

Annual Report of the Hearing Officer for Trade Proceedings

2019



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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 proceedings¹, 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.

In 2018, a major overhaul of TDI legislation took place and the explicit recognition of the role of the Hearing Officer in the basic Anti-dumping and Anti-subsidy Regulations followed. In view of these developments, the Terms of Reference of the Hearing Officer have been updated, and modernised by Decision of the President of the European Commission of 21 February 2019².

The status of the Hearing Officer as independent entity remains unchanged. 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 circumscribe the procedure for hearings conducted by the Hearing Officer. Furthermore, the Hearing Officer has decision-making powers on certain procedural issues, such as access to file, extension of deadlines and the confidential nature of a document³. 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 will not have made tangible progress with the investigation. The hearing with the Hearing Officer then could only serve for a presentation of the views and arguments of the parties as there will be no elements on which the Hearing Officer 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. However, 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 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 of the investigating authority, which is bound by legal deadlines. To this effect, finding a 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 of parties are respected by the Commission Services.

Therefore, while the principles laid down in the original Terms of Reference of 2012 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; and

1 OJ L 107/5 of 19 April 2012.

2 OJ L 60/20 of 28 February 2019. Articles of the Terms of Reference referred to in the body of this Report now refer for convenience to the new Terms of Reference.

3 Commission Decision C(2019) 6506 granting a delegation of powers relating to the adoption of certain measures in trade proceedings under Article 207 TFEU at the 2307th meeting of the Commission on 11 September 2019.

- the Hearing Officer will in principle not accept or consider evidence that has not been submitted to the Commission Services in the 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 be 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 may 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 2019 and main observations.

2. EVOLUTION OF ACTIVITIES 2019

The Terms of Reference, both the 2012 version and the current version, cover trade proceedings provided for in 10 basic Trade Regulations⁴. During 2019 one of the basic Regulations listed in the Annex, specifically, Regulation (EC) No 868/2004 of the European Parliament and of the Council, was replaced by Regulation (EU) 2019/712 of the European Parliament and of the Council⁵ of 17 April 2019 on safeguarding competition in air transport⁶. While technically the scope of competence of the Hearing Officer thus did not change, the scope of the new basic Regulation itself has extended the scope of its application in relation to fair competition in air services. Furthermore, it has opened a possibility for the Hearing Officer to exercise their competence in trade proceedings concerning trade in services and conducted by other Commission Services than those, responsible for trade defence and the other areas dealt with by DG TRADE.

Historically, the vast majority of intervention requests concerned trade defence proceedings (anti-dumping and anti-subsidy). Although only a very few requests related to the Safeguards Regulation, the General System of Preferences and Trade Barrier Regulation issues have been received before, in 2019 a more substantial part of the Hearing Officer's interventions concerned these areas. This diversification was important enough that the methodology of the current annual report had to be reconsidered.

In previous years, the same comparative analysis could be used as all intervention requests concerned similar type of proceedings. Now that the types of proceedings concerned

have become more diverse, the same approach could no longer be applied. The statistics related to interventions in anti-dumping and anti-subsidy proceedings are provided in Annex 1 to this report for reference purposes.

In 2019, the Hearing Officer received altogether 21 intervention requests and held 7 hearings. 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 2019, 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 comparison with previous years, the number of requests have been stable since 2017, whereas the number of actual hearings held is the same as in 2018.

4 A list of all Trade Regulations covered is provided in Article 1 of the Terms of Reference (ToR).

5 Regulation (EC) No 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community (OJ L 162, 30.4.2004, p. 1).

6 Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004 (OJ L 123, 10.5.2019, p.4.)

3. HEARINGS

In view of relatively few hearings, each case concerned can be addressed individually. They are listed below in chronological order by the first intervention request.

During all interventions in 2019, the Hearing Officer found that the procedural rights of the interested parties had been respected.

AD 649 – Urea and ammonium nitrate (UAN) – 3 hearings and 1 written intervention

In 2019 The Hearing Officer was requested to intervene 4 times in this proceeding, out of which 3 times by the same representative of exporting producers concerned.

