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ACHIEVING TRANSPARENCY IN THE EU'S ANTI-DUMPING REGIME

SYNOPSIS

The EU's anti-dumping and anti-subsidy system is often criticised for being non-transparent. Unlike the US which uses the Administrative Protective Order to permit access to the data collected throughout investigations, the EU system only permits access to a non-confidential file which is lacking in sufficient detail to adequately prosecute a case. This paper introduces the complexities of anti-dumping/subsidy investigations under the EU system and the problems posed by the lack of access to the information on the file, and explores the possibility for the introduction of APO to the EU system.

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| DATA IN INVESTIGATIONS IS COMPREHENSIVE | An extensive amount of data is collected by the EU Commission during anti-dumping and anti-subsidy investigations. The type of data and the calculations made using that data to establish whether measures are necessary are complex and involved. |
| ACCESS TO DATA IS LACKING | The EU Commission imposes a strict level of confidentiality on the data collected. Access is only granted to the non-confidential file which contains indexed data or has data removed. This makes adequate verification of data collected and decisions taken practically impossible. |
| MISTAKES AND IRREGULARITIES | There have been proven instances of mistakes and manipulation of data that have affected the decisions taken to impose measures. |
| APO SYSTEM IN US | Has been in place for 35 years and permits authorised persons access to all data. Sanctions are imposed for violations to protect confidentiality. |
| APO SYSTEM IN EU | The US system could, and should, be transposed to the EU. |
| OBJECTIONS ARE NOT VALID | Proper sanctions will prevent distribution of confidential information (as with the US) and can be imposed. Costs can be limited. |

INTRODUCTION

The EU's anti-dumping system¹ does not permit the independent scrutiny of certain data collected by the EU Commission during anti-dumping investigations. What data is available for scrutiny is lacking in sufficient detail for those parties who will ultimately be affected by any eventual measures, such as EU retailers, importers, distributors and brand-names, to verify that the justification for such measures is fair and accurate.

The FTA believes that this needs to change – particularly in light of recent changes to the level of influence Member States have in taking the ultimate decision to impose measures.

The US operates a system that permits authorised persons access to confidential information collected during the course of anti-dumping investigation under its Administrative Protective Order or 'APO'. This level of transparency has existed for thirty five years and works well. The FTA believes that a similar system should be introduced to the EU and within this paper details the basic EU investigation system and its failings with respect to data access, explores why and how an APO system could be implemented in the EU and considers the arguments that have been raised in opposition.

¹ Throughout this paper reference is made to "anti-dumping" for reasons of expediency only; for the main part, the same arguments may be applied to anti-subsidy investigations and measures.

1.0 ANTI-DUMPING INVESTIGATIONS IN THE EU

An anti-dumping investigation is a complex process that takes place over fifteen months during which time a significant amount of data – upon which the decision to impose anti-dumping measures, and the level of those measures, relies – is collected. This section details the stages involved and the information collected².

1.1 REQUEST FOR AN INVESTIGATION

A request for an anti-dumping investigation is normally made by an association representing EU manufacturers or, on occasion, the manufacturers themselves (aka “the complainant”). The Commission can also initiate an investigation on its own initiative.

Article 5(2) of the basic Regulation³ says this complaint must include evidence of dumping, injury (to the industry⁴), and a causal link between the two. This must be supported by: the identity of the complainant; a list of all known Community producers of the like product; a description of the volume and value of the Community production of the like product by the complainant and other producers; the name of the country(ies) of origin or export in question and the identity of known exporters or producers; information concerning the allegedly dumped product such as its description, domestic and export prices, changes in import volumes and name of importing companies known to be importing the product; and the effect of the imports on the industry.

1.2 THE INVESTIGATION

After deciding that the complaint shows sufficient *prima facie* evidence, the Commission will initiate an investigation to validate the claims within the complaint. This is achieved through requesting information from interested parties such as exporters, importers and EU producers and by conducting ‘verification visits’ at the premises of those parties. The intent of this information gathering exercise is to determine whether there is dumping and whether that dumping is directly injuring the EU industry.

