



EUROPEAN COMMISSION

Hearing Officer for Trade proceedings

Brussels, 12 June 2017

**Annual Report of the Hearing Officer
for Trade Proceedings
2015/2016**

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1. CONTEXT AND OVERVIEW

The primary role of the Hearing Officer is to guarantee the rights of defence of interested parties and thereby contribute to ensure that the rules are implemented in an objective and transparent manner in trade proceedings.

Certain ground rules of the rights of defence are laid down in the EU Charter of Fundamental Rights as follows: the right of every person (i) "to be heard, before any individual measure which would affect him or her adversely is taken", (ii) "to have his or her affairs handled impartially, fairly and within a reasonable time" and (iii) "to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy".

More specific rules of parties involved in trade proceedings are contained in the basic regulations dealing with the different types of trade defence instruments, such as the anti-dumping, circumvention of measures, safeguards regulations, or in the trade barriers regulation. The role and the powers of the Hearing Officer for trade proceedings are set out in a formal mandate by a Decision of the President of the European Commission of 29 February 2012 on the function and terms of reference of the hearing officer in certain trade proceedings (OJ L 107/5, 19 April 2012). This underpins the Commission's commitment to guaranteeing due process in trade proceedings and to improving the impartiality of the function. The Hearing Officer is attached, for administrative purposes, to the Commissioner responsible for trade policy; however, he enjoys independence in performing his duties and shall not take instructions in fulfilling his tasks.

The Terms of reference also lay out detailed rules on hearings conducted by the Hearing Officer on all aspects of a trade proceeding and throughout all phases of the proceedings. Furthermore, the Hearing Officer has been delegated the decision-making powers on a number of procedural issues, such as access to file, extension of deadlines and the confidential nature of a document. At the request of an interested party the Hearing Officer can also examine information that is confidential by nature and cannot be disclosed to parties, and inform the party whether in his view the information has been correctly reflected in the findings of the Services.

The Hearing Officer is empowered to raise with the Commissioner responsible for trade policy and the Director General for Trade, any concerns about the conduct or content of any trade investigation.

The function of the Hearing Officer for DG Trade was established in 2007. Until 2012, the Hearing Officer acted without a formal mandate on the basis of the existing legal framework for trade proceedings. Since 2012 the Terms of Reference of the Hearing Officer are set out in a Decision of the President of the European Commission.¹

This report has been drafted in accordance with Article 18(1) of the Terms of Reference and contains a summary of the activities in 2015, 2016 and main observations.

¹ Decision of the President of the European Commission of 29 February 2012 on the function and terms of reference of the hearing officer in certain trade proceedings — OJ L 107, 19.4.2012, p. 5ff.

Evolution of activities 2015 - 2016

The Terms of reference cover trade proceedings provided for in 10 basic Trade Regulations.² From the outset the vast majority of intervention requests concerned trade defence proceedings (anti-dumping and anti-subsidy). Only a very few requests related to General System of Preferences and Trade Barrier Regulation issues have ever been received, none in 2015 and 2016.

In 2015, the Hearing Office received 51 intervention requests, whereas in 2016 the Hearing Officer received 53 intervention requests.

Altogether 20 hearings were held with individual parties, 4 hearings were held with several parties with similar interests in 2015. A single request for a confrontational hearing was received but other interested parties used their discretion to decline the participation.

As regards other interventions the Hearing Officer held 2 meetings with the case team only, 2 meetings with an interested party only and carried out 3 requests for verification of information in the confidential file.

In 2016 in total 25 hearings were held with individual parties and the case team, 4 hearings with the interested party only, 1 hearing with the case team. In a number of cases the intervention requests did not result in a formal intervention, rather were resolved by means of an informal discussion with the requesting interested party.

All requests related to trade defence instruments and, in 2015, concerned 24 out of 97 ongoing trade defence proceedings, but in 2016 – 25 out of 98 proceedings. No intervention was requested for other trade proceedings, in fact there were no other trade proceedings ongoing.

The following three tables demonstrate that notwithstanding the actual numbers the ratio between the ongoing trade proceedings and intervention requests received by the Hearing Officer compared to previous 4 years has slightly declined.

The actual number of hearings has stabilized in comparison to the previous years. The difference between the number of requests for interventions, the number of hearings and the number of on-going trade proceedings in 2015 and 2016 has been remarkably similar.

² A list of all Trade Regulations covered is given in Article 1 of the ToR.

Table 1: Trade proceedings concerned by intervention requests vs. ongoing proceedings (actual numbers)

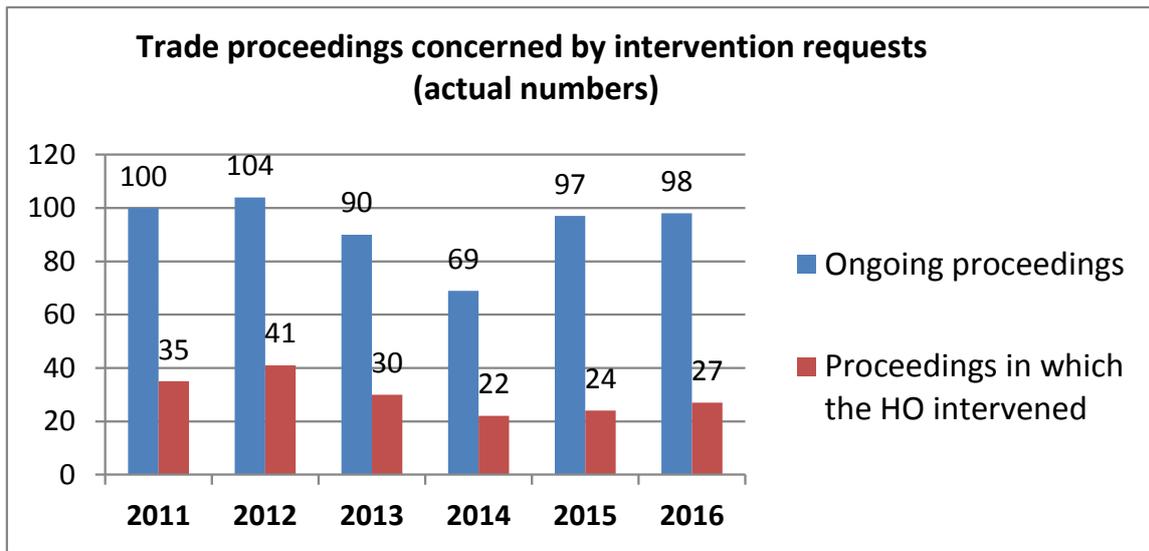


Table 2: Trade proceedings concerned by intervention requests vs. ongoing investigations (in %)

