

Position Paper



FTA
Foreign Trade Association

Committed to free trade

Transparency in the EU Anti-Dumping system: Time to get serious

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TRANSPARENCY IN THE EU ANTI-DUMPING SYSTEM

TIME TO GET SERIOUS

Executive Summary

The FTA has for many years lobbied for greater transparency in the EU anti-dumping system and for independent verification of the data obtained by the Commission and the conclusions it reaches based upon said information. Now, particularly since the Lisbon Treaty has allowed a change in comitology with the effect that definitive decisions taken by Member States on anti-dumping proposals will move from a “simple majority” to a “qualified majority” voting system – essentially shifting the power from Member States to the Commission, the FTA believes that a serious change needs to be introduced to the EU anti-dumping system.

That change is the integration of the so-called “APO” (Administrative Protection Order) system that has been in place in the US for 30 years and gives parties that are involved in anti-dumping investigations full access to the information collected by, and conclusions drawn by, the Commission.

This Paper first examines the investigation process itself and shows the vast amount of data that may be involved when the Commission assesses whether anti-dumping measures should be imposed. It then illustrates how the overly strict confidentiality provisions significantly restrict the access that “interested parties” have to this data – thereby restricting the possibility for any independent verification of the conclusions drawn by the Commission.

Finally, it explains the APO system as it exists in the US and examines how, dealing with the arguments that have been raised in this regard, a similar system may be introduced in the EU.

It concludes that, whilst changes to the current legislation, and in addition new legislation, will undoubtedly have to be implemented, there is no significant reason why an APO system should not be introduced in the EU.

TRANSPARENCY IN THE EU ANTI-DUMPING¹ SYSTEM

TIME TO GET SERIOUS

Introduction

The FTA has for many years criticised the opaque nature of the EU anti-dumping system and the complete lack of any independent verification of the data obtained by the Commission and the conclusions it reaches based upon said information.

The introduction of the Lisbon Treaty has afforded the Commission the opportunity to propose a change in comitology to a number of areas of trade – essentially doing away with the “simple majority” voting system (one vote per Member State) to a qualified majority voting system (known as “QMV”) whereby Member States’ votes are weighted; e.g. 29 for France, Germany, Italy, UK; 13 for the Netherlands; 3 for Malta. Commission proposals are first considered by Member States in an Examination Committee. A positive opinion will result in the proposal being adopted. However, if they fail to deliver an opinion (either owing to abstentions or a “blocking minority” being achieved) and in addition a simple majority opposes, the proposal will be put to vote by Member States at an Appeal Committee. If this Committee also fails to deliver an opinion the Commission may still implement the proposal. The only way to prevent a proposal being adopted is for the Committee to deliver a negative opinion. Under QMV, this constitutes 255 votes².

Followers of the EU’s anti-dumping regime will immediately realise that such a feat will be essentially impossible and will hand the Commission carte blanche to impose any anti-dumping measure it wishes. Therefore, we believe that the time is now right for the Commission to get serious in its frequently spoken claim that it will improve its transparency and instead of focussing on areas such as an improved website, implement something far more substantial.

Before examining that issue directly, it is important to consider exactly what information the FTA wishes to access as a result of the improved transparency. To do that, one must consider the investigation process itself.

1. The request for an investigation

An investigation against imports that are allegedly being dumped and directly causing injury to the EU industry can be requested by any person, or association not having legal personality, acting on behalf of the Community industry. The Commission can also initiate an investigation on its own initiative.

Here, one must consider that Article 5(2) of the basic Regulation³ sets out quite specific criteria with which a complaint must comply before an anti-dumping investigation may proceed. At the most basic level there must be: evidence of dumping; evidence of injury; a causal link between the allegedly dumped imports and the alleged injury. To support this, the complaint should also include the following: the identity of the complainant; a description of the volume and value of the Community production of the like product by the complainant; a list of all known Community producers of the like product (or associations of Community producers of the like product)⁴; a description of the volume and value of Community production of the like product by such producers; a complete description of the allegedly dumped product; the names of the country(ies) of origin or export in question; the identity of each known exporter or foreign producer; a list of known persons importing the product in question; information on prices at which the product in question is sold on the domestic market; information on export prices (or prices at which the product is first resold to an independent buyer in the Community); information on changes in the volume of the allegedly dumped

¹ The points raised within this paper apply to both the EU Anti-Dumping and Anti-Subsidy systems. However, for simplicity, reference throughout is made to “anti-dumping” only.

