

Decision on the European Commission's refusal to grant access to preparatory documents relating to anti-dumping measures on imports of steel fasteners from China (case 1379/2020/MAS)

Decision

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

The case concerned the refusal of the European Commission to grant public access to preparatory documents relating to anti-dumping measures on imports of steel fasteners from China. The Commission did not identify for the complainant the documents falling within the scope of his request and refused access without individually and specifically examining them. Instead, it invoked a general presumption of confidentiality based on the protection of commercial interests and the purpose of investigations.

The Ombudsman had doubts that a general presumption of confidentiality was applicable in this case, notably given that the documents in question are now more than nine years old. She made a proposal for a solution, asking the Commission to provide the complainant with a list of the documents covered by his request and to examine specifically and individually each of the documents with a view to considering their disclosure.

While the Commission produced a list of the documents in question, it refused to examine specifically and individually the documents covered by the request.

It is settled case-law that the Commission is not obliged to apply a general presumption - it is an option. The Commission could have made use of that option and thereby followed the Ombudsman's proposal for solution, to deliver greater transparency in this case. As the Commission's reply to the Ombudsman's proposal does not indicate any flexibility on this matter, the Ombudsman considers it appropriate to close her inquiry at this stage setting out her findings.

She maintains her doubts that a general presumption of confidentiality was applicable in this case. She hopes the Court will clarify this issue when given the opportunity.

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. 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. 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.

2. The complainant submitted to the Commission four different requests for public access to preparatory documents in its file concerning this case. [1]

3. The Commission did not inform the complainant which documents it had identified to be covered by his requests. It relied on a general presumption of confidentiality and thereby refused to individually examine the documents. Accordingly, it did not grant access to any document. The complainant requested a review of the Commission's refusal decision. The Commission confirmed its initial decision arguing again that the entire file in question was covered by a general presumption that disclosing the requested documents would undermine the protection of commercial interests and the purpose of investigations. [2]

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 was no longer 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 (hereinafter: the documents at issue).

The Inquiry

6. The Ombudsman opened an inquiry into the complaint. Her inquiry team inspected the documents that the Commission had identified as falling within the scope of the complainant's request.

The Ombudsman's proposal for a solution

7. The Ombudsman had doubts that a general presumption of confidentiality was applicable in



this case as the documents at issue were older than five years. [3] The Ombudsman noted [4] that the documents at issue dated from between November 2011 and July 2012, that only very few documents were collected during the anti-dumping investigation, and that there was scope for the Commission to consider disclosing, fully or partially, a number of those documents.

8. The Ombudsman made a proposal for a solution to the Commission. In particular, she proposed the following:

- *The 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.*
- *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 Commission's reply to the proposal for a solution and the complainant's comments

9. Following the first part of the Ombudsman's proposal, the Commission drew up a more detailed list of the requested documents which was subsequently made available to the complainant.

10. However, the Commission did not accept the second part of the Ombudsman's proposal, to specifically and individually examine the relevant documents. The Commission reiterated that it considers that all of its anti-dumping administrative files including all documents drawn up by the Commission are covered by a general presumption of confidentiality.

11. The Commission argued that neither the EU rules on public access to documents [5] nor the EU anti-dumping rules [6] contain provisions giving one set of rules primacy over the other. It said that the anti-dumping rules contain certain confidentiality obligations, namely that internal documents prepared by EU authorities shall not be divulged except as provided for in the anti-dumping rules [7]. Moreover, information received pursuant to anti-dumping rules may be used only for the purpose for which they were requested. [8] The anti-dumping rules limit the type of public to which information can be disclosed. [9] Providing public access to documents that form part of an anti-dumping investigative file would therefore violate anti-dumping rules which are based on international obligations.

12. It maintained that, even though the complainant had excluded submissions of interested parties from his request, the documents he requested would still have to be considered to contain commercially sensitive information.

13. The Commission held that anti-dumping investigations are procedurally similar to Commission investigations in the area of competition policy, for which the Court of Justice has recognised the existence of a general presumption of confidentiality based on the protection of commercial interests and the purpose of investigations. [10] It argued that providing access to



sensitive information could deter companies from cooperating in future anti-dumping investigations. Therefore, the fact that documents were older than five years did not rebut the general presumption of confidentiality. [11]

14. The **complainant** argued that the Commission's approach to requests for public access to documents in anti-dumping procedures is overly restrictive.

15. He argued that from the list of documents drawn up by the Commission, it seemed that the majority of the documents could be made accessible without breaching any confidentiality clause.

The Ombudsman's assessment after the proposal for a solution

16. While the Commission accepted the first part of the proposal for a solution, producing a list of the documents it had identified as falling within the scope of the complainant's request, the Ombudsman seriously regrets that the Commission retained its position with regard to the second part of her proposal and refuses to examine the documents it identified individually to determine whether they can be disclosed.

17. It is settled case law that it is not an obligation upon the Commission to apply a general presumption - it is an option. [12] The Commission could have made use of that option in this case by following the Ombudsman's solution proposal, thus delivering greater transparency.

18. However, the Commission's reply to the Ombudsman's proposal for a solution does not indicate any flexibility on this matter. The Ombudsman does not expect that further inquiries would lead the Commission to reconsider its position. She therefore considers it appropriate to close her inquiry at this stage setting out her findings.

19. The Ombudsman maintains her doubts that a general presumption of confidentiality was applicable in this case. She hopes the Court will clarify this issue when given the opportunity.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following finding:

The Ombudsman welcomes the Commission's decision to accept the first part of her solution proposal but seriously regrets the Commission's refusal to examine specifically and individually each of the requested documents with a view to disclosing them or explaining why they could not be disclosed.

The complainant and the European Commission will be informed of this decision .



Emily O'Reilly European Ombudsman

Strasbourg, 06/09/2021

[1] Under Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049> [Link]

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

[3] Judgment of 23 September 2020, Basaglia v Commission, T-727/19, paragraph 79.

[4] The Ombudsman's solution proposal is available at:

<https://www.ombudsman.europa.eu/en/solution/en/138837> [Link]

[5] Regulation (EC) 1049/2001.

[6] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union:

<http://data.europa.eu/eli/reg/2016/1036/2020-08-11> [Link].

[7] Article 19(5) of Regulation (EU) 2016/1036.

[8] Article 19(6) of Regulation (EU) 2016/1036.

[9] Article 6(3) of Regulation (EU) 2016/1036.

[10] Articles 4(2) first and third indent and 4(3) of Regulation (EC) 1049/2001.

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

[12] Judgment of 22 January 2020, Therapeutics International v EMA, C-175/18 P, paragraphs 60 - 61.