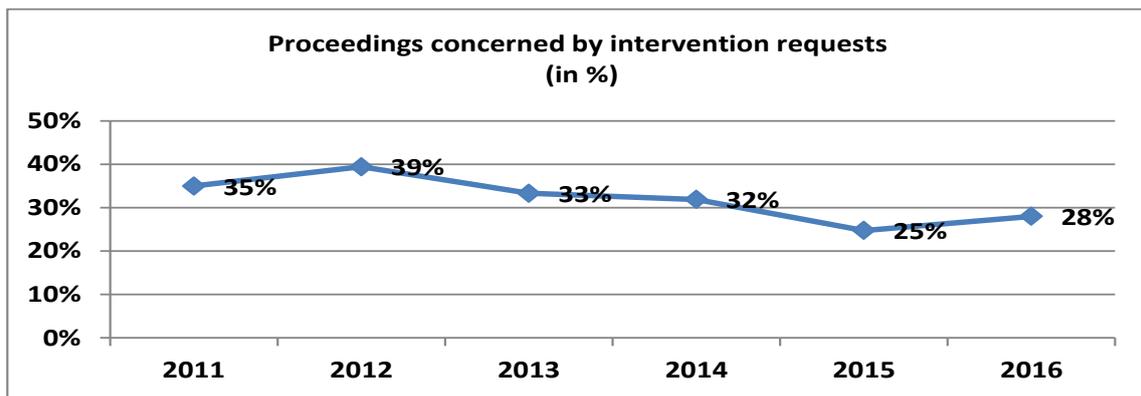
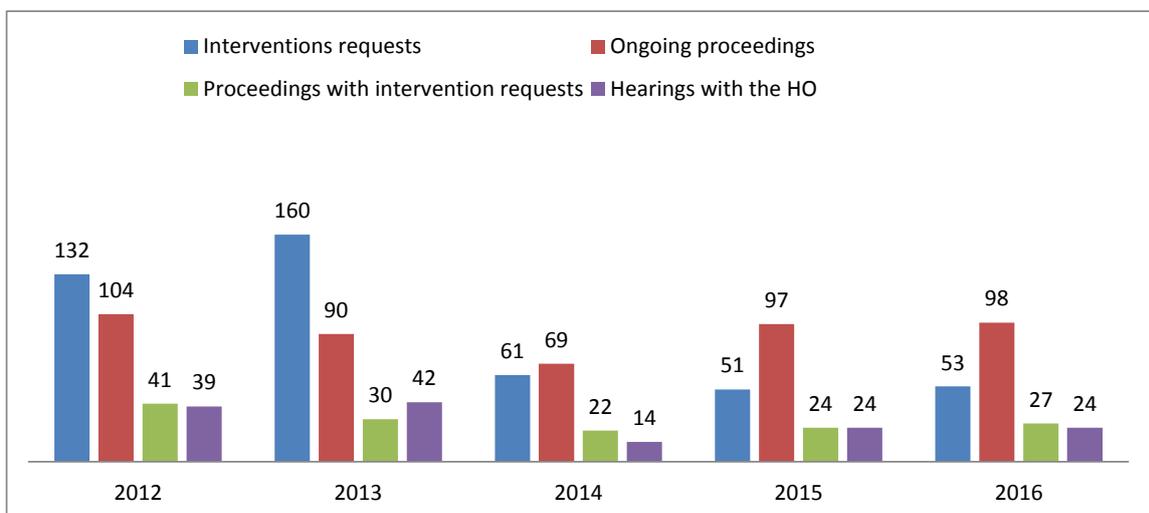


Table 3. Trade proceedings concerned by intervention requests vs. ongoing proceedings and the number of intervention requests vs. hearings



2. INTERVENTIONS AND RECOMMENDATIONS 2015

Intervention requests by case type

16 out of the 20 trade proceedings in which the Hearing Officer intervened in 2015 concerned on-going initial trade defence investigations and reviews. The four remaining cases concerned the pre-initiation stage of cases.

The following table shows the breakdown by case type.