² The simple majority system will continue to be used for the first 18 months following the implementation of the Regulation.

³ Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community – OJ [2009] L343/51

⁴ When the complaint is made on behalf of the Community industry.

imports; the effect of those imports on prices of the like product on the Community market and the consequent impact of the imports on the Community industry.

Retailers and importers (and their representative associations, such as the FTA) who wish to take part in an investigation must register as an “interested party”. This allows one to submit information, hold a hearing with the Commission and have access to the file upon which information relative to the investigation is held.

2. The investigation procedure

Once the Commission has examined a complaint and has established that it contains sufficient *prima facie* evidence, it will initiate an investigation with a view to establishing whether first provisional and then definitive (final) measures should be imposed. To reach such a conclusion it will require information.

It will, of course, already hold a great deal of information pertinent to the investigation in the form of the complaint. However, it will request other interested parties such as exporters, importers and EU producers not directly party to the complaint to provide further information. This normally takes the form of questionnaires comprising quite specific requests but interested parties may also file information in a non-standard format. In each case, a confidential and non-confidential version must be filed. Deadlines are tight – at most 40 days – which, considering that no warning of an investigation is given (the filing of a complaint is a confidential matter) until the initiation is published in the Official Journal, places a significant restriction on those interested parties wishing to protest.

As might be expected, the industry is required to cooperate fully with the Commission in its investigation, including so-called “verification visits” by Commission officials to assess whether the data it has supplied is true and accurate. The Commission also has the right to carry out similar visits to verify information received from any other interested party. In addition, it may also visit a third country (an analogue country) when the exporting country under investigation is a non-market economy.

2.1 Determination of dumping

Dumping is said to have occurred when the export price of a product is less than the “normal value” (at its simplest definition, the domestic market price). Therefore, the normal value, and the export price, must be calculated.

2.1.1 Normal value

When investigations are conducted against market economy countries, the following information is required to assess the normal value: the prices paid, in the ordinary course of trade, by independent consumers on the domestic market; the prices of other producers or traders; the constructed value. Establishing each of these requires very involved methods producing a significant amount of information.

When investigations are conducted against non-market economy countries (NMEs), the normal value of the product in the chosen analogue country is calculated⁵. This can be the domestic price, the export price or constructed value of the like product, or any other reasonable basis (including Community prices⁶). In addition, there may have to be adjustments to account for differences between the NME and analogue country in the conditions of sale or physical characteristics of the product⁷.

Finally, there are “special” NME regimes (such as China) where market economy conditions for individual exporters can exist. Provided that the company in question can meet the five stringent

⁵ The Commission is frequently criticised for choosing countries that many would claim are not analogous (the USA is a common choice) and frequently accepts that suggested in the complaint.

⁶ [e.g.] “*Mandarins originating in China* – Notice of initiation [2007/C246/08] – OJ C246/15

⁷ However, significant differences in the cost of raw materials are never adjusted.

requirements laid out in the basic Regulation⁸, normal value will be calculated in the same way as it would for a market economy country. Obtaining market economy treatment (“MET” as it is known) usually has a significant impact on the dumping margin and hence the final dumping duties and can often result in zero duties – a not insignificant matter for importers.

2.1.2 Export price

The determination of the export price is by no means a straightforward affair. Two methods are used (covered in Article 2(8) and 2(9) of the basic Regulation) to calculate either the price actually paid for the product when sold for export, or a constructed price (when there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party).

Whilst the first of these may seem simple to determine, complications can arise when, for example, a producer sells to an intermediary between the exporter and EU importer (and whether that company is in some way related to the producer) or sales made on an OEM basis.

To determine the constructed price, the Commission will either take the price at which the imported products are first resold to an independent buyer or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis. Adjustments for all costs, including duties and taxes, incurred between importation and resale, and for profits accruing must also be made.

