



EUROPEAN COMMISSION

Hearing Officer for Trade proceedings

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HO/AK

**Annual Report of the Hearing Officer  
for Trade Proceedings  
2017/2018**

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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 for 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, anti-subsidy and safeguards regulations, or in the trade barriers regulation. The role and the powers of the Hearing Officer for trade proceedings have first been set out in formal Terms of Reference 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<sup>1</sup>, in order to underline 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/she enjoys independence in performing his duties and shall not take instructions in fulfilling his tasks.

### **New Methodology and Modernisation of Trade Defence Instruments**

Amendments to the EU's antidumping and anti-subsidy regulations with the aim of introducing a new methodology to calculate the normal value to better address state-induced market distortions in third countries and to strengthen the anti-subsidy instrument entered into force on 20 December 2017.

2018 saw a further major overhaul of the Trade Defence Instruments (TDI) legislation. The EU reformed its anti-dumping (AD) and anti-subsidy (AS) legislation in 2018 to react more effectively to unfair trade practices that harm EU producers. The changes have made investigations faster and more transparent, with an additional focus on helping smaller companies. These new rules, which started applying for new investigations in 2018, include the possibility to impose higher duty levels in cases where there are more serious market distortions.

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<sup>1</sup> OJ L 107, 19.4.2012, p. 5.

The role of the Hearing Officer, following the legislative changes in 2018, is now expressly recognised in the basic AD and AS Regulations. In this context, the Hearing Officer also contributed to the procedures to be applied by the Commission to increase transparency and guarantee the procedural rights of the parties.

The Hearing Officer has not yet been called upon to pronounce herself on the new methodology and on the modernisation package.

### **New Terms of Reference for the Hearing Officer**

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, which has been updated and modernised in 2019<sup>2</sup>, in view of the new developments described above.

The status of the Hearing Officer as independent entity is confirmed. As before, the Terms of Reference lay down detailed rules on the interventions of the Hearing Officer in all aspects of a trade proceeding and throughout all phases of the proceedings. They describe the procedure for hearings conducted by the Hearing Officer. Furthermore, the Hearing Officer has been delegated decision-making powers on certain 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 the Hearing Officer's view the information has been correctly reflected in the findings of the Services. The Hearing Officer is in addition 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 new Terms of Reference serve to provide for a more structured, predictable and transparent process, allowing for greater effectiveness of the Hearing Officer's interventions.

In this respect it is important that the new Terms of Reference tackle issues that have surfaced over time as regards the intervention requests by parties. In particular, parties have been requesting hearings either too early or too late in the process. When the requests come in an early stage of the proceeding, the Commission Services (Trade Defence services) will not have made tangible progress with the investigation. The hearing with the hearing officer then can only serve for a presentation of the views and arguments of the parties as there will be as yet no elements on which the hearing officer

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<sup>2</sup> OJ L 60, 28.2.2019, p. 20. Articles of the Terms of Reference referred to in the body of this Report now refer for convenience to the new Terms of Reference.

can base any observations. When inversely the hearing requests come in at a very late stage of the proceeding, it may be too late to take into account valid observations. But obviously, hearing requests can also concern very specific actions of the Trade Defence Services, such as the selection of a sample which comes early in the proceeding. Issues of access to the file, confidentiality and similar, can come up at any stage of the proceeding and can then be raised with the hearing officer.

The interventions of the Hearing Officer should now become more effective, allowing for adequate follow-up where appropriate. This is in the interest of all parties to a proceeding to safeguard their rights of defence and the investigating authority which is bound by legal deadlines. To this effect, good balance between parties' rights and the time constraints of the proceeding is essential. At the same time, the Hearing Officer is not a part of the investigation process, but its role is to guarantee that the rights of defence are respected by the Commission services.

Therefore, while the principles laid down in the current Terms of Reference remained untouched, the inclusion of the following new elements has taken place:

- Requests for intervention of the Hearing Officer must be submitted in good time and expeditiously, so as not to jeopardise the orderly conduct of the proceeding;
- To that effect, interested parties should request the intervention of the hearing officer at the earliest possible time following the occurrence of the event justifying such intervention;
- Hearings with the Hearing Officer should in principle only take place if the issues could not be settled with the Commission services in due course;
- Hearing requests should in principle be made within the relevant timeframes set for the procedure – although there may be valid reasons for late requests which the hearing officer will take into account;
- The Hearing Officer will in principle not accept or consider evidence that has not been submitted to the Commission services in due course of the proceeding.