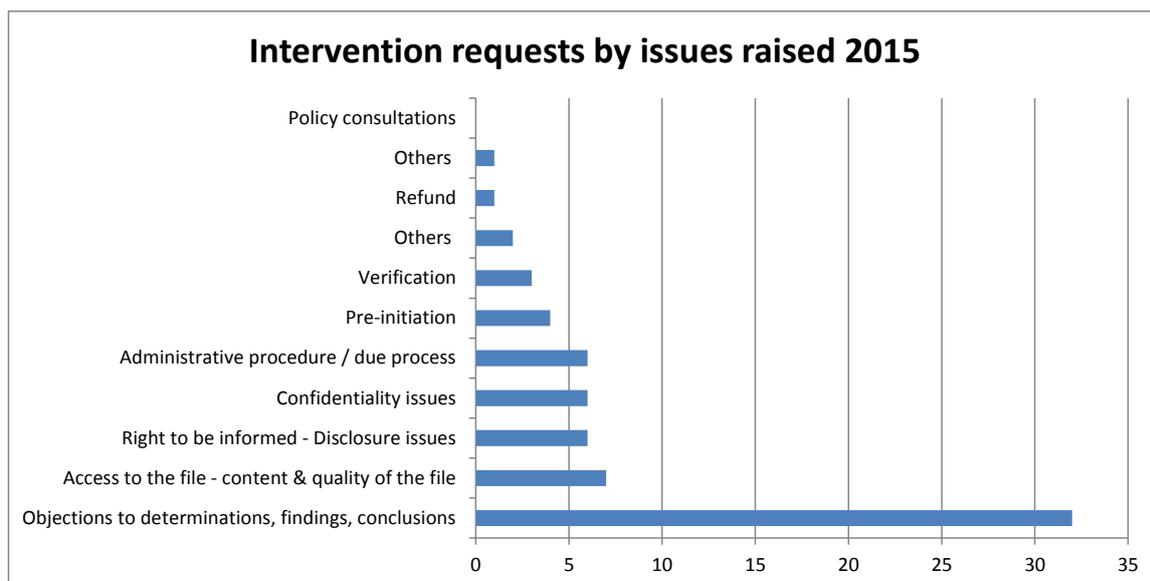
Table 5: Interventions by case type

Type	Cases ongoing 1.1.2015	Cases initiated 2015	Sum of cases ongoing during 2015	Cases in which the HO intervened	in %	
Initial cases (Art 5 AD, Art 10 AS)	15	14	29	11	38%	
Reviews	Absorption	0	0	0		
	Circumvention	4	7	11	2	18%
	Expiry	9	13	22	1	5%
	Interim	9	11	20	1	5%
	New exporter	9	1	10	1	10%
Re-opening of a case	1	1	2	0		
UT Withdrawal/Implementation				0		
Pre-Initiation				4		
Refund	3			0		
Total	50	47	97	20	21%	

The actual number of cases as shown in this table does not correspond to the intervention requests or the number of hearings as in certain proceedings the Hearing Officer was requested to intervene at different stages of the proceeding. Specifically in the proceeding AD 617 Silico-Manganese the Hearing Officer intervened both at pre-initiation stage and during the investigation. In 2 proceedings (after the initiation they were labelled AD499 and AD619 Rebars) in 2015 the Hearing Officer intervened at the pre-initiation stage only. Hence, these proceedings were not yet counted as on-going proceedings for the statistical purposes.

The main issues brought before the Hearing Officer in 2015 can be grouped into the following categories:

Table 7: Categories of intervention requests

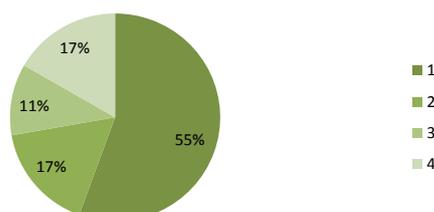


The above table indicatively demonstrates relative number of times different issues had been raised with the Hearing Officer because only rarely an intervention request concerned only one type of issues. In majority cases each request referred to a range of issues.

In 2015 no particular investigation attracted a large number of parties; however there were proceedings in which the same interested party requested more than one intervention. Notably, 3 interventions per proceeding were requested in AD610 Alufoil – one by exporters, one by EU importers and one request for confrontational hearing. In proceeding AD 617 Silico-Manganese EU industry requested 2 interventions, including one at the pre-initiation stage, and exporters requested one intervention. In the proceeding AD 608 GOES an intervention request was received from different types of interested parties – one from concerned exporters, one from EU industry and one from concerned exporters and users jointly. Two proceedings stood out by the number of intervention requests: in the proceeding AD614 Tartaric Acid 4 hearings were held upon request from the concerned producer. In another proceeding – AD607 Stainless Steel – 2 hearings were held upon request by exporters, 1 hearing – upon request from EU industry and 1 request for verification of information in the confidential file was received.

Table 4. Number of hearings per each proceeding concerned

Number of Hearings per proceeding concerned



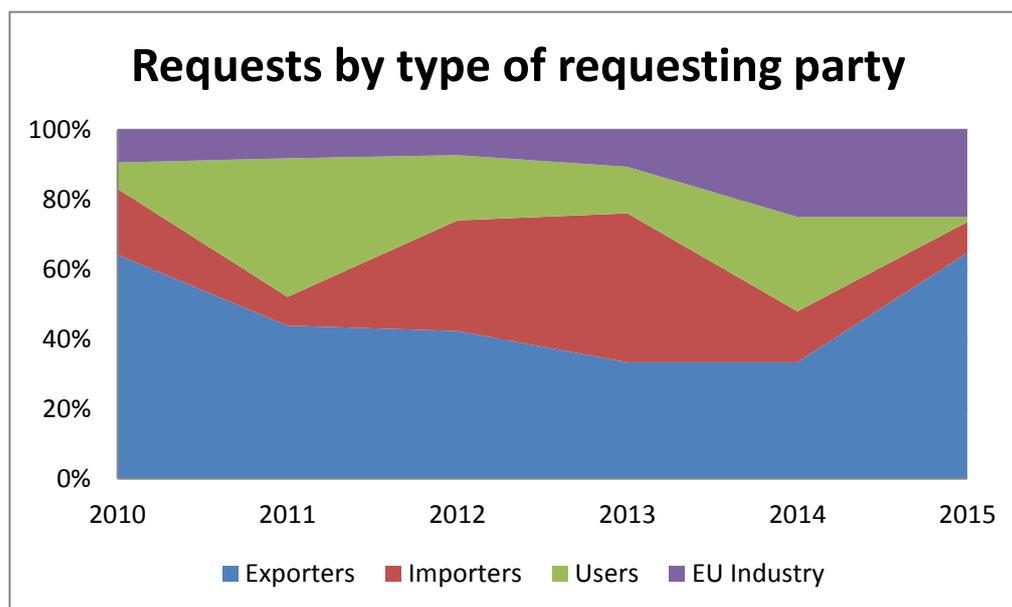
Intervention requests by type of interested party

In 2015, the most frequent users of the Hearing Office were exporters (exporting producers in the countries concerned by the investigation) which count for 60% of all parties involved in intervention requests, followed by EU industry (23%), EU importers (8%) and Commission services responsible for investigations (5.5%). EU users and foreign government representatives participated in one intervention request each and represented 1.4% of all parties.