The first request related to access to a specific document in the proceeding. Upon review of the request, the Hearing Officer concluded that the rights of defence of interested parties were sufficiently protected in principle when having access to the consolidated, non-confidential version of the complaint rather than to the original form of the complaint.

Later in the proceeding, following the imposition of provisional measures, the same exporting producers came forward with a list of alleged deficiencies. The Hearing Officer encouraged the Commission Services, responsible for investigation, to disclose further information to the extent possible to facilitate understanding of facts and findings upon which the Commission Services base their conclusions. In particular, the Hearing Officer recommended that a sufficiently meaningful summary of a study submitted by the exporting producers shall be included in the open file.

Upon receipt of the Final Disclosure Document, the same exporting producers raised another list of alleged deficiencies, which were largely similar to the ones already discussed during the previous hearing. The Hearing Officer noted the similarities and refrained from repeated discussion.

At the same time, exporting producers from a different country of origin requested an intervention of the Hearing Officer in view of their disagreement with the interpretation by the Commission services of two relevant judgements. The Hearing Officer observed that the interpretation of the court judgements also lies within the competence of the courts that have made the disputed ruling.

AD652 - Steel Road Wheels (SRW) - originating in the People's Republic of China -1 hearing

An exporting producer challenged the application of Article 18 of the basic Regulation.

The Hearing Officer considered that the exporting producer, in view of their best efforts, should not properly be considered as non-cooperating in the sense of providing false or misleading confirmation.

On that basis, the Hearing Officer invited the Commission services to further clarify the use of Article 18 of the basic Regulation and to consider the new and additional evidence received in the course of investigation, to the extent possible.

The Hearing Officer invited the Commission services to reflect the above considerations and the new evidence in the wording of the regulation applying the provisional measures.

Solar Panels - UT - Sunowe -Solar panel undertaking ('UT'): invalidation of UT invoices for one exporting producer – 1 hearing

The Hearing Officer was requested to intervene in this investigation by the exporting producer concerned.

The exporting producer raised the issue of interpretation of the provisions of the UT regarding the customs treatment of the goods imported during the period of the UT but kept in inventory.

Considering that interpretation of provisions of the UT does not fall within the competence of the Hearing Officer and at the request of participants to have the discussion formally on record it was suggested that the participants of the hearing submit summaries of their statements made during the hearing at their earliest opportunity. The Hearing Officer concluded that at this stage the positions of the services and the interested party appear to be irreconcilable.

It has been understood that the interested party may decide to pursue the matter further through the competent courts.

AS 650 - Anti-Subsidy proceeding concerning imports of Biodiesel originating in Indonesia – 1 hearing and 1 extension of a deadline

In this proceeding the Hearing Officer has been requested to intervene by two different parties.

One party requested an extension of deadlines to comment on the provisional regulation. The Hearing Officer did not however find any exceptional circumstances that would justify such prolongation.

Another party requested the intervention of the Hearing Officer and a hearing took place. The exporting producer claimed that disclosure on the undercutting calculations was insufficient, that certain meaningful non-confidential summaries were lacking, that information on the situation of the Union industry was incomplete, and that certain verifications should have been undertaken.

The intervention of the Hearing Officer resulted in the disclosure of additional information.

RF52-14 - Ferro Silicon – 1 hearing

The applicant had requested a suspension of the refund applications as several judicial proceedings were pending before the EU courts as they could affect the outcome of this investigation. Thereafter, the applicant had appealed one of the rulings and subsequently requested another suspension of the application.

Although the Hearing Officer considered that there were some merits in relation to the concerns of the applicant,

4. OTHER INTERVENTIONS

SF009 R1 – Steel safeguards – 5 intervention requests, no hearings

In this proceeding, the same Union importer three times requested intervention of the Hearing Officer, specifically calling for reopening of the investigation and changes in the product scope concerned by the measures.

The Hearing Officer found that these requests were outside the competence of the Hearing Officer, including the fact that these requests that were submitted also outside the timeframe of the investigation.

Nevertheless, the Hearing Officer agreed to meet the party after the end of the investigation to explain the legal situation.

Other intervention requests concerned requests for additional disclosures or clarifications and were dealt directly with the Commissions services responsible for the investigation.