While the Hearing Officer continues to assess each request on its own merits, these elements should encourage parties to come forward at the right point in time so that their arguments can be properly taken into account and given the appropriate follow-up.

The more information is given to parties on how the general principles that determine the exercise of its functions by the hearing officer are translated into practice, the better they will be able to raise issues of concern to them in an appropriate manner.

- The timelines and further elements set out above will contribute to creating a more structured process in which parties' rights can be fully upheld. They will contribute to the predictability and transparency of the process, in making sure that parties can understand the individual steps of the procedure and their role in it;

- In addition, in the interest of transparency, parties will be provided with further information on the follow-up of hearings and recommendations of the hearing officer.

This report has been drafted in accordance with Article 18(1) of the Terms of Reference and contains a summary of the activities in 2017, 2018 and main observations.

### **Evolution of activities 2017 – 2018**

The year 2017 saw a change in the office of the Hearing Officer with the previous Hearing Officer retiring in the middle of the year. Until the end of the year 2017 an *ad interim* appointed official carried out the duties of the Hearing Officer. The current Hearing Officer was appointed as from January 2018. As neither of her predecessors could provide a report for the full year 2017, the current report covers the period of 2 years (2017 and 2018) i.e. also a period in which the activities of the Hearing Office had not been under responsibility of the current Hearing Officer.

The Terms of Reference cover trade proceedings provided for in 10 basic Trade Regulations.<sup>3</sup> From the outset the vast majority of intervention requests concerned trade defence proceedings (anti-dumping and anti-subsidy). Only few requests related to General System of Preferences.

In 2017, the Hearing Officer received 30 intervention requests and held 28 hearings. In 2018, the Hearing Officer received 28 intervention requests and held 8 hearings. One request for a confrontational hearing was received in 2018 but other interested parties used their discretion to decline their participation, so such confrontational hearing did not take place.

In 2017 and 2018, in a number of cases, the request for an intervention was submitted simultaneously with a request for a hearing with the services responsible for the investigation. The Hearing Officer took the view that the interested party should first address their concerns to the services and only when a solution could not be reached, the Hearing Officer would intervene.

As a result, interested parties seeking an intervention were able to find a solution directly with the investigation teams in most of the cases.

In 2018, only few investigations led to intervention requests. These were either requests from several interested parties or a number of intervention requests from the same party. The interested parties mostly challenged the determinations, facts and conclusions of the investigation and in all cases the services agreed to provide clarifications or additional disclosures. In a noteworthy case, the interested party challenged the Commission's

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<sup>3</sup> A list of all Trade Regulations covered is given in Article 1 of the Terms of Reference.

policy of protection of personal data within the framework of the investigation. The case was referred further to the European Commission's Data Protection Officer. During all interventions in 2018, the Hearing Officer found that the procedural rights of the interested parties had been respected. According to the records available, also in 2017 the procedural rights have been respected in all proceedings that were referred to the Hearing Officer.