The number of interested parties does not correspond to the number of intervention requests as in many requests several interested parties participated, occasionally representing different types of interested parties. As it had been noted before, in certain proceedings multiple intervention requests had been received from the same party, the most representative in this respect was case AD614 Tartaric Acid where the same party requested an intervention 4 times.

The following table shows the breakdown by type of interested party since 2010. As was to be expected, those most affected by trade defence investigations, i.e. exporters in the countries concerned, are constantly the most frequent applicants. The number of hearing requests filed by European companies depends very much on the particularity of the issues at stake and varies year by year and case by case. For example: In 2013 around 70% of the intervention requests of importers were filed by numerous importers of footwear who questioned the legality of the re-opening of the footwear investigation (AD499) and the implementation of judgements by the Court of Justice in cases C-249/10P (Brosmann) and C-247/10P (Zhejiang Aokang). A significant number of requests in 2013 were also made by importers and users of Solar Panels who challenged the justification for the imposition of anti-dumping measures in case AD590. In contrast, in 2014, the relatively high share of the EU industry was due to several intervention requests of EU producers of solar panels in case AD590 who considered their rights of defence affected for various reasons. The same trend continued in 2015 when the number of intervention requests from importers decreased, whereas number of requests from exporters and EU industry continued to grow.

Table 6: Evolution of the relative share of requests by type of interested party



Right to be informed: content, quality and timing of disclosure

One major field of activity of the Hearing Officer is to ensure that interested parties are properly and timely informed of the main facts and considerations on which the Commission services base their findings.

Complaints about content and quality of disclosure were raised in a number of cases and related to claims such as: (i) insufficient analysis of arguments and data submitted by the parties;³ (ii) non-transparent determinations;⁴ or (iii) insufficient justification of conclusions or decisions.⁵ Some of the issues were solved during a hearing, in other cases, the Hearing Officer recommended and the services accepted to provide further disclosure and/or address the matter in more detail in the final legal act.

Right of access to the file, non-confidential files and confidentiality

The other main activity of the Hearing Officer is to ensure that interested parties get access to the file, and that the information in the non-confidential file is meaningful while respecting the legitimate interests of confidentiality and of professional and business secrecy.

The intervention requests concerning access to the file related to (i) difficulties in accessing the open file or a particular document; delay in processing a request for information or meaningfulness and completeness of the open file.

Confidentiality issues were raised in a few cases and concerned requests for confidentiality of the identity of a company⁶ or risk of disclosure of confidential information.⁷

The intervention requests in ‘Solar Panels’ in this respect related to the minimum import price adaptation mechanism foreseen in the price undertaking, to insufficient disclosure, as well as to the absence of information in the non-confidential file.

Disagreement with determinations, findings and conclusion

Another major field of activity of the Hearing Officer relates to the right of every interested party to submit comments on determinations, findings and conclusions before any measure is taken and to ensure that comments that are relevant to the case are properly taken into account. It has to be observed that in 2015 such requests were predominant.

The below table only indicatively demonstrates relative number of times different issues had been raised with the Hearing Officer because only rarely an intervention request concerned only one type of issues. In the majority of cases each request referred to a range of issues.

³ R581 Sulphanilic Acid

⁴ AD590 Solar Panels, R569 Ammonium Nitrate

⁵ AS603 Glass fibre, R593 Glass fibre

⁶ R592 MSG, AD 590 Solar Panels

⁷ AD607 Stainless Steel, R564 DCD

Such intervention requests can be broken down broadly as follows:

Disagreement with initiation or termination of a case	2
Objections to selection of sample	0
Price undertakings/UT related matters	3
Market Economy Treatment requests	1
Objections to application of Article 18/Article 28 (non-cooperation – use of best facts available)	1
Definition of interested party	4
Objections to other determinations, findings, conclusions (e.g. product scope, exemption, competition issues, calculations)	22

Disagreement with initiation or termination of a case

Following several deficiency letters, a Korean producer of tube and pipe fittings complained about the long-lasting deficiency process of its partial interim review request and was afraid that it may be rejected. The matter was discussed with the Office and Complaint, the party was informed that it would receive disclosure and a possibility to comment before rejection. The hearing request was withdrawn.

In the review investigation ‘Sulphanilic Acid’⁸ an EU-producer requested the Hearing Officers’ intervention and disagreed with the proposal to repeal the anti-dumping and anti-subsidy measures concerning India and to continue only the anti-dumping measures concerning China. The services followed the Hearing Officer’s recommendation to improve the analysis and separate and distinguish the reasoning for a finding of likelihood of injury for the product coming from China on the one hand, and no likelihood for products from India.

In ‘Stainless Steel’, the Taiwan Steel and Iron Industries Association together with a group of European users and services centres disagreed with the initiation of the case and raised concerns that the complainants are (ab)using the trade defence instrument and apply business practices destined to drive independent service centres out of the market. The matter was discussed in a hearing and further addressed in the Commission Regulation imposing provisional measures.

Interventions relating to price undertakings

In ‘Solar Panels’ an EU producer, representing the complainants, submitted evidence on price offers of Chinese exporters below the minimum import price set in the price undertaking that the Commission had accepted from Chinese exporters and the Chinese Chamber (CCCME) in July 2013 and complained about the absence of any response or action by anti-dumping services. A hearing allowed clarifying and explaining the

⁸ R582 Sulphanilic Acid

procedures and limits in sharing information with other parties in the process of monitoring and verifying individual companies with a view to establish whether the price undertaking has been breached.

Objections to application of facts available

Recourse to Article 18 of the basic anti-dumping regulation and Article 28 of the basic anti-subsidy regulation (use of best facts available) due to insufficient cooperation or incomplete or deficient data is a recurring matter of intervention request. It is standard practice that hearings requested in such cases are chaired by the Hearing Officer.

In 2015, there was only one intervention request in this regard. In case R601 Biodiesel where a US company raised objections on application of this article. The Hearing Officer confirmed that legal standards have to be met even in the absence of cooperation. However, the limited information available in the file was due to the fact that the interested party decided not to cooperate and it cannot be held against the investigation services as lack of evidence.