Generalised System of Preferences +

On 11 February 2019 the Commission initiated the procedure for temporary withdrawal of the tariff preferences provided to the Kingdom of Cambodia under Article 19 of Regulation (EU) No 978/2012⁷.

The Hearing Officer was consulted on how to ensure that the procedural rights of interested parties are explained adequately.

there were also merits to the Commission services' reasons not to extend the suspension, especially considering the risk of losing data over time. As to the timing of the expected judgment of the Court of Justice, there might be probabilities but there could not be certainty.

She considered that the applicant and the Commission services should reflect on a possible solution acceptable to both sides within the limits set by the law, and hold a meeting to reach an agreement.

Access to documents

In case AD 649, the Hearing Officer received a request for intervention that the Commission services should grant access to the initial complaint that had been lodged. The request for intervention was based on the Ombudsman's decision that in a review, the initial request forms part of the overall reasons on the basis of which the opening of an expiry review is based. The Hearing Officer found that the situation in a new complaint was not comparable and that in addition, having verified the files, no specific reasons would lead to a different conclusion.

Confidentiality

Several requests for intervention, which did not lead to a hearing, concerned the granting of more extensive disclosure because parties considered that their rights of defence were not respected because of the restrictive practice of the Commission Services.

5. AUDIT 2019

In 2019 the European Court of Auditors (ECA) carried out a performance audit of the Commission's management of trade to discuss their work related to trade defence instruments, and their cooperation with DG TRADE.

In their clearing letter concerning the performance audit on the Commission's role as an enforcer of EU trade defence policy with regard to the work of the hearing officer for trade proceedings, the ECA concluded that, in spite of the administrative attachment of the Hearing Officer's staff to DG Trade, at the time directly to the Director F, the Hearing Officer acts independently from a functional point of view. This independence relies on the personalities of the persons involved rather than on the institutional setting.

The ECA further observed that the new Terms of Reference now stipulate that the Commissioner for Trade can appoint an acting Hearing Officer in case of a conflict of interest or an inability to act, thus ensuring business continuity in unforeseen circumstances.

6. OTHER ACTIVITIES

In 2019, the Hearing Officer continued with her outreach activities and presented the changes in the Terms of Reference, the Annual Report, and observations pertaining thereto, to the Member States in the Working Party on Trade Questions.

As usual, the Hearing Officer presented her observations and information in dedicated sessions during the annual trainings in for the Trade Defence Services, and for the staff working in EU Delegations.

On 24 October 2019, the Hearing Officer met with the business association Aegis/UNIFE, to explain the role and functioning of the Hearing Officer to the Union industry, as well as to reply to their questions.

The ECA also acknowledged the importance that the Hearing Officer is invited to the meetings of the Trade Defence Committee(s) and that this good practice ensures direct communication between the Hearing Officer and the Committee members, which increases both independence and transparency. And that, since June 2018, DG TRADE includes the Hearing Officer in all inter-service consultations, even for cases without hearings. This was recognised as a good practice, formalised in the 2019 Terms of Reference, which ensures that the Hearing Officer receives all draft decisions in a timely manner. This facilitates the Hearing Officer's follow-up on cases in which there have been hearings and other interventions. In addition, it responds to the requirement in Article 4(8) of the Terms of Reference, namely that the Hearing Officer shall be informed "of any substantial change of the Commission's position" up to the definitive measures.

On 10 December 2019, the Hearing Officer participated in a Civil Society Dialogue on Trade Defence instruments and rights of parties in trade proceedings, together with the Commission Services managing trade defence instruments. The Hearing Officer highlighted the most recent changes and the exact role and competences of the Hearing Officer in particular in the framework of the modernized trade defense system of the EU. In particular, she stressed that the Hearing Officer is a fully independent Commission official who is not part of the Trade Defense Services, nor of DG Trade for that matter, and not involved directly in the conduct of investigations.

This was, in fact, the first time the Hearing Officer addressed the larger civil society to raise awareness of the possibility to make their concerns known and thus, to safeguard the rights of defense of the interested parties in trade proceedings.