2.2 Comparison between the normal value and export price

At its core, this is relatively straightforward and as seen under Article 2(10) merely requires that the comparison “...be made at the same level of trade and in respect of sales made at, as closely as possible, the same time and with due account taken of other differences which affect price comparability.” However, when this is not possible adjustments are required and Article 2(10) sets out ten different factors (with an eleventh allowing for “other factors”) being: physical characteristics; import charges and indirect taxes; discounts, rebates and quantities; level of trade; transport, insurance, handling, loading and ancillary costs; packing; credit; after-sales costs; commissions; currency conversions.

2.3 Dumping margin

Once the normal value and export price have been calculated, the dumping margin can then be calculated by dividing the difference between the two by the CIF export price (duty unpaid) at the EU border and converting into a percentage. In other words, if the normal value was calculated to be 70, the export price 40 and the CIF export price 50, the dumping margin would be 60%⁹. However, even this is not straightforward as when dumping margins vary a weighted average can be established and Article 2(11) sets out specific and involved rules for their use.

2.4 Injury

Four steps must be established to determine injury: the exact product scope in the complaint and whether the products listed and those manufactured by the Community are “like products”¹⁰; whether domestic producers of the like product are “Community Industry” (within the requirements set out under Article 4); whether the Community Industry is experiencing “material injury”; whether there is a causal link between the injury and the dumped imports.

⁸ Article 2(7)(c)

⁹ A dumping margin of less than 2% is considered *de minimis* and not susceptible of having caused injury.

¹⁰ Article 1(4): “a product which is identical, that is to say, alike in all respects, to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration.”

2.4.1 Product scope and like product

The product scope is important: too wide and the impact of the dumped imports will be reduced, making it easier to claim that no injury is taking place; too narrow and domestic producers will find it difficult to claim injury by similar, though not identical, dumped products. As for determining the product concerned, a whole host of factors are considered such as: essential physical, technical and chemical characteristics; main uses; degree of inter-changeability; channels of trade; raw materials; differences in production costs and prices. Similar discussions take place over the determination of like products but they are generally limited to its basic physical, chemical and/or technical characteristics and basic use.

2.4.2 Community industry

The definition of “Community industry” is a crucial element since no investigation can be opened if the production by the Community producers supporting a filed complaint represents less than 25% of total Community production. This may seem simple matter of accepting all producers located in the EU, however those related to the exporters or importers of the dumped product, and those that are importing the product – of which the determining criteria are numerous – can be rejected¹¹. In today’s increased use of out-sourcing this can raise complications.

2.4.3 Material injury

The basic Regulation does not give a definition of what should be considered “material” but Article 3(1) distinguishes actual injury and the threat of injury or material retardation of the establishment of the establishment of such an industry¹². Actual injury must be based on positive evidence and considers: the volume of dumped imports; the effects of those imports on Community prices; the consequent impact on the Community industry. The assessment is conducted over a “reference period” that normally covers three to five years before the investigation although only injury occurring during the period covered by the investigation (i.e. 12 months) is considered. A mere allegation that injury may occur is not sufficient to constitute a “threat” and Article 3(9) insist that any assessment be based on facts and that *“The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.”* It goes on to list four factors which can be used to determine this: a significant increase of dumped imports indicating the likelihood of substantially increased imports; sufficient freely disposable capacity of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the Community; whether prices of imports would significantly depress prices or prevent price increases and could increase demand for further imports; inventories of the product being investigated. However, it concludes by saying; *“No one of the factors listed above by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury will occur.”* This gives significant discretion to the Commission which in practice appears to be weighted toward finding injury.

2.4.4 Causal link

There are two tests to determine whether there is a causal link between the dumped imports and injury: a positive test and a negative test.

The positive test basically says that it must be proven that the dumped imports are causing injury¹³ by showing that the volume and/or price levels are responsible for an impact on the Community industry to a “material” degree. A number of issues are considered in the positive test

¹¹ In general, if they support the imposition of measures they are not rejected, whereas they are excluded if they oppose.

¹² The latter is never applied.

¹³ This would appear to be ostensibly automatic; to the best of our knowledge, upon finding dumping and injury the Commission has always found that the former is causing the latter.

such as: price sensitivity, previous anti-dumping cases and characteristics of the Community market.