Definition of the interested party

The Hearing Officer intervened in two disputes concerning the treatment of a company or institution as interested parties. In 'Stainless Steel'⁹ case a hedge fund objected to the non-acceptance as an interested party. The Hearing Officer backed the view of the Services that a company acting through its representatives can become interested party, but not a person or a hedge fund through ownership in the form of shareholding.

In 'Solar Panels'¹⁰ an employee of an EU university applied to be registered as interested party in order to gain access to the minutes of a hearing with the EU industry. The Hearing Officer shared the view of the anti-dumping services that the access was refused in accordance to the exceptions foreseen under EU legislation governing public access to documents.

Objections to other determinations, findings, conclusions

Other intervention requests concerned various issues such as product definition, choice of analogue country or requests for individual examination.

In total in 2015 were registered 5 such intervention requests. In 'Stainless steel' case the request for intervention was combined with other issues, in one case an individual examination request was granted, one request for a hearing between the parties with different interests did not materialize as the other parties concerned did not accept a participation, and in one case the Hearing Officer concluded that the rights of defence have not been affected.

⁹ AD607 Stainless Steel

¹⁰ AD590 Solar Panels

Administrative procedure / due process

Requests for hearings concerning administrative procedure and due process have been received in few cases.¹¹

This type of intervention requests were received from representatives of EU industry, exporters, importers and trade defence services. In 3 cases the intervention request did not proceed to a hearing stage, while in one case the Hearing Officer found that a clarification of product scope definition was sufficient to address the concerns of the interested party. In 'Solar Panel' case the Hearing Officer recommended to clarify the interpretation and the methodology applied to the minimum import price adaptation mechanism in a transparent proceeding involving all parties.

3. INTERVENTIONS AND RECOMMENDATIONS 2016

Intervention requests by case type

25 out of the 27 trade proceedings in which the Hearing Officer intervened in 2016 concerned on-going initial trade defence investigations and reviews. There was one request for intervention in a refund case and pre-initiation case.

The following table shows the breakdown by case type.

Table 5: Interventions by case type

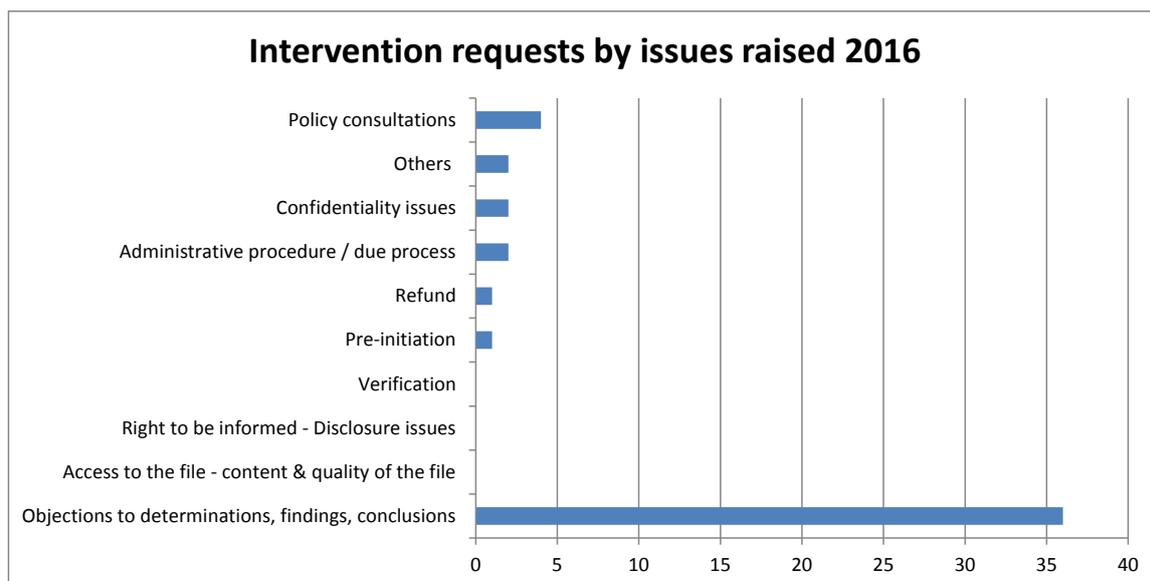
Type	Cases ongoing 1.1.2016	Cases initiated 2016	Sum of cases ongoing during 2016	Cases in which the HO intervened	in %	
Initial cases (Art 5 AD, Art 10 AS)	20	15	35	14	40%	
Reviews	Absorption	0	0	1		
	Circumvention	1	1	2	50%	
	Expiry	22	13	35	1	3%
	Interim	7	2	9	8	89%
	New exporter	7	0	7	0	0%
Re-opening of a case	1	9	10	0	0%	
Pre-Initiation	0	0	0	1	n/a	
Refund	3	0	3	1	33%	
Total	58	40	98	27	28%	

The actual number of cases as shown in this table does not correspond to the intervention requests or the number of hearings as in certain proceedings the Hearing Officer was requested to intervene at different stages of the proceeding.

The main issues brought before the Hearing Officer in 2016 can be grouped into the following categories:

¹¹ AD590 Solar Panels, R584 Citric Acid

Table 7: Categories of intervention requests



The above table indicatively demonstrates relative number of times different issues had been raised with the Hearing Officer because only rarely an intervention request concerned only one type of issues. In majority cases each request referred to a range of issues.

Number of hearings per each proceeding concerned

In 2016 no particular investigation attracted a large number of parties; however in almost all proceedings the same interested party requested more than one intervention.

Two proceedings produced four intervention requests each during the year. In one hearing¹² the exporting producer used the hearings as means to actively exert the rights to be heard. Whereas in another proceeding¹³ exporting producers and Union industry association raised concerns.

Intervention requests by type of interested party

In 2016, the most frequent users of the Hearing Office were exporters (exporting producers in the countries concerned by the investigation) which count for 60% of all parties involved in intervention requests, followed by EU industry (23%), EU importers, users requested 2 interventions and Commission services responsible for investigations twice raised their concerns with the Hearing Officer. Foreign government representatives participated in one intervention request thus representing 1.4% of all parties.

