Reply of the European Commission to the proposal for a solution from the European Ombudsman
- Complaint by Mr [redacted], ref. 1379/2020

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

In 2009, the European Union imposed an anti-dumping duty on imports of iron or steel fasteners originating in China.[1] In 2011, the Dispute Settlement Body of the World Trade Organization ('WTO') found that certain aspects of this duty were 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.[2] The Chinese government continued to consider that this measure violated international trade rules. A WTO compliance panel and the WTO Appellate Body concluded in 2015 and 2016, respectively, that the EU had not acted in line with some international trade rules. In February 2016, the Commission repealed the anti-dumping duty.[3]

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

The Commission relied on a general presumption of confidentiality and refused disclosure of the requested documents. 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.

[1] An overview of this investigation is available at http://trade.ec.europa.eu/tdi/case_history.cfm?id=458&init=458.
[2] 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.
[3] 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.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

Dissatisfied with the Commission's confirmatory decision, the complainant turned to the Ombudsman.

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 Appellate Body Reports adopted by the Dispute Settlement Body of the WTO on 28 July 2011 and on 12 February 2016. He specified that the requests cover legal memoranda, notes, fiches and general documents related to the legislative phase linked to the adoption of such Regulations.

III. EUROPEAN OMBUDSMAN'S INQUIRY AND THE PROPOSAL FOR A SOLUTION

In the course of the inquiry, the European Ombudsman reviewed the requested documents and issued a proposal for a solution.

First, the Ombudsman proposes that the European Commission provides the complainant with a list of the documents identified as being the requested documents, including in particular each document's date, title and author.

Secondly, the Ombudsman questions the applicability of the general presumption of confidentiality used by the Commission to refuse access to documents, as well as the application of the exception related to the protection of commercial interests and the protection of the purpose of investigations. The Ombudsman proposes that the Commission examines specifically and individually each of the requested documents and considers in particular disclosing the general disclosure document dated 31 July 2012, the briefings to the senior management of the Directorate General for Trade as well as the documents relating to the inter-service consultation.

IV. THE REPLY OF THE EUROPEAN COMMISSION TO THE PROPOSAL FOR A SOLUTION OF THE EUROPEAN OMBUDSMAN

As a preliminary remark, the Commission acknowledges the fact that the complainant reduced the scope of all four of his requests only to the documents drawn up by the Commission as part of the anti-dumping administrative files, thus excluding the submissions from the third parties. Consequently, the Commission's reply to the Ombudsman proposal concerns the reduced, and not the original, scope of the documents (hereafter 'the requested documents').

The European Commission has examined in detail the proposal for a solution of the European Ombudsman.

Concerning the first proposal of the European Ombudsman related to the identification of the documents (points 16-20 of the solution proposal), the Commission has taken it into account and has drawn up a more detailed list of the requested documents. The list of documents can be found in the Annex of this document.

Concerning the second proposal of the European Ombudsman related to the applicability of the general presumption of confidentiality (points 21-36), the European Commission confirms the position it adopted in the confirmatory decision, namely that all documents contained in the Commission's anti-dumping administrative files, including the documents drawn by the Commission, are covered by the general presumption of confidentiality. The reasons for this position are set out hereafter, as well as clarifications why the availability of information and documents pertaining to trade defence investigations is strictly regulated depending on the status of the information and the documents in question.

With regard to the right to access to these documents, it should be noted that neither Regulation (EC) No 1049/2001 nor the basic anti-dumping Regulation[4] contain a provision expressly giving one regulation primacy over the other. Hence, it is necessary to ensure that each of the two regulations is applied in a manner which is compatible with the other and enables them to be applied consistently.

First, in relation to information provided to the Commission in confidence, Article 19(5) of the basic anti-dumping Regulation states that 'the Commission and Member States, including the officials of either, shall not reveal any information received pursuant to this Regulation for which confidential treatment has been requested by its supplier, without specific permission from that supplier. Exchanges of information between the Commission and Member States, *or any internal documents prepared by the authorities of the Union* or the Member States, shall not be divulged except as specifically provided for in this Regulation'(emphasis added).

The Commission draws the attention that the EU legislators specifically included 'internal documents prepared by the authorities of the Union' as documents requiring confidential treatment.