1.2.1 DUMPING

This is defined as when export price of a product is less than the ‘normal value’ (at its simplest definition, the domestic market price). To assess the normal value requires: the prices paid, in the ordinary course of trade, by independent consumers on the domestic market; the prices of other producers or traders; and the constructed value⁵. The export price is calculated either by using the price actually paid for the product when sold for export – which can be complicated when, for example, the producer sells to an intermediary between the exporter and EU importer – or a constructed price which may be the price the products are sold to an independent buyer. These costs are also adjusted to take account of duties and taxes incurred between importation and resale, and for profits.

A comparison will then be made between the normal value and the export price that is, with respect to Article 2(19) of the basic Regulation, “...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, often this is not possible and so adjustments are made covering factors such as physical characteristics, import charges and indirect taxes, credit, after-sales costs and currency conversions.

Finally, the dumping margin is calculated by dividing the difference between the normal value and export price by the CIF export price (duty unpaid) at the EU border, given as a percentage.

² An explanation of an anti-subsidy investigation (where the presence of subsidies, in place of dumping *per se*, is assessed) has not been included for reasons of brevity. However, it can be taken as read that these are equally complex, if not more so.

³ Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community – as amended by Regulations Nos. 756/2012, 1168/2012 and 37/2014.

⁴ Reference throughout this paper is made to “industry”; the recognised term for the EU manufacturers.

⁵ For non-market economy countries the normal value in a third country market economy is used (with suitable adjustments) subsequent to verification visits. In special NMEs such as China, individual producers can show they operate under market economy conditions and be treated accordingly.

1.2.2 INJURY

To determine injury the Commission must establish that the products to be investigated and those manufactured by the Community are 'like products'⁶, that the investigation is supported by a sufficiently high representation of the EU industry, and that it is experiencing 'material injury' as a direct result of the dumped imports.

In determining the product concerned, a number of factors are considered such as the essential physical, technical and chemical characteristics, the main uses and the degree of inter-changeability. The definition of "Community industry" is crucial 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.

Article 3(1) of the basic Regulation distinguishes between actual injury and the threat of injury. Actual injury must be based on positive evidence concerning the volume of dumped imports, the effects of those imports on Community prices, and the consequent impact on the Community industry. A three to five year period prior to the investigation is examined, although only injury that occurred during the final year is considered. Article 3(9) of the basic Regulation defines a threat of injury as a "...change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent." and lists four factors to determine this. However, it also says; "No one of the factors listed above by itself can necessarily give decisive guidance..." and so the Commission does have significant discretion in this regard.

1.2.3 CAUSAL LINK

To determine a causal link between the dumped imports and injury the Commission must show 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 such as: price sensitivity, previous anti-dumping cases and characteristics of the Community market. The Commission must also ensure that any injury caused to the Community industry as a result of other factors, is not attributed to the dumped imports (e.g. volume and prices of imports not sold at dumping prices, contraction in demand, export performance, and productivity of the Community industry⁷).

1.2.4 UNION INTEREST

Finally, based on submitted evidence and verification visits, the Commission must consider the interests of EU importers, retailers, consumers and industry so that no measures are imposed if it is not in the Union interest to do so. However, since this includes consideration of the industry requesting measures it is generally considered to be a forgone conclusion⁸.

2.0 MEASURES

Measures normally take the form of ad valorem duties and are introduced, within nine months, as provisional duties (for which importers issue a guarantee), and within fifteen months as definitive duties which are normally imposed for the maximum five year period. After provisional duties, although most of the data has been collected, the investigation continues – although there is rarely a significant change to the definitive measures.

⁶ 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."

⁷ However, it would appear that the Commission focuses on non-attribution, i.e. whether the causal link is broken.