The number of interested parties does not correspond to the number of intervention requests as in many requests several interested parties participated, occasionally representing different types of interested parties. As it had been noted before, in certain

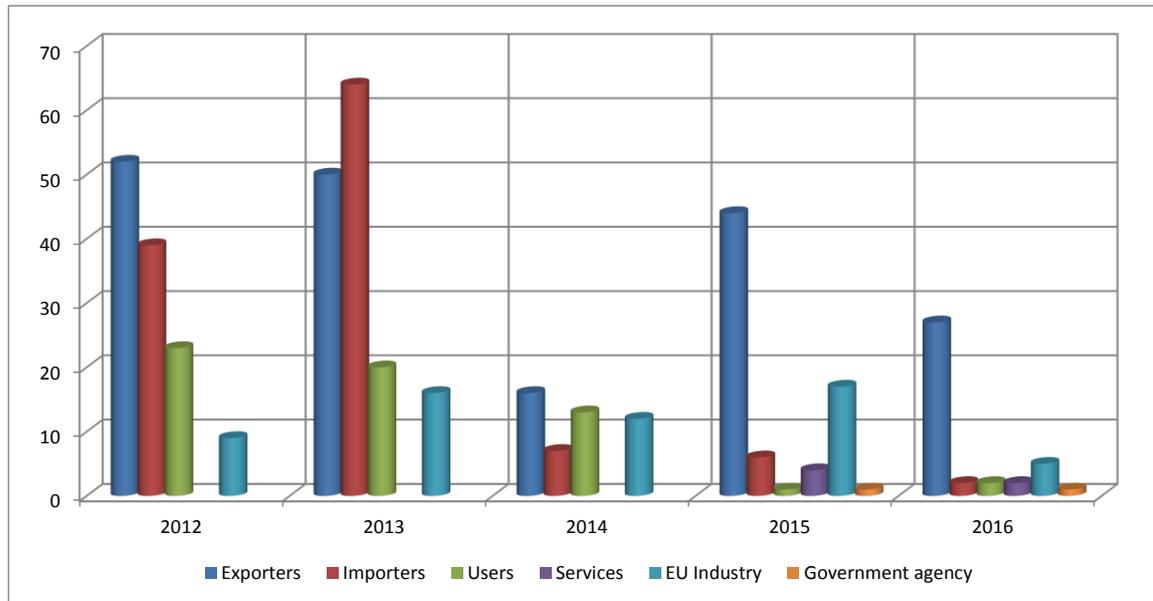
¹² AD629 Thermal paper

¹³ AD620 Cold Rolled Flat Steel

proceedings multiple intervention requests had been received from the same party or in the same proceeding.

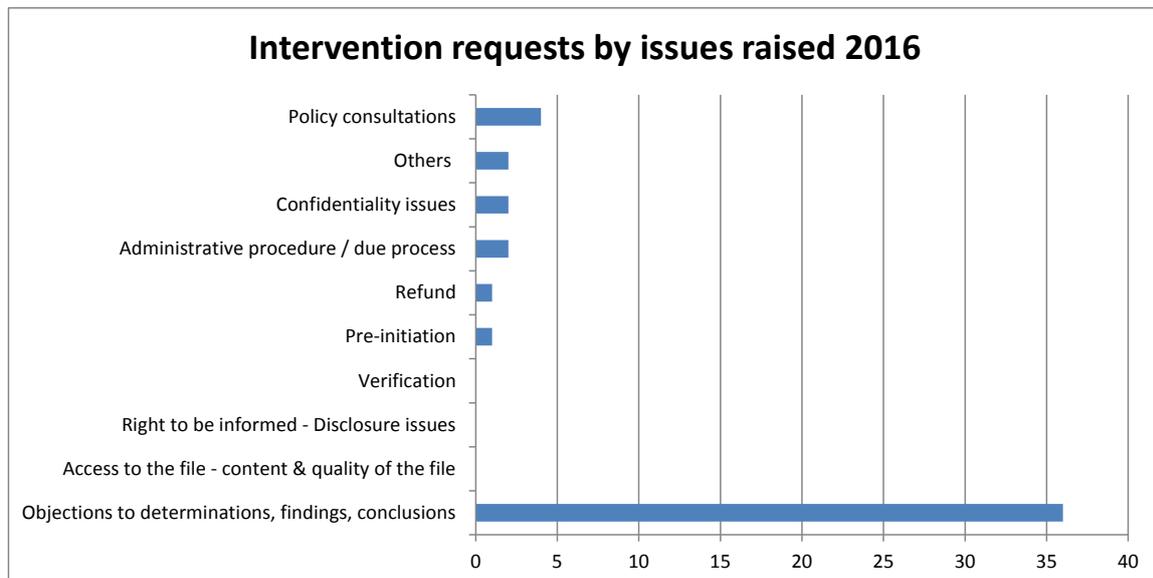
The following table shows the breakdown of intervention requests by type of interested party since 2010. As is to be expected, those most affected by trade defence investigations, i.e. exporters in the countries concerned, are constantly the most frequent applicants. The number of hearing requests filed by European companies depends very much on the particularity of the issues at stake and varies year by year and case by case. In 2016 the trend remained unchanged.

Table 6: Evolution of the relative share of requests by type of interested party



The main issues brought before the Hearing Officer in 2016 can be grouped into the following categories:

Table 7: Categories of intervention requests



The above table indicatively demonstrates relative number of times different issues had been raised with the Hearing Officer because only rarely an intervention request concerned only one type of issues. In majority cases each request referred to a range of issues.

Right to be informed: content, quality and timing of disclosure

One major field of activity of the Hearing Officer is to ensure that interested parties are properly and timely informed of the main facts and considerations on which the Commission services base their findings.

In 2016 no intervention regarding the quality of disclosure and timing were raised although in some case the interested parties approached the Hearing Officer, however the issues were resolved directly with the services responsible for the proceeding.

