

Proposal of the European Ombudsman for a solution in case 1379/2020/MAS on the European Commission's refusal to grant access to preparatory documents related to anti-dumping measures on imports of iron or steel fasteners from China

Solution - 09/11/2020

Case 1379/2020/MAS - Opened on 24/08/2020 - Decision on 06/09/2021 - Institution concerned European Commission (Solution partly achieved) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

Background to the complaint

1. In 2009, the European Union imposed an anti-dumping duty on imports of iron or steel fasteners originating in China. [2] In 2011, the Dispute Settlement Body of the World Trade Organization ('WTO') found that this duty was not in line with the WTO Anti-Dumping Agreement. The European Commission therefore initiated a review of the anti-dumping duty at issue and amended the anti-dumping measure in October 2012. [3] The Chinese government considered that this measure violated international trade rules. A WTO compliance panel and the WTO Appellate Body came to the conclusion in 2015 and 2016, respectively, that the EU had not acted in line with international trade rules. In February 2016, the Commission repealed the anti-dumping duty. [4]

2. The complainant submitted four different requests for public access to documents to the Commission linked to this anti-dumping file. He requested documents related to

- the initial anti-dumping investigation leading up to Council Regulation 91/2009 of 26 January 2009;
- the review procedure following the above-mentioned WTO Dispute Settlement Body ruling leading up to Council Implementing Regulation No 924/2012 of 4 October 2012;
- an expiry review leading up to Commission Implementing Regulation (EU) 2015/519 of 26 March 2015; and
- the implementation of the WTO Appellate Body Reports of 15 July 2011 and 18 January 2016 (Article 21.5 DSU) by the EU.

3. The Commission relied on a general presumption of confidentiality and refused disclosure of



the requested documents without having examined them individually. The complainant requested a review of the Commission's refusal decision. The Commission confirmed its initial decision arguing that disclosing the requested documents would undermine the protection of commercial interests and the purpose of investigations. [5]

4. Dissatisfied with the outcome, the complainant turned to the Ombudsman.

5. The complainant clarified in his complaint to the Ombudsman that, in order to facilitate the process, he is at this stage not interested in obtaining access to the submissions of the relevant interested parties during the anti-dumping investigations or prior to the adoption of the mentioned Regulations. However, the complainant maintained his request for access to documents related to the adoption of the Regulations at issue linked to the implementation of the unfavourable WTO Dispute Settlement decision against the European Union. He specified that the request covers legal memoranda, notes, fiches and general documents related to the legislative phase linked to the adoption of such Regulations.

The inquiry

6. The Ombudsman opened an inquiry into the Commission's refusal to grant access to the requested documents, in reduced scope as set out in the complaint.

7. In the course of the inquiry, the Ombudsman inspected a number of documents provided by the Commission. The Commission had identified these documents as falling within the scope of the complainant's more limited request as per the complaint. The documents inspected by the inquiry team date from between November 2011 and July 2012.

Arguments presented to the Ombudsman

8. The Commission noted in its confirmatory decision that the basic anti-dumping Regulation [6] puts in place confidentiality requirements in its Articles 19(5), 19(6) and 6(7). It considered that, for the purposes of interpreting the exceptions laid down in the first and third indent of Article 4(2) of Regulation No 1049/2001, the existence of a general presumption must be recognised. According to this general presumption, the Commission stated, the disclosure of the documents belonging to the administrative files of anti-dumping procedures pursuant to the basic anti-dumping Regulation would undermine the interests protected by the above provisions of the basic anti-dumping Regulation.

9. The Commission argued that disclosure would undermine the protection of commercial interests. [7] It stated that the companies concerned have a legitimate expectation, rooted in Articles 6(7), 19 and 20 of the basic anti-dumping Regulation, that the information they supply to the Commission under that Regulation, in the framework of the anti-dumping procedures established therein, will be used only for the purpose for which it was requested and will not be disclosed to the public.



10. The Commission stated that this exception applies even after the closure of the investigation [8] and can apply for up to 30 years and beyond. [9]

11. The Commission also argued that disclosure would undermine the protection of the purpose of trade defence investigations. [10] In its view, the prospect of publication by the Commission of information collected during an anti-dumping investigation runs the risk of adversely affecting the willingness of undertakings to cooperate. If the documents were to be disclosed, the concerned companies would lose their trust in the reliability of the Commission and in the sound administration of trade investigations.

12. The complainant questioned the existence of a general presumption of confidentiality. He stated that the European Court of Justice has not yet ruled on access to documents within the context of trade defence proceedings. The right to access the documents is guaranteed by primary EU law, he says. The exceptions to this right should therefore be interpreted narrowly and proportionately.

13. He considered that, in line with Article 6(4) of Regulation 1049/2001, the Commission should have analysed whether it could grant partial access to the requested documents.

14. Regarding the Commission's argument that disclosure would undermine the protection of commercial interests, the complainant pointed out that the Council, following an access to documents request made to it and related to the preparatory works of exactly the same antidumping implementing regulations, had sent him a large number of documents.