⁸ 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).

Member States take the ultimate decision to impose measures. However, as a result of the 'Comitology Regulation'⁹ – reflecting the increased delegated powers brought by the 'Lisbon Treaty' – and the relevant amendment to the basic Regulation¹⁰, their influence has diminished. As a first step an Examination Committee will consider and vote on a proposal. A positive vote will result in measures, failure to reach a decision or a negative vote will result in the proposal being submitted (potentially with amendments) to an Appeal Committee. This Committee may also suggest amendments but the time to do so will be limited. A positive vote or failure to reach a decision will result in the measures being adopted. Critically, and unique to anti-dumping, a negative vote is required to prevent measures¹¹ making duties an almost certainty.

3.0 THE NEED FOR IMPROVEMENT

As is evident from the above, a significant amount of data is collected by the services of the EU Commission in order for it to decide whether anti-dumping measures should be applied. In addition, those services have a significant amount of discretion when it comes to the nature, and assessment, of that data.

3.1 CONFIDENTIALITY

It is therefore frustrating to realise that neither the data collected nor (for all practical purposes) the decisions based thereon are open to independent scrutiny as a result of the Commission's (over)reliance on Article 19(1) of the basic Regulation "*Any information which is by nature confidential...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.*" To counterbalance this, there is the provision under Article 19(2) that says non-confidential summaries of information must be provided – information that is stored on the 'open file' to which interested parties have access. If this 'open file' were to comply with Article 19(2) of the basic Regulation (which reflects the text of Article 6.5.1 of the WTO Anti-Dumping Agreement) insofar that these summaries were "*...in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.*" then the need for a solution would be reduced. However, data is invariably represented in an indexed form or, more often than not, simply withheld on the wishes of the complainant – a practice which has been strongly criticised by a WTO Panel¹² – and so these summaries are far from ideal. Admittedly, 'reasonable understanding' is (typically) vague however, the WTO Panel in *Argentina – Ceramic Tiles*¹³ said that the purpose of these summaries was "*...to inform interested parties so as to enable them to defend their interests.*" The FTA does not see how the EU Commission's normal practice in this regard is in line with that clarification.

3.2 MISTAKES AND MANIPULATION OF DATA

If one could trust the EU Commission to conduct all investigations in an accurate and fair way, the problem described above would be lessened. Unfortunately, experience shows it cannot be relied upon to do this. Equally unfortunate is the fact that this experience is difficult to prove since the only way to do so is by relying upon cases that have been argued before the EU Courts or at WTO Panels – which occur relatively infrequently. The problem is exacerbated by the fact that EU Courts are unable to review data and calculations based thereon when the data in question is confidential – a failing that the solution proposed within this paper would address since confidential material would then be presentable to the Court.

⁹ Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

¹⁰ Regulation (EU) No. 37/2014

¹¹ As from 1 November 2014 the so-called 'double majority' voting system is used; normally, at least four Member States representing at least 35% of EU population is sufficient to block a proposal whereas a minimum of 55% of Member States who *also* represent at least 65% of total EU population being required to allow legislation to pass. However, in anti-dumping the latter is required to block.

¹² *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.

¹³ WTO document WT/DS189/R, 28/09/01

However, innocent mistakes do happen and do so frequently¹⁴. There have also been many accusations of intentional manipulation of data. While these are normally impossible to prove it is interesting to look at *Dow Chemicals*,¹⁵ where the judge said “it is apparent...that the way in which the spare production capacity in the United States was calculated is dubious, even inconsistent in relation to evidence relied on in the present case.” and went on to note several other similar inconsistencies in the investigation that alluded to “dubious calculations” but stopped short of using such explicit language.