Right of access to the file, non-confidential files and confidentiality

The other important activity is to ensure that interested parties get access to the file, and that the non-confidential file is meaningful while respecting the legitimate interests of confidentiality and of professional and business secrecy.

The intervention requests concerning access to the file could relate to difficulties in accessing the open file or a particular document; delay in processing a request for information or meaningfulness and completeness of the open file.

The confidentiality issue featured prominently in the case at the stage of pre-initiation¹⁴ when the Commission services decided to implement directly the transparency policies of the recently adopted communication Trade for All¹⁵. The EU industry association raised objections that the non-confidential part of the complaint may be published on internet. The Hearing Officer found that even though the transparency efforts as such are an improvement of the policy, the necessary changes in the basic legislation shall be introduced before any practical steps can be taken.

In another case¹⁶ the Hearing Officer following an intervention request by Union importers observed that all interested parties have rights to have meaningful information in the non-confidential file (NCF). The Commission services had also received comments from the interested party that some of the information in the file may be misleading. In respect of treatment of confidentiality of information the Hearing Officer found that the current practice is not in line with the WTO Appellate Body ruling. The form of the questionnaire that was still in use allowed to grant confidentiality automatically to a substantial part of information received from interested parties. A consequence of this practice was that parties could withhold too much

¹⁴ Seamless Pipes and & tubes (iron or steel)

¹⁵ COM/2015/0497 COMMUNICATION FROM THE EUROPEAN COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS. Trade for All. Towards a more responsible trade and investment policy

¹⁶ R631 PET

information without sufficient justification thus affecting the rights of other interested parties to comment and react to such information.

Disagreement with determinations, findings and conclusion

Another field of activity of the Hearing Officer relates to the right of every interested party to submit comments on determinations, findings and conclusions before any measure is taken and to ensure that comments that are relevant to the case are properly taken into account. It has to be observed that in 2016 such requests were predominant.

The below table only indicatively demonstrates relative number of times different issues had been raised with the Hearing Officer because only rarely an intervention request concerned only one type of issues. In majority cases each request referred to a range of issues.

Such intervention requests can be broken down broadly as follows:

Disagreement with initiation or termination of a case	3
Market Economy Treatment requests	1
Definition of interested party	2
Objections to other determinations, findings, conclusions (e.g. product scope, exemption, competition issues, calculations)	36

Disagreement with initiation or termination of a case

In 2016 no intervention request concerning disagreement with initiation or termination of the case resulted in a hearing or other intervention by the Hearing Officer.

Interventions relating to price undertakings

In 2016 no case was brought before the Hearing Officer concerning a price undertaking.

Objections to application of facts available

In 2016 no case was brought before the Hearing Officer concerning the application of facts available clause.

Definition of the interested party

In one case¹⁷ an EU importer called to the Hearing Officer to be recognized as an interested party during the investigation and to be included in the sample of unrelated importers in the Union.

¹⁷ R643 Tungsten Carbide

In a re-opening case¹⁸ the exporting producer questioned the definition of parties following the judgement in the case. In this case the Hearing Officer observed that the interested parties of the original case remain the interested parties also after a re-opening. The Hearing Officer advised the Commission services to send an Information letter to other interested parties from the original case explaining that they are still interested parties and can provide comments and will receive disclosure.

Objections to other determinations, findings, conclusions

Other intervention requests concerned various issues such as product definition, choice of analogue country or requests for individual examination.

Majority of all intervention requests and hearings were falling in this category. The interested parties requested an intervention to challenge various aspects of the investigations. Usually each intervention request concerned a variety of issues not related to the procedural rights of the interested party. In majority of the intervention requests and hearings the Hearing Officer found that procedural rights of the interested parties were respected, although in some case other observations were made.

In a proceeding¹⁹ the interested parties with different interests – ie Union industry, exporting producers and Union importers – successively requested interventions by the Hearing Officer to argue their interests. The Hearing Officer found that the intention to apply anti-dumping duties retroactively contained elements of a change of policy of the Commission services. In addition, the Hearing Officer expressed concerns with regard to the compatibility of the mentioned presumption with Art 10.6 of WTO Anti-dumping Agreement. In particular, the Hearing Officer considers that the retroactive introduction of the presumption of importers' awareness at the time of opening of the proceeding in this case amounted to an unpredictable change of practice, which raised serious concerns about the rights of defence of importers in this proceeding.

In a refund case²⁰ the Hearing Officer found that the issue with the refund has occurred due to a legislative lacuna in the Basic Regulation which simply does not foresee the procedure for refund in anti-circumvention investigations. Thus, the refund request is now pending with the Czech Customs Authorities. While the Commission Services cannot instruct the competent national authority to take a decision, the Hearing Officer recommended sharing the hearing report report with the Czech customs authorities for the purpose of guidance and assurance.

¹⁸ AD585a – Reopening of the anti-dumping investigation concerning threaded tube or pipe cast fittings of malleable cast iron following the judgment

¹⁹ AD620

²⁰ RF70-02 Open Mesh

Recurrent case in 2016, like in 2015, remained a case²¹ of implementation of the ECJ judgement on Market Economy Treatment (MET). The Hearing Officer found that the Commission services now intend to correct an identified illegality which was committed 10 years ago and to effectively examine all MET claims submitted during the original investigation. The Hearing Officer found that the publication of a notice appeared to be the best option in this case where not all interested parties are known to the Commission services to assure that the rights of interested parties are protected and the procedure is transparent.

Administrative procedure / due process

Requests for hearings concerning administrative procedure and due process have been received in two cases.

This type of intervention requests were received from representatives of EU industry, and importers. In both cases the intervention requests did not proceed to a hearing stage.

4. GENERAL MATTERS, POLICY ISSUES AND RECOMMENDATIONS

Consultation on policy issues

The Hearing Officer shall be consulted by the Director responsible on policy issues regarding procedural matters and substantive issues which have an impact on the rights of interested parties in accordance with Article 4.7 of the Terms of Reference.