Second, in relation to any information obtained in the course of trade defence investigations, Article 19(6) of the basic anti-dumping Regulation provides that 'the information received pursuant to this Regulation shall be used only for the purpose for which it was requested'.

Lastly, Article 6(7) of the basic anti-dumping Regulation governs the conditions under which information collected by the Commission can be obtained by certain categories of operators. It states that 'the complainants, importers and exporters and their

[4] 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, OJ EU L 176, 30.6.2016.

representative associations, users and consumer organisations, which have made themselves known in accordance with Article 5(10), as well as the representatives of the exporting country, may, upon written request, inspect all information made available by any party to an investigation, as distinct from internal documents prepared by the authorities of the Union or its Member States, which is relevant to the presentation of their cases and not confidential within the meaning of Article 19, and is used in the investigation'.

The above provisions make it very clear that the European legislators wanted to restrict access to information collected and prepared in the context of trade defence investigations, including the internal documents drawn by the Commission, only to a limited category of operators clearly identified in the basic regulations, to the exclusion of other operators or individuals.

Anti-dumping investigations have strong procedural similarities with other types of Commission investigations in the area of competition policy, such as state aid[5] and proceedings under Article 101 of the Treaty on the Functioning of the EU[6], for which the Court of Justice has acknowledged the existence of a general presumption of confidentiality. Such a presumption allows the Commission to consider that the disclosure of certain categories of documents undermines, in principle, the interest protected by the exception which it is invoking, by relying on such general considerations, without being required to examine specifically and individually each of the documents requested.[7]

Similar to these types of investigations, in anti-dumping investigations, any decision of the European Commission has to be based on a complex assessment of facts collected during an investigation, to which Union and foreign economic operators who can demonstrate their interest in the case, as well as foreign states participate.

The Commission would like to restate its position that the documents requested are part of the administrative files of procedures governed by the basic anti-dumping Regulation.

Concerning the first indent of Article 4(2) of Regulation 1049/2001 (protection of commercial interests), the Ombudsman mentions that 'the requested documents are more than eight years old, and the antidumping measure to which they relate was repealed in February 2016, that is, over four years ago. The Ombudsman refers to the recent Basaglia judgment stating 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

[5] Judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 61, and judgment of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraph 36.
[6] Judgment of 28 February 2014, *European Commission* v *EnBW Energie Baden-Württenberg*, C-365/12 P, EU:C:2014:112, paragraphs 60 and following and the case law cited.
[7] Judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraph 56 and the case-law cited.

historical unless, exceptionally, it is shown that it still constitutes essential elements of the commercial position of the undertaking to which it relates.[8]

First, the Commission would like to remind that the confirmatory decision in question was adopted on 29 July 2020 while the Basaglia judgment was delivered on 23 September 2020. Therefore, the European Commission is of the view that the confirmatory decision was legally and factually correct at the point in time when it was adopted by the Commission.

Secondly, in the view of the Commission, the Basaglia judgment, including its conclusion that commercial information, in principle, is no longer sensitive after 5 years, does not apply to documents covered by the general presumption of confidentiality in state aid and antitrust cases.[9] In these cases, commercial information can be sensitive up to 30 years and possibly beyond.[10] As mentioned above, the Commission considers that here are strong procedural similarities between the anti-dumping investigations and state aid or merger investigations. Therefore, the European Commission is of the view that the Basaglia judgment cannot be transposed to the area of trade defence.

Even though the complainant excluded the submissions of the relevant interested parties from the scope of his request, the requested documents still contain commercially sensitive information which were received from the third parties in the course of the anti-dumping investigation.

Granting access to the documents in question would also be in violation of the basic anti-dumping Regulation. The basic anti-dumping Regulation sets out, inter alia, the procedures that the Commission and parties concerned must follow. The provisions relating to procedures also determine how the Commission deals with sensitive business information submitted by companies, concerning their business strategies, their turnover, price and cost data, and their business relations. Access to such documents which are part of those procedures would affect the protection of their commercial interests. The relevant provisions of the basic anti-dumping Regulation, notably its Articles 6(7), 19 and 20, do not provide for an expiry of the protection of confidentiality. Moreover, the concerned companies have a legitimate expectation, rooted in the aforementioned provisions, 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, even if the submission might date back a number of years.

Note that these provisions have their origins in the EU's international obligations, i.e. the WTO Anti-Dumping Agreement, which also requires the Union to not set any time limit to the protection of confidential information.