7. 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. In 2019, the Hearing Officer was consulted by the Commission Services on several templates, and on the integration of the role of the Hearing Officer in the elaboration of the general safeguards mechanism in the framework of the EU's Free Trade.

Recommendations

In 2019, the Hearing Officer issued a recommendation to the Commission Services to disclose the non-confidential version of an initial review request, having regard to the European Ombudsman's findings in an identical case which had been accepted by the Commission, and to disclose certain data to an interested party as these data had already been disclosed in another investigation.

Decisions

The Terms of Reference confer on the Hearing Officer certain decision-making powers on a number of issues (disputes on access to file, confidential nature of a document, deadlines). The Hearing Officer has decided several times on the extension of deadlines for parties. Nevertheless, since the entry into force of the first version of the Terms of Reference in April 2012, as a rule a mutually acceptable solution was found when relevant issues were raised.

8. MAIN OBSERVATIONS

In comparison with the previous years, the number of overall requests per year in 2019 has been stable since 2017, whereas the number of actual hearings held is the same as in 2018. With all the necessary caution, it seems that the parties' interest to request an intervention of the hearing officer remains stable. The apparent stabilisation of hearings at a lower level than in 2017 could be ascribed to the policy of the Hearing Officer to encourage parties to settle their issues directly with the Services, before turning to the Hearing Officer. This takes account of the fact that the Hearing Officer is not part of the investigation team. Since 2017, an intervention of the Hearing Officer was requested each year at around the level of 30% of the ongoing investigations.

In 2019 all hearings held were requested by exporting producers; as regards the requests for interventions – the bulk of requests were received from exporting producers. The Hearing Officer also received requests from two Union importers in the Steel Safeguard review investigation and in another review investigation a sampled Union importer requested the granting of anonymity. This marks a deviation from all previous years when the Union industry on average accounted for 10-20% of all intervention requests.

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 most visible 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 2019, 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 2019, the Services have followed the proposals and suggestions of the Hearing Officer.

In 2019, other intervention requests took on more importance as compared to previous years. These consisted

in relatively straightforward requests such as prolongation of deadlines, but also in requests related to matters that are more complex. In particular, an issue of policy linked to access to documents arose, such as making available to parties the earlier version of a complaint, which can be different from the final version on which an initiation of proceedings may be based, demanded careful attention. Another issue concerned the extent to which the non-confidential version of a complaint provided for the right balance between protection of business confidentiality and the rights of defence. Cooperation with the Trade Defence Services

A formal consultation mechanism is in place⁸ 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 responsible for Trade Defence matters, in all proposals sent to the Commission for adoption. The Hearing Officer should likewise be invited to all meetings of the Trade Defence Committee(s) and noted that sometimes there was still a lack of knowledge of the Trade Defence Services. In 2019, the Hearing Officer was further consulted 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 safeguards mechanism in the framework of the EU's Free Trade Agreements. Some units of the DG Trade Directorate responsible for Trade Defence 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.

Hearings

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 in a case.

In 2019, the Services have followed the proposals and suggestions of the Hearing Officer.

8 Article 4.10 of the Terms of Reference.

Transparency

Further progress has been made in 2019 to improve interested parties' access to information important for the defence of their interests, notably in terms of the contents of disclosures. The Hearing Officer has 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

Parties' right to good administration

The Hearing Officer's Reports for the years 2015 and 2016 expressed the concern that the consultations on trade policy updates regarding procedural matters and substantive issues having an impact on interested parties had been carried out only occasionally rather than systemically. As set out in the Report covering the years 2017 and 2018, a certain number of mechanisms have been put in place

leading to a significant improvement of the situation. In 2019 these mechanisms have been working in an overall acceptable manner.

Likewise, the mentioned Reports for the years 2015 and 2016 expressed concerns about the consistent and correct application of the established rules and procedures for anti-dumping and anti-subsidy proceedings throughout the Commission Services responsible for investigations. In this respect it can be noted that over the past years, the Commission services have made considerable efforts towards standardisation of procedures including the setting up of standard documents and dedicated training especially of newcomers. The margin of discretion left to individual case teams or units is therefore much reduced. However 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.