15. As regards the Commission's argument that disclosure would undermine the protection of the purpose of investigations, the complainant stated that the anti-dumping case at issue has been closed for years now. He explained that the WTO dispute settlement proceedings came to an end over 4 years ago and that the trade defence investigations have already been closed for over 5 years.

The Ombudsman's assessment

Regarding the obligations of institutions applying a general presumption of confidentiality

16. In its initial reply to the complainant's request for public access, the Commission relied on a general presumption of confidentiality without however identifying, which documents were covered by the complainant's request.

17. In its confirmatory decision, the Commission generically indicated which categories of documents fall within the scope of the complainant's request. However, the Commission did not provide the complainant with a list of documents it identified as being part of the file covered by



the general presumption of confidentiality. Notably, several of the documents inspected by the Ombudsman's inquiry team were not mentioned in the confirmatory decision. [11]

18. In accordance with recent case law of the General Court, it is only once the institution has identified which documents are covered by the request for access, indicating, for example, their date, their nature and the institution or administration which drafted them, that it can classify them into categories and that it can then apply a general presumption of confidentiality to them. [12]

19. In the absence of such identification, applicants are not able to argue that a document is not covered by the general presumption of confidentiality. They therefore cannot rebut the general presumption. [13] The existence of such an irrefutable general presumption risks undermining the objectives of Regulation 1049/2001 and depriving applicants of an important means of holding the institution to account when it comes to invoking a general presumption.

20. The Ombudsman proposes that the Commission now provides the complainant with a complete list of documents that it has identified as being the requested documents, including in particular each document's date, title and the institution or body having drafted it.

Regarding the application of a general presumption of confidentiality

21. The Commission considered that all documents contained in the Commission's administrative file are covered by a general presumption of confidentiality.

22. The purpose of Regulation 1049/2001 is to confer on the public the widest possible access to documents of the EU institutions. [14]

23. The European Court of Justice has recognised that in certain cases it is open to the EU institution to rely on general presumptions which apply to certain categories of documents. [15] As general presumptions constitute an exception to the rule that the EU institution concerned is obliged to carry out a specific and individual examination of every document which is the subject of a request for access and, more generally, to the principle that the public should have the widest possible access to the documents held by the institutions of the European Union, they must be interpreted and applied strictly. [16] The Ombudsman considers that this interpretation has to be restrictive both in scope and in time.

24. The Court of Justice has recognised five categories of documents, which enjoy general presumptions of confidentiality: (i) the documents in an administrative file relating to a procedure for reviewing State aid; (ii) the submissions lodged in proceedings before the courts of the European Union, for as long as those proceedings remain pending; (iii) the documents exchanged between the Commission and notifying parties or third parties in the course of merger control proceedings; (iv) the documents relating to an infringement procedure during its pre-litigation stage; and (v) the documents relating to a proceeding under Article 101 TFEU. The



Court of Justice stressed that, in each of those cases, the refusal of access related to a set of documents which were clearly defined by the fact that they all belonged to a file relating to ongoing proceedings. [17]

25. The Court of Justice has, to date, not issued a judgment setting out that documents included in the administrative file of an anti-dumping investigation are covered by a general presumption of non-disclosure.

26. The Ombudsman is aware of the practicality of applying presumptions of non-disclosure for EU institutions. However, she considers that general presumptions bear the risk that institutions will all too instinctively invoke them without considering the particular circumstances of the case at hand. In particular, if EU institutions were to unilaterally create general presumptions for more and more categories of documents, and without any limitation in time, this would fundamentally undermine the rationale of Regulation 1049/2001 and the relevant transparency provisions of primary EU law [18] .

27. In any event, she considers that even if a general presumption were to be recognised for documents included in the administrative file of an anti-dumping investigation, that general presumption would no longer apply in this case.

28. The requested documents are **more than eight years old** , and the anti-dumping measure to which they relate was repealed in February 2016, that is, **over four years ago** . [19]

29. Regarding the risks for the protection of commercial interests invoked by the Commission, [20] the General Court has confirmed in a recent judgment that information, which may have been covered by business secrecy or be of a confidential nature, but which is **five years old or more, must be regarded as historical** unless, exceptionally, it is shown that it still constitutes essential elements of the commercial position of the undertaking to which it relates. [21]

30. The information that the Commission claims is covered by the exception pertaining to the protection of commercial interest must therefore be regarded as historical.

31. The Commission therefore has to “ *examine, in a concrete and individual manner, whether the application of the exception in question continues to be justified, taking into account the passage of time and the content of the documents in question.*” In the course of this examination, the rule that information which may have been a business secret or confidential five years ago must be regarded as historical information is a useful point of reference in this respect . [22]

32. As it has not examined specifically and individually each of the requested documents, the Commission has not demonstrated which information contained in those documents is still covered by the exception of the protection of commercial interests. [23]

33. The same applies to the exception pertaining to the protection of the purpose of investigations in Article 4(2) third indent of Regulation 1049/2001. This exception applies only



where there is an on-going investigation [24] or follow-up is imminent. [25] The Commission has not explained why, despite the fact that the anti-dumping measures at issue have been repealed over four years ago, disclosure of any part of the administrative file would undermine the protection of the purpose of the investigation.