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[8] Judgment of 23 September 2020, *Basaglia* v *Commission*, T- 727/19, ECLI:EU:T:2020:446, paragraph 79 and the case-law cited.
[9] Judgment of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraphs 68-69.
[10] Idem., paragraph 67.

It should be added that the European Commission does not have any power to oblige an interested party to cooperate in an anti-dumping investigation and that there are no sanctions for not participating to an investigation. This means that, while the investigation is essential for the establishment of facts[11], cooperation to such investigation is purely voluntary, as the Court of Justice has confirmed: '… the fact remains that the Basic Regulation [now, Regulation (EU) 2016/1036] does not give the Commission any power of investigation allowing it to compel the producers or exporters complained of to participate in the investigation or to produce information. In those circumstances, the Commission depends on the voluntary cooperation of the parties in supplying the necessary information within the time-limits set.'[12]

In such circumstances, a strict guarantee that the information collected in the course of trade defence investigations will be handled as described in the basic anti-dumping regulation is even more important to induce the parties to provide data to the investigating authority.

As a final remark, the Commission would like to mention the judgment in Case C-404/10P. In that ruling the Court of Justice, referring to the applicability of the general presumption of confidentiality in merger cases, stated the following: 'having regard to the nature of the interests protected in the context of merger control proceedings, clearly the conclusion reached in the preceding paragraph of this judgment is correct irrespective of whether the request for access concerns a control procedure which is already closed or a pending procedure. The publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether a control procedure is pending. Furthermore, the prospect of such publication after a control procedure is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending.'[13]

The same was recognized for other similar investigations such as anti-trust investigations.[14]

In addition, please note that Article 339 of the Treaty on the Functioning of the EU also prohibits to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Concerning the exception laid out in the third indent of Article 4(2) (protection of the purpose of the investigations) of Regulation (EC) No 1049/2001, the Ombudsman mentions that 'this exception applies only where there is an on-going investigation or follow up is imminent. The Commission has not explained why, despite the fact that the

[11] Judgment of 25 October 2011, *Transnational Company 'Kazchrome' AO and ENRC Marketing AG* v *Council of the European Union*, T-192/08, EU:T:2011:619, paragraph 272.
[12] Judgment of 13 July 2006, *Shandong Reipu Biochemichals Co. Ltd* v *Council of the European Union*, T-413/03, EU:T:2006:211, paragraph 65.
[13] *Judgment of the Court of Justice of 28 June 2012, European Commission* v *Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393, paragraph 124.
[14] Judgment of the General Court of 7 October 2014, *Schenker AG* v *European Commission*, T-534/11, EU:T:2014:854, paragraphs 57-58.

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.'

The Commission maintains its position that the disclosure of the requested documents would undermine the purpose of anti-dumping procedures, despite the fact that the Commission implementing regulation (EU) No 2016/278 repealed the definitive anti-dumping duty imposed by Regulation (EC) No 91/2009.

This protection of the purpose of the investigation is inextricably linked with the protection of the commercial interests which, as explained above, continues to apply in this case. As explained above, the requested documents contain commercially sensitive information collected during the anti-dumping investigation.

By disclosing the requested documents, the Commission would run 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. The disclosure of the requested documents would jeopardise the Commission's authority, both vis-à-vis the industry and the Member States, and thus lead to a situation where the Commission would be unable to properly carry out its tasks of enforcing EU law and its international commitments by applying trade defence instruments in compliance with EU law and WTO rules. Consequently, the purpose of trade defence investigations and, implicitly, of the effective protection of the EU industry would be undermined.

Notwithstanding the above, disclosing the documents requested, notably legal memoranda, notes, fiches and general documents related to the legislative phase linked to the adoption of the relevant Regulations, would reveal the Commission's internal strategy and thinking at a point in time when the Regulations were not yet adopted. Even if this is linked to the implementation of specific investigations and the corresponding Regulations, this would allow interested parties to draw conclusions with respect to other investigations which consequently would be undermined.

IV. CONCLUSION

The European Commission considers that its confirmatory decision was fully in line with the applicable legislation and the relevant case-law on access to documents. A more detailed list of documents identified as falling under the reduced scope of the complainant's requests is attached to this document.

For the Commission
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