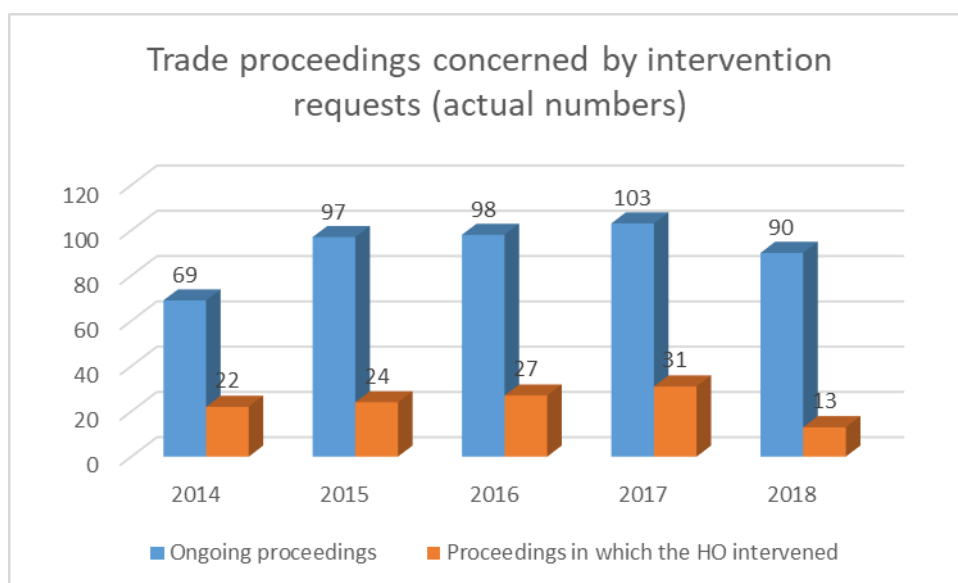
As regards other interventions, the Hearing Officer held 2 meetings with the case team only and carried out 3 requests for verification of information in the confidential file.

The majority of requests related to trade defence instruments and, in 2017, concerned 31 out of 93 ongoing trade defence proceedings. In 2018, they concerned 13 out of 82 proceedings. A single intervention was requested in 2017 for another type of trade proceeding concerning the implementation of the Generalized System of Preferences. The requested intervention, however, did not fall within the competence of the Hearing Officer as the interested party requesting an intervention presented only political arguments

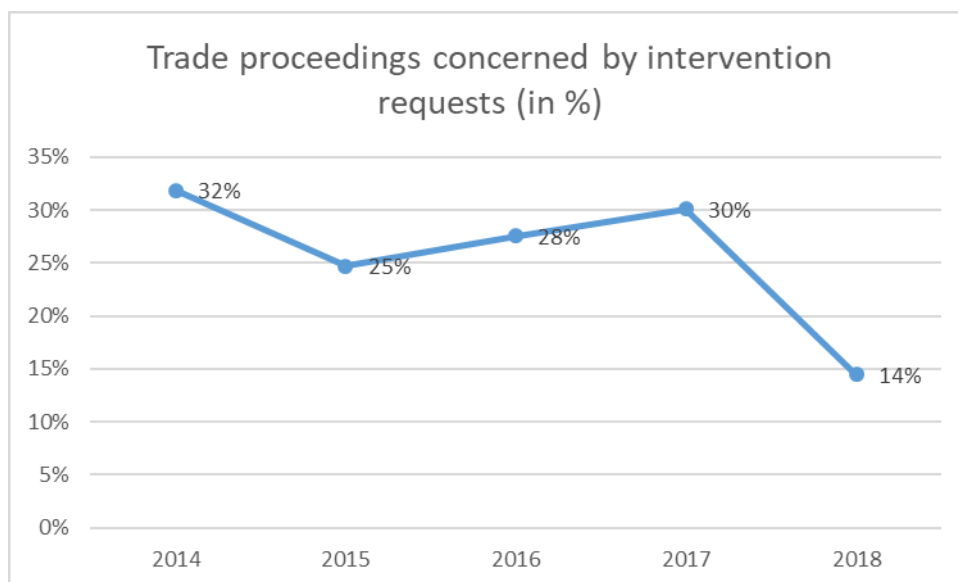
The number of hearings held has stabilized in comparison to the previous years. The difference between the number of requests for intervention, the number of hearings and the number of on-going trade proceedings in 2017 followed the previously established trend, while it fell sharply in 2018. This can be explained partially by the fact that the number of new investigations leading to new measures which, in turn, habitually give rise to more interventions has decreased. By contrast, the number of review investigations has increased, and usually they lead to fewer interventions as the measures are already in place and the interested parties only pursue procedural aspects of the review. In 2018 the intervention requests often did not result in a formal interventions. Rather the issues were resolved by means of informal discussions with the requesting interested party. In many cases, as a result of the shortening of deadlines agreed upon in the Trade Defence Instruments Modernisation Package, requests for intervention were submitted to the Hearing Officer in order to respect these deadlines, whilst the issue at hand was then solved directly with the services responsible for the investigation without the need for actual intervention by the Hearing Officer.