34. As set out above, the Commission is concerned that “ *the prospect of publication by the Commission of information collected during anti-dumping investigation runs the risk of adversely affecting the willingness of undertakings to cooperate* ”. In this regard, the Ombudsman notes that the complainant no longer requests access to documents containing information collected from undertakings during anti-dumping investigation submissions of the relevant interested parties. He maintained his request only as regards documents produced by the Commission. Indeed, only very few of the documents reviewed by the Ombudsman’s inquiry team were collected during the anti-dumping investigation.

35. In the light of the above, the Commission should not base itself on a general presumption but, instead, examine specifically and individually each of the requested documents, and assess to what extent the invoked exceptions to the right of access apply.

36. Having carefully examined the documents, the Ombudsman considers, that there is scope for the Commission to fully or partially disclose a number of these documents, for instance, the general disclosure document dated 31 July 2012, consultation and information documents for the Trade Defence Committee, the briefings to DG Trade senior management and the documents relating to the inter-service consultation.

The proposal for a solution

Based on the above findings, the Ombudsman proposes that the European Commission should provide the complainant with a list of the documents identified as being the requested documents, including in particular each document’s date, title and author.

Further, the Commission should examine specifically and individually each of the requested documents it has listed and consider in particular disclosing the general disclosure document dated 31 July 2012, the briefings to DG Trade senior management and the documents relating to the inter-service consultation.

The European Commission is invited to inform the Ombudsman by 15 January 2021 of any action it has taken in relation to the above solution proposal.

Emily O'Reilly European Ombudsman

Strasbourg, 09/11/2020



[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] An overview of this investigation is available at http://trade.ec.europa.eu/tdi/case_history.cfm?id=458&init=458 [Link].

[3] Council Implementing Regulation (EU) No 924/2012 of October 2012 amending Regulation (EC) No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:275:0001:0022:EN:PDF> [Link].

[4] Commission Implementing Regulation (EU) No 2016/278 of 26 February 2016 repealing the definitive anti-dumping duty imposed on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0278&from=EN> [Link].

[5] Exceptions to the right of access to documents pursuant to Article 4(2) first and third indent of Regulation 1049/2001.

[6] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1036> [Link].

[7] Article 4(2) first indent of Regulation 1049/2001.

[8] Judgment of 13 September 2013, Netherlands v Commission, T-380/08, EU:T:2013:480, paragraph 43.

[9] Judgment of 28 June 2012, Commission v Agrofert Holding, C-477/10 P, EU:C:2012:394, paragraph 67.

[10] Article 4(2) third indent of Regulation 1049/2001.

[11] This includes, for instance, the general disclosure document of 31 July 2012, the different briefings to DG Trade senior management from between April and July 2012 and the documents relating to the inter-service consultation from between November 2011 and July 2012.

[12] Judgment of 28 May 2020, Campbell v Commission, T-701/18, ECLI:EU:T:2020:224, paragraph 45, 52.

[13] Judgment of 28 May 2020, Campbell v Commission, T-701/18, ECLI:EU:T:2020:224,



paragraph 42.

[14] Article 1 of Regulation 1049/2001.

[15] Judgment of 16 July 2015, ClientEarth v Commission, C-612/13 P, EU:C:2015:486, paragraph 69 and the case-law cited.

[16] Judgment of 16 July 2015, ClientEarth v Commission, C-612/13 P, EU:C:2015:486, paragraph 81.

[17] Judgment of 4 September 2018, ClientEarth v Commission, C-57/16 P, ECLI:EU:C:2018:660, paragraph 81 and the case law cited; judgment of 16 July 2015, ClientEarth v Commission, C-612/13 P, EU:C:2015:486, paragraph 78.

[18] See Article 15(3) TEU and Article 42 of the Charter of Fundamental Rights of the European Union, and Article 15(1) TFEU, which provides that the institutions, bodies, offices and agencies of the European Union are to conduct their work as openly as possible.

[19] A procedural error was corrected by the Commission following the judgment of the European Court of Justice in Case C-644/17 Eurobolt by Commission Implementing Regulation (EU) 2020/611 of 30 April 2020, this has however no bearing on the fact that, in substance, the investigation has been closed since February 2016.

[20] Exception in Article 4(2) first indent of Regulation 1049/2001.

[21] Judgment of 23 September 2020, Basaglia v Commission, T-727/19, ECLI:EU:T:2020:446, paragraph 79 and the case-law cited.

[22] Judgment of 23 September 2020, Basaglia v Commission, T-727/19, ECLI:EU:T:2020:446, paragraph 82.

[23] Article 4(2) first indent of Regulation 1049/2001.

[24] Judgment of the General Court of 15 December, T-437/08, CDC Hydrogene Peroxide v Commission, paragraph 62.

[25] See Judgment of the General Court of 7 June 2011, T-471/08, Toland v Parliament, paragraph 51