3.3 ADMINISTRATIVE IRREGULARITIES

There is also the question of whether the Commission oversteps its boundaries in the broad discretion it enjoys when implementing the basic Regulation. For example, Article 20(5) says “Representations made after final disclosure [the proposal to impose/not impose measures] is given shall be taken into consideration only if received within a period to be set by the Commission in each case, **which shall be at least 10 [calendar] days**, due consideration being given to the urgency of the matter. A shorter period may be set whenever an additional final disclosure has to be made¹⁶” (emphasis added). However, the minimum period of ten days is, other than in very exceptional instances¹⁷, the only period that is set leaving interested parties little time to react. In addition, disclosure documents are frequently sent out on a Friday afternoon – effectively cutting the response period by two days.

Furthermore, there have been occasions when final proposals have been sent to Member States either within a day or two from the date responses from interested parties are received (provoking accusations that due consideration was not given to those responses) or even before the expiration of this ten day period (i.e. before responses have been received) – a practice which has earned the criticism of the Court and annulment of regulations¹⁸. Access to information via APO would reduce the deleterious effects of such practices. There have been other questionable instances¹⁹ when use of APO (if it were available) may have done likewise.

4.0 THE SOLUTION

It is therefore clear that a system of greater transparency is needed within the EU system to prevent that anti-dumping measures are imposed based upon mistakes and/or dubious methods. Such a system would also enhance the credibility of the EU system and those that administer it. The FTA is of the opinion that such a system already exists; the Administrative Protective Order (or ‘APO’) that has been used in the US for more than 35 years. Both the International Trade Administration of the Department of Commerce (DOC) which investigates dumping, and the International Trade Commission (ITC) which investigates injury, use the system. Both entities, just as the EU Commission, collect extensive and sensitive information during investigations to establish whether anti-dumping measures should be applied. Where the US differs from the EU is in the level of access to that information.

¹⁴ See for example Panel Report *EC – Salmon (Norway)*, WT/DS337/R, 16/11/2007

¹⁵ *The Dow Chemical Company v Council of the European Union* (T-158/10) para. 54

¹⁶ The final sentence was added on 20.02.2014 via amending Regulation 37/2014 following changes owing to comitology

¹⁷ For example: *R459 - Expiry Review on the anti-dumping measures applicable to imports of certain footwear originating in the People’s Republic of China and Vietnam*, where a 22 days period was granted.

¹⁸ See *Foshan Shunde Yongjian Housewares & Hardware v Council* (C-141/08)

¹⁹ For example: *AD586 - Ceramic tableware and kitchenware from China*, where the disclosure documents on the final proposal were faxed (incidentally, to an incorrect number) rather than Emailed to the lawyers representing the Chinese industry the evening before a hearing scheduled to discuss the points raised in the provisional regulation. Also *AD568 – Oxalic Acid from China and India*, where disclosure documents were Emailed to the lawyer representing the Chinese industry using an incorrect Email address (which went uncorrected) – the documentation was received four days later (having been posted on a Friday). See *Yuanping Changyuan Chemicals Co. Ltd v Council of the European Union* (T-310/12) paras. 41 and 42.

4.1 THE US APO SYSTEM

A Senate Report from 1979²⁰ recognised that for petitioners in anti-dumping investigations “...their ability to obtain relief has been impaired by its lack of access to the information presented by the exporters and foreign manufacturers.” and additionally that importers, exporters and other respondents have complained of “...lack of access to information supplied by the domestic parties to such cases...”. As a consequence, the Tariff Act 1930 was amended to permit the release of certain confidential information, under a protective order enforced with appropriate sanctions.