9. ANNEX

Anti-dumping and anti-subsidy proceedings concerned by intervention requests in 2019

The following tables demonstrate the actual numbers and the ratio between the ongoing trade proceedings and intervention requests received by the Hearing Officer compared to previous 4 years. The methodology there is the same as used before for comparison and cross-reference purposes.

The actual number of hearings has stabilized during the last two years after a substantial change 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 2018 and 2019 has been remarkably similar.

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

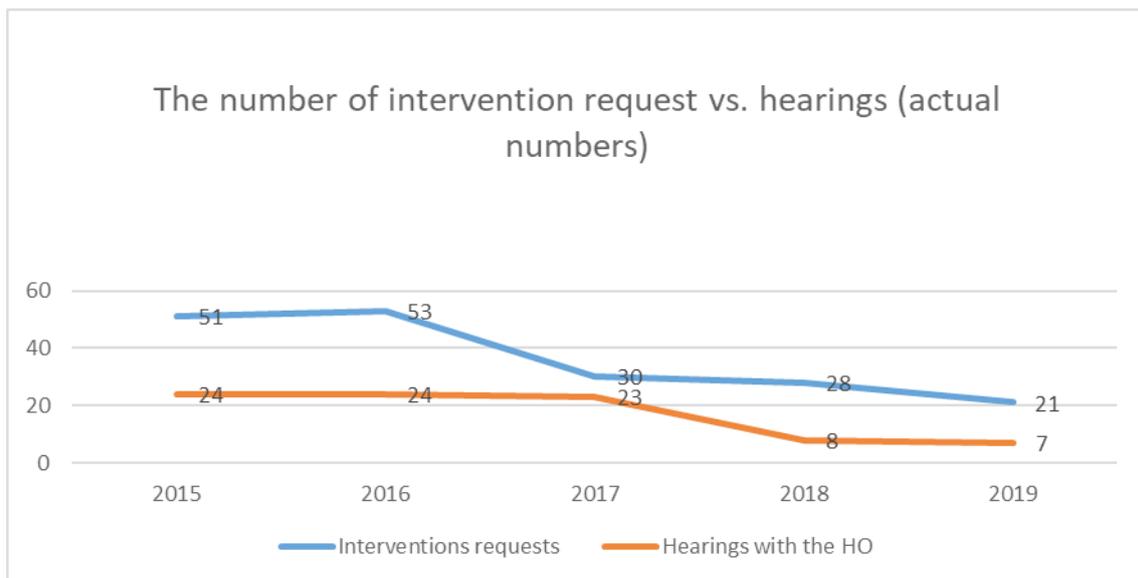


Table 2: Trade proceedings concerned by intervention requests vs. ongoing investigations (in %)