In 2015 the Hearing Officer raised concerns regarding the commitment to publish the non-confidential versions of complaints which had a direct impact on the rights of interested parties without appropriate legislative and procedural basis. This concern proved well-grounded as an intervention was filed by affected interested parties²² early in 2016 and was described in this report before. Following the hearing the Commission services consulted the Hearing Officer informally that the policy change regarding the automatic publication of the non-confidential part of the complaint has been abandoned.

The Hearing Officer was consulted, again informally, on compliance with the Appellate Body report in case DS397 (fasteners) regarding discontinuation of the practice to grant automatically confidentiality to parts of the Questionnaire replies.

Formally, in 2016 the Hearing Officer was not consulted on policy issues and hence was not in position to express his views.

²¹ AD499 Footwear

²² Seamless Pipes and & tubes (iron or steel)

Recommendations

In 2016 the Hearing Officer did not issue recommendations.

5. DECISION

The Terms of Reference confer on the Hearing Officer decision-making powers on a number of issues (disputes on access to file, confidential nature of a document, deadlines). Since the entry into force of the Terms of Reference in April 2012, no such decision has been required since a mutually acceptable solution was found in all intervention requests where such disputes were raised.

6. MAIN OBSERVATIONS

The number of the intervention requests received in 2015 and 2016 continued the historically established pattern of relatively stable relation between ongoing trade defence cases and the cases affected by intervention requests.

As was to be expected, those most affected by anti-dumping investigations, i.e. exporters in the third countries concerned, were also the most frequent applicants. Whereas the number of intervention requests filed by European companies usually depends on the particularity of the issues at stake and varies year by year and case by case.

The cooperation between the trade defence services and the Hearing Officer in 2015 was not always satisfactory and the rights and roles of the Hearing Officer according to the terms of reference could not be fully exercised.

A formal consultation mechanism is in place²³ obliging the Director responsible for the above policy changes or updates to formally consult the Hearing Officer. The Hearing Officer was not formally consulted on any substantial relevant policy change initiatives during the years 2015 and 2016, although a significant number of such initiatives were launched during these periods.

Some units of DG Trade Directorate H, however, occasionally consulted the Hearing Officer on other issues arising from their case by case decisions.

The main activity of the Hearing Officer is to organise and chair hearings at the request of interested parties. These hearings are organised in a particular way in order to maximise the participation of all services concerned in the decision making and to achieve a high degree of transparency for the interested parties of a case. Therefore, to all hearings in addition to the case team, a designated Member of the Cabinet of the Commissioner responsible for trade policy will be invited, a member of the Commission's Legal Service dealing with the case at hand, the Director H and the horizontal policy unit H1. Also, representatives of other DGs concerned or involved with the specific cases, as e.g. DG TAXUD, might be invited if appropriate. Of the listed invitees the Legal Service participated regularly, Member of the Cabinet – whenever available. Director of the Directorate H normally does not attend hearings; moreover, representatives from the unit H1 also almost never attended a hearing.

²³ Article 4.7 of the Terms of Reference

During the hearings the requesting interested party, usually represented by its board or legal representative, introduces its concerns, requests and demands and the representatives of the case team, normally at the level of Head of Unit, will respond. The HO will then endeavour to encourage the participants to clarify their points of view and resolve differences in the most cooperative manner achievable. The HO will ask questions to all participants and eventually express his views on the issues at hand and, where appropriate, make suggestions and recommendations with regard to the further proceedings of the case.

After a hearing, a report about the hearing is drafted by the HO's office including the main contributions of the parties (including the contributions of the HO) and given to the case team, other participants from Commission's services and eventually to the requesting interested party for comments.

The final hearing reports were consistently distributed to all invited participants and put in the case file (confidential and non-confidential versions) for inspection by all interested parties (also Members States, who have access to even the confidential case files).

Despite the political commitment towards more transparent trade policy in general and specific commitments in the area of trade defence²⁴ little progress has been made during the last two years to improve interested parties' access to information important for the defence of their interests.

In fact, the EU trade defence system, in comparison with developed trade defence systems of major global trading partners, is not very transparent. In particular large parts of the calculation of the dumping and injury margins are declared confidential and not verifiable by the parties concerned. Thus, interested parties often resort to the Hearing Officer to review and verify the information in the confidential file of a proceeding evoking provisions of Art. 15 of the Terms of Reference²⁵. On several occasions the Hearing Officer has acted on such requests to verify and review pieces of information which are not accessible to the interested party. However, the Hearing Officer cannot systematically verify the confidential calculations in trade proceedings as the Hearing Office has no dedicated staff or accounting expertise. It is obvious that the Hearing Officer cannot perform the function of a *supra* auditor for the trade defence services.

Finally, the specific role of the Hearing Officer to safeguard application of the principle of EU law - the right of good administration – had been neglected as the consultations on

²⁴ Com/2015/0497 Communication From The European Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions. Trade for All. Towards a more responsible trade and investment policy

²⁵ **Access to information confidential by nature, not susceptible to summary information**

At the request of an interested party the hearing officer can examine information that is confidential by nature and not susceptible to summary, to which that party has no access, in order to verify how that information was used by the Commission services responsible for the investigation.

The hearing officer shall inform the requesting interested party of whether, in his view:

(a) the information withheld from the party is relevant to that party's defence; and
(b) where relevant, the investigation services have correctly reflected the information in the facts and considerations on which they have based their conclusions.

trade policy updates regarding procedural matters and substantive issues having an impact on interested parties had been carried out only occasionally rather than systemically.

Moreover, after several years of experience in the role of the Hearing Officer and taking into account the views of experienced trade counsels representing the different interested parties in the proceedings, there are growing concerns about consistent and correct application of the established rules and procedures for anti-dumping and anti-subsidy proceedings.

It appears that the principle of uniform application of the rules is left at the discretion of individual investigating units or even individual case teams. There seems to be no systematic approach to building and enforcing an institutional knowledge and experience and also little interest in exploring the better practices of other major trading partners in implementing the WTO Anti-dumping Agreement and conducting the investigations. Therefore, it appears advisable that particular regard is paid to the quality management of both, the process and the substance, in the use of the instruments of trade defence under EU trade laws.