The negative test basically ensures that any injury caused to the Community industry as a result of factors other than the dumped imports, is not attributed to those dumped imports¹⁴. Article 3(7) says these may include: the volume and prices of imports not sold at dumping prices; contraction in demand or changes in the patterns of consumption; restrictive trade practices of, and competition between, third country and Community producers; developments in technology; the export performance and productivity of the Community industry. The Commission also considers other factors such as exchange rate fluctuations.

2.5 Union interest¹⁵

Article 21(1) insists that the Commission must consider the various interests within the Community before anti-dumping measures may be imposed and that no measures should be imposed if it can be shown that it is not in the Union interest to do. However, since the interests of all the players in the Community (importers, retailers, consumers and the industry) are considered, not only is a wealth of information required but the interests of those requesting measures are considered – leading some to consider that the conclusion is inevitable¹⁶. The Commission reaches this decision based on the evidence submitted by interested parties via questionnaire responses, other submissions and by verification visits to exporters, importers and EU producers.

3.0 Imposing measures

Once all the evidence mentioned above is collected and assessed and all the calculations completed, the Commission will be left with the necessary data on which to base their decision to impose anti-dumping measures. This happens in two steps: firstly, within nine months provisional measures can be imposed; secondly, within the following six months and invariably for the maximum five years, definitive measures can be imposed.

At the provisional stage Member States are consulted at the Anti-Dumping Committee although their decision is not binding on the Commission; if a majority of Member States vote against duties, the Commission can still impose them¹⁷. At this stage, to all intents and purposes, the main bulk of the investigation has been completed and it is unusual for the definitive measures to vary more than marginally – although submissions and evidence are still accepted. At the definitive stage Member States are again consulted at the Anti-Dumping Committee, before a formal, binding vote is taken by the Member States at Council¹⁸. Voting, at the current moment, is taken by simple majority. However, in a system unique to anti-dumping, rather than a measure being adopted if a majority vote in favour, a measure can only be rejected if a majority vote against; this essentially means that abstentions count as votes in favour.

¹⁴ Rather than look at whether there is a link between injury and factors other than dumping, it would appear that the Commission focuses on non-attribution, i.e. whether the causal link is broken.

¹⁵ The more recognised term “Community interest” has changed since the introduction of the “Lisbon Treaty”; therefore, in this paper the new terminology is used.

¹⁶ Instances where the interests of Community consumers have won out are very rare, e.g. *Handbags* [Council Regulation (EC) 1567/97 – OJ [1997] L208/31] and *CD-Rs and DVD-Rs* [Commission Decision 2006/713/EC – OJ [2006] L293/7 and Commission Decision 2006/753/EC – OJ [2006] L305/15]. However, it is important to note that importers and retailers can have an impact (so long as they take part in an investigation an interested party – either individually or via their association) and there have been instances when either the analogue country was changed or duties lowered.

¹⁷ [e.g.] In *Leather Uppers* 3 voted in favour, 10 opposed, 12 abstained.

¹⁸ Other than very political cases (e.g. the expiry review on *Leather Uppers* [Council Regulation (EC) 1294/2009 – OJ [2009] L353/1]) in practice, the ADC vote is essentially “rubber stamped” by the Council and the ADC is where the decision is taken.

4.0 Confidentiality

As one can tell from the above, during an investigation a substantial amount of information is collected by the Commission before any measures are applied. One would be forgiven for thinking that, as interested parties (in particular retailers, importers and potentially consumers) are directly affected by the imposition of these measures, access to the evidence collected would be permitted – in order that one might adequately prosecute one’s case. Indeed, Article 6(?) of the basic Regulation permits interested parties to inspect “...all information made available by any party to an investigation...” However, there exists a significant impediment to this possibility in the form of the confidentiality provisions within Article 19(1), which reads:

“Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person supplying the information or upon a person from whom he has acquired the information) or which is provided on a confidential basis by parties to an investigation, shall, if good cause is shown, be treated as such by the authorities.”

This is obviously subjective and offers the opportunity for the complainant, and subsequently the Commission, to take an over-zealous approach and apply confidentiality to almost anything.