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

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

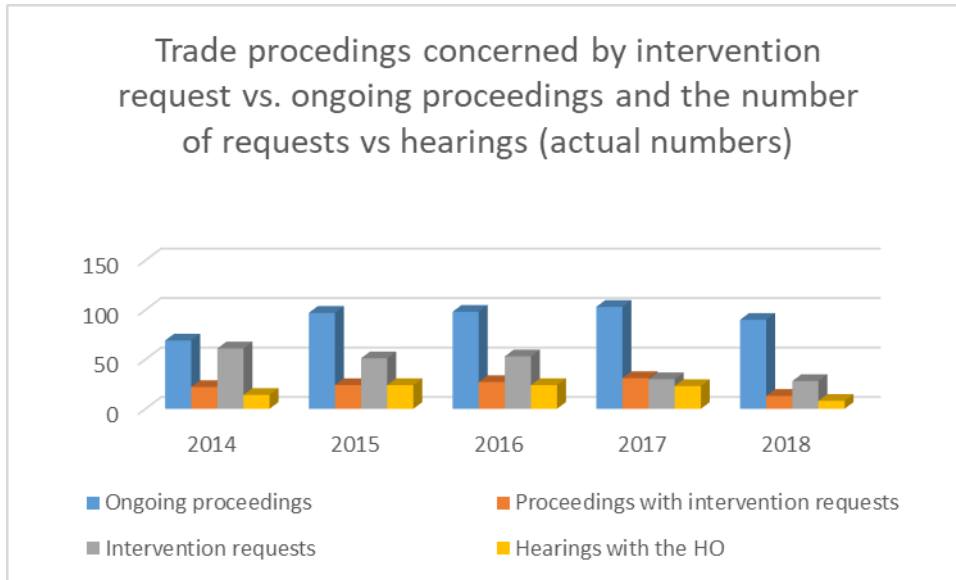


**Table 2: Trade proceedings concerned by intervention requests vs. ongoing investigations (in %)**

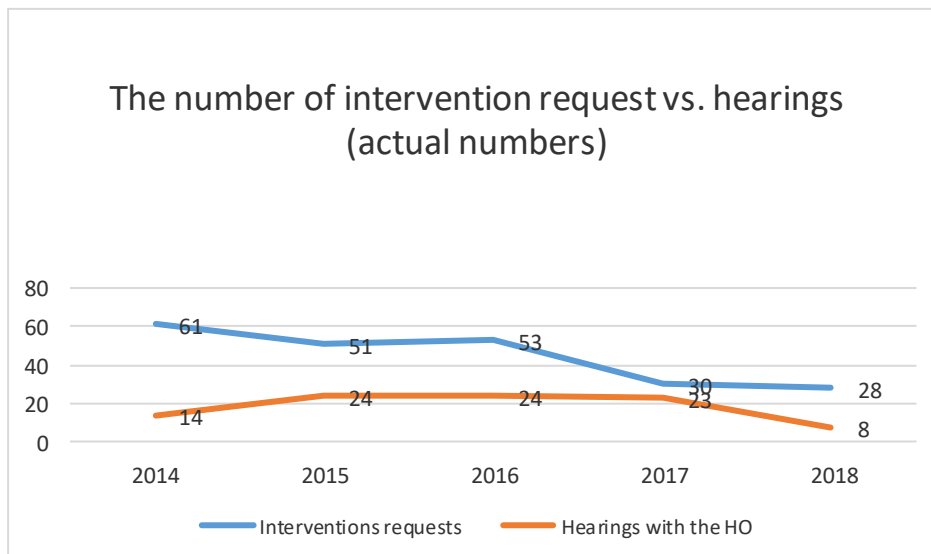




**Table 3. Trade proceedings concerned by intervention requests vs. ongoing proceedings and the number of intervention requests vs. hearings**



**Table 4. Number of hearings per each proceeding concerned**



## 2. INTERVENTIONS AND RECOMMENDATIONS

### Intervention requests by case type

The majority of trade proceedings in which the Hearing Officer intervened during the period 2017-2018 concerned on-going initial trade defence investigations, and reviews.

