key mechanisms to ensure transparency in TDI investigations, it is only natural that the June 2009 Transparency Initiative has assigned a key role to the Hearing Officer in the various types of conflict that can arise in this respect. To mention a few: the Commission services and the party submitting a questionnaire reply can disagree whether information is susceptible to non-confidential summary. They can also disagree about the quality of the summary. Such dispute can equally arise between parties to an investigation, typically those with opposed interests. A conflict that is fortunately not encountered too often and that should also be mentioned here is whether the name of a company can be withheld from the non-confidential file, for example, because it was threatened with retaliation in case it supports the Community industry at the origin of the investigation.[16]

A party's failure to provide an adequate non-confidential summary obliges the investigating authority to reject the information submitted in confidence 'unless it can be satisfactorily demonstrated from appropriate sources that the information is correct'.[17] This means that the rules concerning non-cooperation apply[18] to the extent that information has to be rejected. In other words, failure to provide a non-confidential summary can have serious adverse consequences for an interested party. The vast majority of this type of dispute is normally satisfactorily solved in direct contacts between the Commission services and the party in question. In case no agreement is found, the party can request the intervention of the Hearing Officer. He has no power to decide the dispute but he will give, within a short period of time (around three days), a non-binding recommendation. His recommendation would carry considerable weight and the Commission services can only depart from it if they give valid reasons. Thus, the Hearing Officer serves as an additional layer of control of the Commission services.

As pointed out above, parties do not have access to the confidential information provided by others. They can only see the non-confidential summaries. Only the Commission can review the totality of the facts submitted. To compensate at least partly for this inconvenience, that is, the absence of an APO system in the EU, the Hearing Officer can play an important role. Upon request by a party concerned, he can review the correctness of certain aspects of the European Commission's findings that are based on confidential data.

5. Transition to Electronic Non-confidential Files

Technological progress in principle permits maintaining non-confidential files in electronic format. Electronic files offer two advantages. First, parties who consult the non-confidential files on the premises of the Commission could simply copy these files on an electronic storage media like a CD-ROM or a memory stick. The time-consuming exercise of making paper copies would no longer be necessary and lawyers would no longer have to scan the copies to share them with their overseas clients or those in the Community. The Commission services are currently carrying out a test case of electronic filing in the expiry review on imports of shoes from China and Vietnam. Parties are receiving copies of the file via CD-ROM in that case.[19] Up to now the results of this test case have been encouraging and parties were indeed very satisfied with this move. Moreover, the introduction of electronic filing offers further scope for more sophisticated transmission of information in the future. Therefore, the Commission announced in its June 2009 Transparency Initiative that it examines the introduction of electronic non-confidential files for all cases.

Second, transition to electronic filing is a precondition for granting access to the non-confidential file via the Internet. This would allow, for example, exploring additional functionalities such as an alert function. Again this does not come without a cost. The Commission is also examining this step in particular by looking at the security aspects. The United States authorities are examining this option as well while the investigating authorities of Canada and Australia already today provide online access.[20] Online access considerably facilitates cooperation in a TDI investigation.[21]

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16 See, for example, the Regulation imposing provisional measures on imports of certain footwear with textile uppers from PR China and Indonesia, OJ L 29, 31.1.2007, 3, and the Regulation imposing provisional measures on imports of ironing boards from PR China and Ukraine, OJ L 300, 31.10.2006, 13.

17 Article 19 (3) *in fine* Basic AD Regulation, Art. 29(3) *in fine* Basic AS Regulation.

18 Article 18 Basic AD Regulation, Art. 28 Basic AS Regulation. See also Müller et al., *supra* n. 4, paras 6.18 et seq.

19 Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam, OJ C 251, 3.10.2008, 21.

20 With regard to Australia, see <http://adpr.customs.gov.au/Customs/>.

21 The Commission services provide occasionally courtesy copies in exceptional circumstances, for example, in very small cases with few submissions and a very small number of parties.

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An issue that comes to the fore in the context of an electronic non-confidential file is the question as to who should have access. This question obviously poses itself as well in relation to paper non-confidential files, but the issue has another dimension in view of the much easier and wider access via the Internet. In principle, two possibilities exist, that is, access that is limited to the parties concerned by an investigation and access for the general public. The United States' Department of Commerce has located all its non-confidential files in a central reading room on its premises in Constitution Avenue in Washington, and every member of the public can inspect the file in this reading room during the normal opening hours and can make photocopies against payment of a fee. In contrast, the Community limits access to interested parties. This is fully in line with its obligations arising from Articles 6.1.2 and 6.4 WTO ADA as well as Articles 12.1.2 and 12.3 Agreement on Subsidies and Countervailing Measures (ASCM). The Commission has also announced in its 2009 TDI Transparency Initiative that access will remain restricted to interested parties. It is interesting to note that Australia and Canada already today provide for online access and they have opted for the same solution.

6. Conclusion

The Commission has recently reassessed its internal procedures in TDI proceedings. An important aspect of this process relates to increased transparency. This largely is still work in process and in the process of implementation. Regular reporting on this process will be done through publications, presentations in various fora, and via DG Trade's website. Comments made by credible stakeholders will be very valuable for the purpose for further steering the process.

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