That said, there is an important condition contained within Article 19(2) which insists that says “Interested parties providing confidential information shall be required to furnish non-confidential summaries thereof.” In order to ensure that the information that remains once the confidential information has been removed is meaningful, the same article goes on to say “Those summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.” This, which directly copies the text of Article 6.5.1 of the WTO Anti-Dumping Agreement, was clarified by a WTO Panel which said “...the purpose of the non-confidential summaries...is to inform the interested parties so as to enable them to defend their interests”¹⁹.

It is, of course, in the EU industry’s best interest to allow other, opposing, interested parties access to as little information as possible and as such it will often file non-confidential complaints where substantial portions have been excised²⁰, often merely on the wishes of the complainant – a practice which has been strongly criticised by a recent WTO Panel²¹. This commonly covers areas such as the production volumes of the complainants²² but can even extend to protecting the names of the companies supporting the complaint requesting the anti-dumping investigation or review²³.

The removal of relevant information from a complaint to produce a non-confidential version makes the proper prosecution of an anti-dumping investigation by retailer and importer interested parties extremely difficult. After all, it is the complaint which forms the underlying basis for the investigation; for instance, to take the example given above, since Article 5(4) insists that no anti-dumping investigation can be initiated if the “standing” of the complainants (i.e. their production as a percentage of the overall Community production) is less than 25%, this is a crucial piece of information.

Requests to the Commission to take a firmer line on what should be considered confidential have fallen on deaf ears and although assurances that the quality of non-confidential complaints will improve have been forthcoming for some time, the results are lacking.

In addition, all information collected by the Commission with respect to normal value, export prices, dumping margins, (etc.) i.e. that collected on verification visits, is also confidential. No access to the files with respect to this information is permitted by interested parties. Once measures are imposed, this

¹⁹ *Argentina – Ceramic Tiles*: WTO document WT/DS189/R, 28/09/01

²⁰ e.g. *Ironing Boards originating in China and Ukraine* [Commission Regulation (EC) 1620/2006 – OJ [2006] L300/13] where 19 of the 25 annexes containing information relevant to the investigation were blank.

²¹ *EC – Iron and Steel Fasteners (China)*: WTO document WT/397/R, 03/12/2010, where the Panel found that the Commission had made no attempt to substantiate an EU producer’s claim that a non-confidential summary could not be provided.

²² e.g. *Ceramic Tiles* – ongoing investigation [Commission Notice 2010/C160/06 – OJ [2010] C160/20]

²³ c.f. *Certain footwear with uppers of leather originating in the People’s Republic of China and Vietnam* [Council Regulation 1472/2006 – OJ [2006] L275/1] and the subsequent expiry review: OJ [2008] C251/21

information is summarised in the Regulation imposing the duties, but there is no possibility of independent verification; one has to trust that the Commission has collected, interpreted and applied the information in an accurate and correct. This obviously results in concerns that innocent errors have occurred (as the WTO Panel in *EC – Salmon (Norway)* found)²⁴ and accusations of deliberate manipulations of data.

5.0 The Solution

The FTA believes that the only solution to this problem is a simple one and one that will not be solved merely by improving the non-confidential file. The Commission must get serious about its claims of improved transparency and permit full access to the files; that is, the confidential business information (CBI) submitted by the complainants and other interested parties, the information collected by the Commission in order to assess whether dumping, injury and a causal link is present, and whether it is in the interest of the Community to impose measures, and the calculations made to determine such.

In the US, such a system has been in place in its anti-dumping legislation for 30 years. This is the administrative protective order (aka “APO”).

5.1 The APO system in the US

The APO system that is part of its trade defence legislation provides that:

“[T]he administering authority or the Commission shall make all business proprietary information²⁵ presented to, or obtained by it, during a proceeding...available to interested parties who are parties to the proceeding...regardless of when the information is submitted during a proceeding.”²⁶

This does not give access to any person – nor are we advocating for that here – but only to “authorised applicants”. An application to exercise one’s rights under the APO is required and this is subject to a deadline. There are also rules governing how one may obtain the information and exemptions as to what may be disclosed. Finally there are sanctions for any breaches.