The following table shows the breakdown of the number of intervention requests by case type. The number of actual interventions is presented separately.

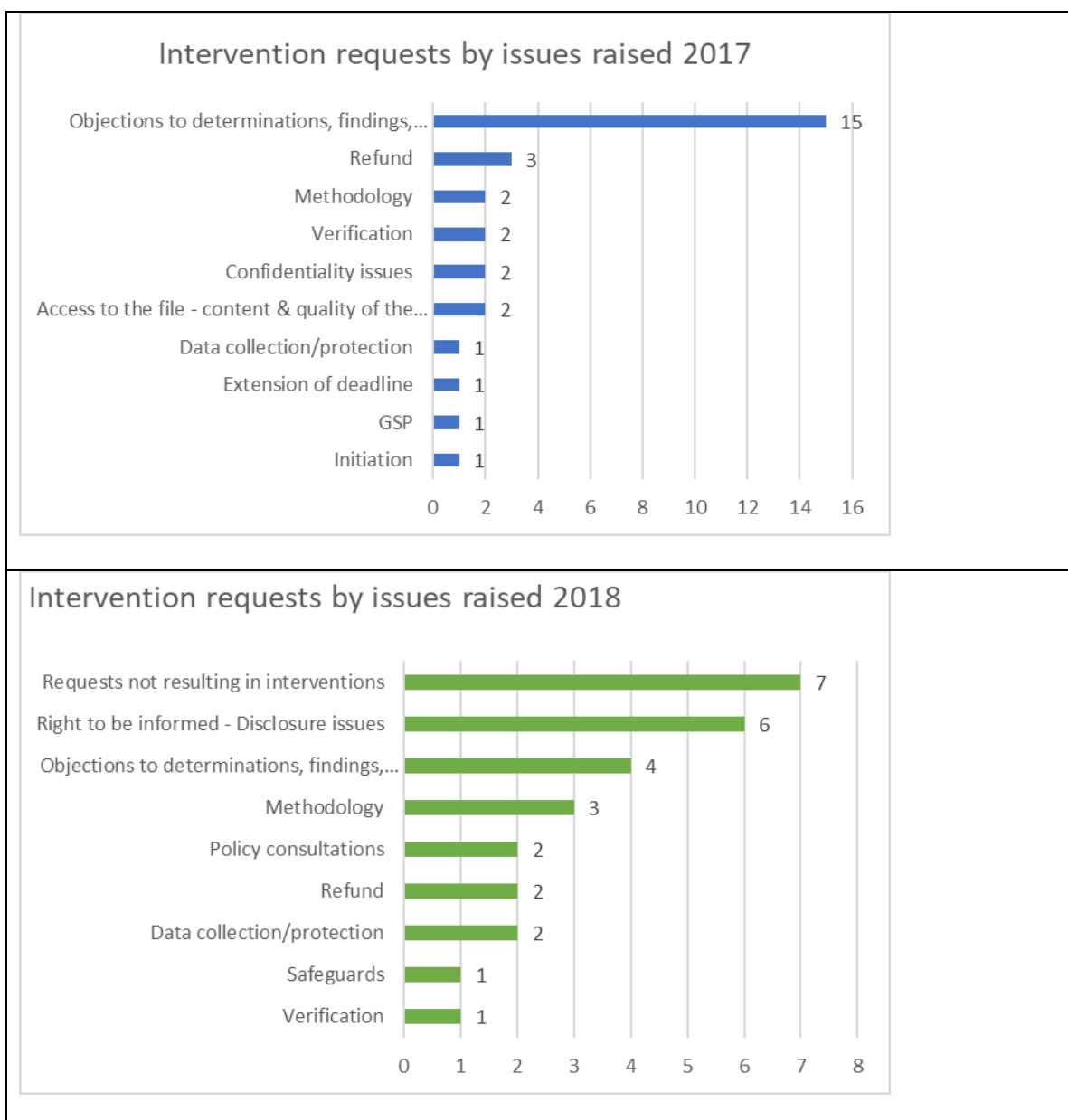
**Table 5: Interventions by case type**

Type	Cases ongoing 1.1.2017	Cases initiated 2017	Sum of cases ongoing during 2017	Cases in which the HO was requested to intervene	in %	
Initial cases (Art 5 AD, Art 10 AS)	17	13	30	8	27%	
Reviews	Absorption	0	3	0	0%	
	Circumvention	1	3	4	0	0%
	Expiry	17	9	26	12	46%
	Interim	3	10	13	3	23%
	New exporter	8	6	14	0	0%
Re-opening of a case	6	0	6	5	83%	
UT Withdrawal/Implementation	1	0	1	0	0%	
Pre-Initiation	0	0	0	0	0%	
Refund	5	0	5	2	40%	
Others (GSP)	1	0	1	1	100%	
<b>Total</b>	<b>62</b>	<b>41</b>	<b>103</b>	<b>31</b>		
Type	Cases ongoing 1.1.2018	Cases initiated 2018	Sum of cases ongoing during 2018	Cases in which the HO was requested to intervene	in %	
Initial cases (Art 5 AD, Art 10 AS)	12	9	21	4	19%	
Reviews	Absorption	1	1	1	1	0%
	Circumvention	4	0	4	0	0%
	Expiry	10	17	27	6	22%
	Interim	2	3	5	1	20%
	New exporter	4	3	7	0	0%
Re-opening of a case	5	6	11	0	0%	
UT Withdrawal/Implementation	1	0	1	0	0%	
Pre-Initiation	0	0	0	0	0%	
Refund	5	0	5	0	0%	
Others (GSP and safeguards)	5	3	8	1	13%	
<b>Total</b>	<b>48</b>	<b>42</b>	<b>90</b>	<b>13</b>		

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 repeatedly to intervene at different stages of the proceeding.

The main issues brought before the Hearing Officer in 2017-2018 can be grouped into the following categories:

**Table 6: Categories of intervention requests**



The above table indicatively demonstrates the 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 cases each request referred to a range of issues.