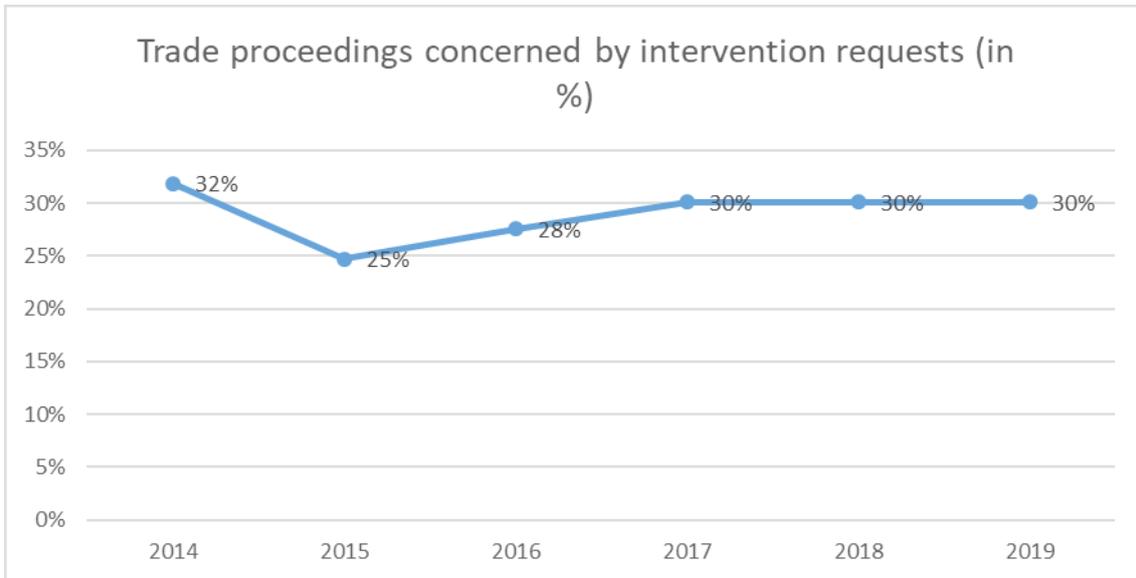


Table 3: Trade proceedings concerned by intervention requests vs. ongoing proceedings and the number of intervention requests vs. hearings

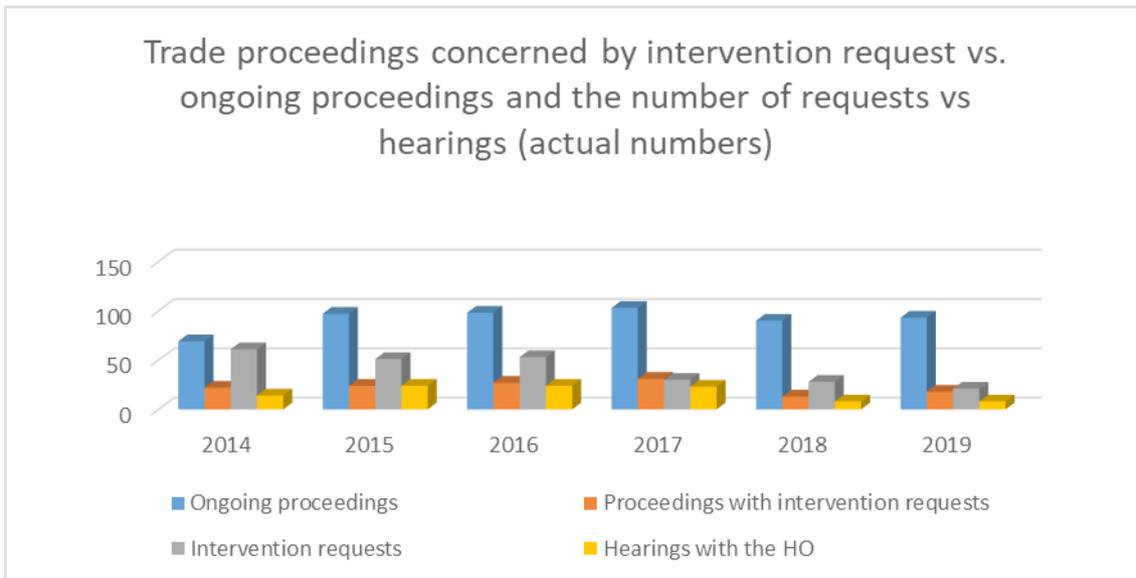


Table 4: Interventions by case type

Type	Cases ongoing 1.1.2019	Cases initiated 2019	Sum of cases ongoing during 2019	Cases in which the HO was requested to intervene	in %
Initial cases (Art 5 AD, Art 10 AS)	11	16	27	8	30%
Reviews	Other	0	5	0	0%
	Expiry	19	8	27	15%
	Interim	3	2	5	40%
	New exporter	8	1	9	0%
Re-opening of a case	3	6	9	0	0%
UT Withdrawal/Implementation	1	1	2	1	50%
Pre-Initiation	0	0	0	0	0%
Refund	7	0	7	2	29%
Total	52	39	91	17	

More information about the Hearing Officer:

<https://ec.europa.eu/trade/trade-policy-and-you/contacts/hearing-officer/>

Hearings Officer's terms of reference:

<http://data.europa.eu/eli/dec/2011/695/oj>

Charter of Fundamental Rights of the European Union:

http://data.europa.eu/eli/treaty/char_2012/oj

Information on the European Commission's Directorate-General for Trade:

https://ec.europa.eu/trade/index_en.htm