At the start of an investigation the Director of the APO/Dockets Unit within the US Dept. of Commerce’s International Trade Administration, and the Secretary to the US International Trade Commission²⁷ sign and issue APO’s for the relevant investigation. This includes the obligations placed on authorised persons to whom an APO is granted such as: non-disclosure (including to the interested party they represent), relevant use, proper storage and reporting of abuse. It also contains the sanction that may be imposed for violations of the APO.

5.1.1 Authorised persons

Only an authorised person can be granted an APO. For the ITA, these are generally lawyers, economists or trade specialists representing the interested party. For the ITC, these are: a lawyer; a consultant or expert under the control of a lawyer representing an interested party; a consultant or expert who appears regularly before the Commission (to be decided on a case-by-case basis) representing the interested party. The person in question must not be involved in competitive decision making for that interested party.

5.1.2 Application

Any authorised applicant wishing to access information under an APO must file an official request. This must contain: (i) a statement, made under oath, confirming authorised applicant status, (ii) a request for the information and an agreement to be bound by the provisions of the APO, and (iii) an acknowledgement that any breach of the APO could result in sanctions. For the ITA, there is no

²⁴ WTO document: WT/DS337/R, 16/11/2007

²⁵ The terms “business proprietary information” and “confidential business information” are interchangeable.

²⁶ Section 777(c)(1)(A) of the Tariff Act 1930 [19 U.S.C. § 1677f]

²⁷ Unlike the EU, where all aspects of an investigation are covered by the Commission, in the US the ITA of the Dept. of Commerce investigates whether dumping has occurred, whereas the independent ITC (in parallel) establishes injury.

deadline (although applicants typically file as soon as possible). For the ITC, the application must be filed within seven days of the initiation of the investigation.

The names of all successful applicants will appear on the APO service list. Each time an interested party files CBI with the authorities it must also serve the same information to those on the APO service list. To prove this step has been completed, it must file “certificate of service” to the authorities. Failure to do so will result in sanctions. In addition, those on that list have the right to obtain CBI obtained by the Commission within Commission reports and questionnaire replies by non-interested parties. This is normally achieved via periodical APO releases by the Commission.

5.1.3 Exemptions

There are exemptions to the above disclosure but these are (rightly so) restrictive such as: material covered by lawyer/client privilege, material covered by a national security classification of “Secret” or “Confidential” and other non-specific material such as trade secrets (e.g. secret formulas). Under the US system, exemptions of the latter type are very rare.

5.1.4 Sanctions

Of course, the above system could not work unless sanctions were imposed for violations of the APO. Under the ITC these are: disbarment from practice in any capacity before the Commission (including that person’s partners, associates, employer and employees) for up to seven years; referral to the US Attorney; referral to the ethical panel of the respective professional association; other sanctions such as denial of access to CBI in any future investigations, or a warning letter (either public or private). Similar sanctions exist with the ITA which include civil penalties up to a maximum \$100,000 for each violation (with each day of the continued violation representing a separate violation).

With such severe sanctions, violations are very rare and are usually minor and due to clerical error.

5.2 Implementing an APO system in the EU

Of course, there is only one EU authority that administers an anti-dumping investigation (the EU Commission) and so in some respects the system would be less complicated. For example, the responsibility for issuing APOs that in the US falls under the remit of the Director of the APO/Dockets Unit of the ITA and the Secretary of the ITC would simply fall under the responsibility of the Director to the EU Commission’s Trade Defence Directorate.

In fact, there need be little real difference between an EU system and that used in the US. The requirements concerning non-disclosure, relevant use, proper storage, and reporting of abuse would remain unchanged. Applicants would still need to confirm under oath their authorised applicant status, be bound by the provisions of the APO and acknowledge the possibility of sanctions for any violations. The exemptions to disclosure could also be the same. Finally, the sanctions could be very similar, i.e. disbarment for the offender *et al* from practising before the Commission, non-access to CBI in future cases, punitive civil penalties, etc.

As to who may be regarded as an authorised person with access to CBI, once again there need be no real difference to the US system – in any case, it is most likely that lawyers will be by far the heaviest users. However, we would envisage that “trade specialists” and “experts” working for a trade association representing the interested party would also be accepted. Since the same non-disclosure (etc.) requirements would apply, together sanctions for violations, this should be possible.