In 2017-2018 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 were requested in AD629 Thermal Paper – all in 2018, by the same exporting producer who vigorously exercised the rights to be heard. In expiry review proceeding<sup>4</sup> altogether 4 interventions were requested, including one for a hearing between the parties with different interests; two hearings were held in the presence of the trade mission representatives from People’s Republic of China contesting the applied methodology on market economy treatment Similar statements were made in another two cases<sup>5</sup> in 2017 when also 4 interventions had been requested, In both proceedings the interested party requesting the intervention was China Chamber of Commerce for Import and Export Machinery and Electronic Products (CCCME).

### **Intervention requests by type of interested party**

In 2017, the most frequent users of the Hearing Office were the EU industries which accounted for 46% of all parties involved in intervention requests, followed by exporters (exporting producers in the countries concerned by the investigation) with 30%, EU importers (14%) and Commission services responsible for investigations (7%). Civil society and foreign government representatives submitted one intervention request each.

In 2018, the EU industry and exporting producers accounted for roughly equal numbers of intervention requests, around 46% each. All other types of interested parties represented equal shares – approximately 3% of all requests.

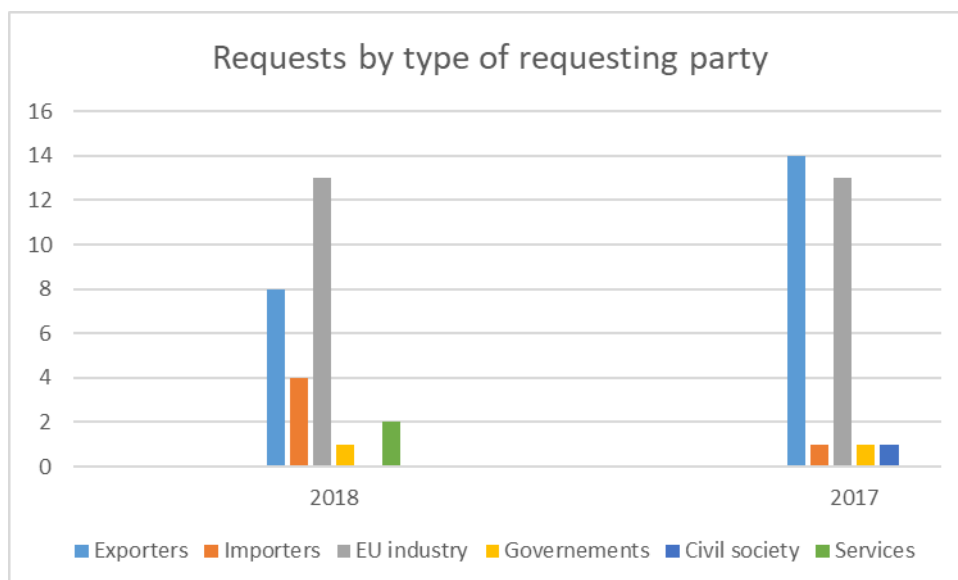
The number of interested parties does not correspond to the number of intervention requests as several interested parties participated in many requests, occasionally representing different types of interested parties. As it had been noted before, in certain proceedings multiple intervention requests had been received from the same party, the most representative in this respect was case AD637 Cast iron articles where the same party requested an intervention four times.

### **Table 7: Evolution of the relative share of requests by type of interested party**

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<sup>4</sup> R657 Seamless pipes and tubes of stainless steel (certain) (SSSPT).

<sup>5</sup> AD637 Cast iron articles (certain) and AD635 Hot-rolled flat products (of iron, non-alloy or other alloy steel) (certain).



### **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 the 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; (ii) non-transparent determinations; or (iii) insufficient justification of conclusions or decisions. Some of the issues were solved during a hearing, in other cases, the Hearing Officer recommended and the services always accepted to provide further disclosure and/or address the matter in more detail in the final legal act. In several cases the intervention of the Hearing Officer led to additional disclosures.

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

Another 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.

Confidentiality issues were raised in a few cases and concerned requests for confidentiality of the identity of a company or risk of disclosure of confidential information. The Hearing Officer aimed to find a reasonable balance between the rights to confidentiality and transparency.

## **Disagreement with determinations, findings and conclusions**

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 2017 such requests were predominant, while in 2018 such requests practically were not received.

## **Administrative issues**

Requests for hearings concerning administrative issues and procedures have been received in the past. However in 2017 there were no such requests. In 2018 there were a number of requests related to administrative issues. These were requests when the interested parties submitted a request for an intervention of the Hearing Officer simultaneously with a request for a hearing with the services. In practically all cases an intervention by the Hearing Officer was finally not required.

The situation arose due to new type of investigations – safeguard investigation – where a very large number of parties are involved and the number of hearings with the investigation team was unprecedented.

## **Data protection**

Following the entry into force on 15 May 2018 of the General Data Protection Regulation<sup>6</sup> ('GDPR') a new type of request was received – a request for the Hearing Officer to verify if the personal data processing within trade defence proceedings was compliant with this legislation. However the relevant legislation for the EU institutions entered into force only on 11 December 2018<sup>7</sup>. The Hearing Officer therefore could not resolve the request within the existing legal framework. The party subsequently referred the issue to the European Commission's Data Protection Officer.

## **Noteworthy cases**

In 2016 a request<sup>8</sup> for an intervention in a refund investigation was received that proved to be challenging to be solved by the existing legal framework. The interested party – an EU importer – requested an intervention by the Hearing Officer who, in 2017, convened several hearings involving different services of the European Commission – the

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<sup>6</sup> OJ L 119, 4.5.2016, p. 1.

<sup>7</sup> OJ L295 21.11.2018 p. 39.

<sup>8</sup> RF7002 Pyrotek.

investigation team, the Legal Service, DGs Taxud and Budget – and invited as well the representative from the Permanent Representation of the relevant Member State and, finally, liaised directly with the customs authorities of the Member State concerned. Despite all efforts, no satisfactory solution could be reached within the existing legal framework. However a year later another refund request<sup>9</sup> was successfully resubmitted to the Commission services in a different form and the exemptions granted to exporting producers were extended retroactively.

In 2017 an expiry review<sup>10</sup> attracted a very high number of affected EU industry representatives. Two consecutive hearings in the case contributed to clarification concerning the continuation and/or likelihood of recurrence of injury in the case. This clarification impacted the outcome of investigation.