Concerning how interested parties obtain CBI, it would seem unlikely that the Commission would have the resources to distribute all CBI submissions to all individuals on the APO service list. To that effect, here also the US system could be used whereby all parties submitting CBI to the Commission would submit the same information to the parties on the APO service list. The exception to this rule would be information received by the Commission from non-interested parties and that collected by the Commission itself.

5.3 Objections

There seem to be three main objections to the implementation of an APO system in the EU – all of which have been voiced by the Commission.

5.3.1 Distribution of CBI

There are fears that once the CBI of a company has been obtained it may be leaked to a competitor. However, with proper sanctions in place this would be highly unlikely. It does not happen in the US and so would not happen in the EU; after all, no lawyer would risk disbarment (along with all members of his/her firm), nor is it likely that non-lawyers would risk the severe financial punishment that would result from such an offence.

Therefore, we do not believe this is a valid argument.

5.3.2 Increased cost

It is true that taking full advantage of the APO system during the course of an anti-dumping investigation would prove more expensive than taking part in an investigation under the current EU system. It is likely that interested parties would require the services of external (legal) APO representatives and the time taken to examine the wealth of CBI filed during an investigation could incur increased fees. This concern is particularly directed towards SME importers and retailers for whom such action would likely be prohibitively expensive.

However, those interested parties who are unable to utilise the APO system would not be in a worse position than they are under the current system as there would still be a non-confidential file to which they will have access. In addition, SMEs could fund such an exercise collectively, either via an association to which they belong (as do most SMEs) or independently. Of course, such companies will also be able to advantage of larger companies using the system²⁸, and by the overall benefits that would result from such a system such as independent scrutiny of the Commission’s calculations.

Therefore, whilst we agree that costs will rise, we do not believe that SMEs will be disadvantaged.

5.3.3 Enforcement of sanctions

This has been raised as the biggest stumbling block to the introduction of an EU APO system and is one that was discussed in some depth during the late 1980s. In essence, in order to implement an EU Regulation whereby a “European Bar Association” could impose sanctions for APO violations on any lawyer in Europe, the agreement not simply of the national bar of each Member State but of the individual bars within each Member State would be necessary. At the time this was last discussed (when the EU consisted of 12, not 27 countries) it was considered to be impossible.

However, we see two rebuttals to this line of thinking. Firstly, the system could be implemented on a voluntary basis; that is, the various bars could voluntarily sign up to be bound by the conditions within the APO system and thereby the sanctions for any violations. Secondly, we question whether the agreement mentioned above would prove so difficult to achieve since, as mentioned above, an APO system could potentially increase the workload of lawyers and hence their revenue. Such a move is likely to be seen positively the bars to which these lawyers belong.

More importantly, we question the need for any “EU Bar” in this matter at all. Of course, in matters relating to disbarment or national bar disciplinary actions, one would be needed. However, for the remaining sanctions imposed on individuals violating the APO, e.g. being banned from acting before the Commission or being subjected to financial penalties, a simple EU Directive would suffice. This would apply to both consultants/experts and lawyers alike.

Therefore, whilst we accept that this last argument is valid, we do not agree that an EU APO should be rejected without first examining fully the points described above.

²⁸ In most investigations, the Commission will ask a “sample” of exporters, importers, users and EU producers to provide information. These are usually the larger in their sector and therefore more easily able to afford legal counsel.

6.0 Conclusion

There is no good reason why the EU should not implement an APO system to its anti-dumping and anti-subsidy legislation. All parties would benefit: exporters, importers, retailers, users and the EU industry would be able to verify that the information provided to and collected by the Commission was assessed accurately and imposed correctly. Indeed, calls for greater transparency *per se* have come from all those parties. In addition, the Commission would be freed from any concerns regarding errors and exonerated from any accusations of impropriety. This is surely something that it would welcome.

The FTA has raised this issue in the past and the Commission, along with certain parts of the EU industry, have expressed concerns whether an EU system could be implemented. However, we have yet to see any concerted effort at addressing these concerns, which from the above analysis do not seem to be insurmountable.

The FTA believes that the time has come for the Commission to get serious about its commitment to transparency. Genuine transparency can only be achieved through an APO-type system to ensure that the assessment of information and calculations that are currently conducted behind the Commission's closed doors will be reviewed independently and transparently.

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