From end of 2017 until the beginning of 2018 a number of different proceedings<sup>11</sup> were presented to the Hearing Officer with objections concerning the methodology applied – non-market economy treatment – in investigations concerning exporting producers from the People’s Republic of China (‘PRC’). The representatives from the permanent representation of the PRC were present at the hearings and made statements to that end, claiming that treating China as a non-market economy was no longer justified. The Hearing Officer regarded these statements as political interventions which were not within the competence of the Hearing Officer.

### **3. 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 4.10 of the Terms of Reference.

A formal consultation mechanism is in place<sup>12</sup> obliging the Director responsible for the above policy changes or updates to consult the Hearing Officer. As a matter of course, the Hearing Officer is now involved in all inter-service consultations initiated by Directorate H, and in all proposals sent to the Commission for adoption. In 2018, the Hearing Officer was consulted on the new procedural deadlines to be established under the TDI modernisation project, and on the development of a number of standard documents pertaining to the procedural rights of parties. Consultations also took place on the integration of the role of the Hearing Officer in the elaboration of the general

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<sup>9</sup> R605a Glass fibres (certain open mesh fabrics of glass fibres).

<sup>10</sup> R648 Glass fibres.

<sup>11</sup> R650, AD637 and R657.

<sup>12</sup> Article 4.10 of the Terms of Reference.

safeguards mechanism in the framework of the EU's Free Trade Agreements. Some units of DG Trade Directorate H occasionally consulted the Hearing Officer on other issues arising from their case-by-case decisions, and her advice was sought on matters related to GSP proceedings.

### **Recommendations**

In 2017 and in 2018, the Hearing Officer did not issue formal recommendations but formulated suggestions during hearings which were accepted by the Services.

## **4. DECISIONS**

The Terms of Reference confer on the Hearing Officer decision-making powers regarding certain issues (disputes on access to file, confidential nature of a document, rights to be heard). 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.

## **5. MAIN OBSERVATIONS**

The number of the intervention requests received in 2017 continued the historically established pattern of relatively stable relation between ongoing trade defence cases and the cases concerned by intervention requests. In 2018, there was a deviation from this pattern. At this stage it is too early to assess the reasons for this deviation, or even if it might develop into a new trend.

Exporters in the third countries concerned, were the most frequent applicants in 2017 while in 2018 the Union industry was equally active. 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 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 inclusion of all services concerned in the decision-making and to achieve a high degree of transparency for the interested parties of a case. In 2018 the Hearing Officer continued the established practice and procedure.

The final hearing reports are distributed to all invited participants and put in the case file (confidential and non-confidential versions) for inspection by interested parties. In 2017 and 2018, the Services have followed the proposals and suggestions of the Hearing Officer.



The Commission has taken the political commitment towards more transparent trade policy in general and as well specific commitments in the area of trade defence<sup>13</sup>. Progress has been made during the last two years to improve interested parties' access to information important for the defence of their interests.

In this respect overall progress can be noted in relation to trade defence policy. Parties are now able to see the agenda of the Trade Defence Committee meetings which are put online. Likewise, the parties now can also see refund Decisions online. Case timelines and published case documents are updated to accommodate the new rules.

In order to strike a balance between the protection of confidential information and the rights of defence, interested parties may 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 Reference<sup>14</sup>. In this context, parts of the calculation of the dumping and injury margins are declared confidential and not verifiable by the parties concerned. But on several occasions the Hearing Officer has acted upon requests to verify and review pieces of information which are not accessible to the interested party. In addition, the Hearing Officer has by now in several instances successfully encouraged the Services to provide more information to the parties to the extent that this does not endanger legitimate concerns of the other 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. The Hearing Officer cannot perform the function of a *supra* auditor for the trade defence services.

The specific role of the Hearing Officer is to safeguard the application of the principle of EU law - the right to good administration.

In this respect it can be noted that the Trade Defence Services have made considerable efforts towards standardisation or procedures including the setting up of standard documents and dedicated training especially of newcomers. Quality management both in regard to substance and process remains of course essential in the use of the instruments of trade defence under EU trade laws.

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<sup>13</sup> 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 (COM (2015) 0497 final).

<sup>14</sup> **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/her 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.”