4.1.1 TYPE OF INFORMATION

The principle of the APO system, and the major difference it has over that exercised in the EU, can be seen in the following provision: “The administering authority or the Commission shall make all business proprietary information [BPI] presented to, or obtained by it, during a proceeding (except privileged information, classified information and specific information of a type for which there is a clear and compelling need to withhold from disclosure) available to interested parties who are parties to the proceeding...regardless of when the information is submitted during a proceeding.”²¹

With respect to the DOC, the substantial majority of BPI is submitted within [single brackets] and may be disclosed. However, as noted, not all information can be released. ‘Privileged information’ includes that covered by lawyer/client privilege, ‘classified information’ is covered by national security classifications such as ‘secret’ or ‘confidential’, whereas the final category can include trade secrets and is “...expected to be used rarely, in situations in which substantial and irreparable financial or physical harm may result from disclosure.”²² This BPI is distinguished from the rest through submission within [[double brackets]]. Similar to the EU system, in addition to this, a ‘public version’ of the BPI information must also be submitted that must be “...in sufficient detail to permit a reasonable understanding of the substance of the information.” with numerical data presented in an indexed form or within 10% of the actual figure²³.

ITC rules follow substantially the same lines and permit the disclosure of BPI which it defines as “...information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission’s ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.”²⁴ Similar to the DOC, certain BPI may not be disclosed such as privileged information, classified information and information such as trade secrets²⁵ – though this differs from the DOC in that it is submitted in [[[triple brackets]]].

4.1.2 ACCESS TO INFORMATION

Access to BPI is only permitted to authorised persons who have signed an APO. For the DOC usually these are a representative (which may include non-lawyers) of an interested party²⁶. For the ITC those authorised persons may be: a lawyer who is acting on behalf of an interested party to an investigation; a consultant or expert under the control of that lawyer; a consultant or expert who appears regularly before the

²⁰ Senate Report No. 96-249, 17 July 1979 (page 100)

²¹ Section 777(c)(1)(A) of the Tariff Act 1930 (19 U.S.C. § 1677f)

²² H.R. Conference Report No. 100-576, 100th Congress, 2d Session, 20 April 1988 (page 623)

²³ 19 C.F.R. § 351.304(c)(1)

²⁴ 19 C.F.R. § 201.6(a)(1)

²⁵ 19 C.F.R. § 201.6(a)(2)

²⁶ As defined under 19 C.F.R § 351.102(b)(29) and essentially the same as that in the EU.

Commission (to be decided on a case-by-case basis) representing the interested party; a representative of an interested party (if not represented by a lawyer). In addition, the person in question must not be involved in competitive decision making for that interested party.²⁷

To obtain access to BPI under APO, the ITC requires that a three-part application be filed. This consists of: (i) a statement under oath that the application is an authorised applicant, (ii) a request for disclosure of BPI and an agreement that the applicant is bound by the APO, (iii) an acknowledgment by the applicant that any breach of the APO may result in sanctions. The application must be made within seven days of the initiation of the investigation. The DOC requirements are essentially the same.

The applicant must also make a sworn statement agreeing: not to divulge BPI to any unauthorised person; to use such information solely for the purposes of the investigation; not to consult with any unauthorised person without the written consent of the ITC Secretary and the lawyer or party from whom such BPI was obtained; that any material storing BPI are securely stored when not in use; that information is submitted accurately and any changes notified promptly; and to report and confirm promptly in writing any breach of an APO²⁸. Finally, at a subsequent date, the applicant will be expected to return or destroy all copies of BPI with a sworn statement that all copies have been returned or destroyed and that no copies have been passed to non-authorised persons²⁹. Similar requirements apply for the DOC.

All applicants who have been approved/authorised will appear on the APO service list. Each time an interested party files BPI 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 BPI not served by interested parties such as Commission reports and questionnaire replies by non-interested parties. This is normally achieved via periodical APO releases by the Commission.

4.1.3 SANCTIONS

The APO system is something that the authorities take very seriously. Consequently, serious sanctions can be imposed against any breach of an APO. For the DOC and the ITC these are broadly similar: (i) being barred from appearing before the Commission in any capacity for up to seven years (a sanction that is also extended to the offender's partners, associates, employer and employees); (ii) referral to the US Attorney; (iii) referral to the appropriate ethics panel of the profession in question; (iv) actions such as denying the offender access to BPI in the current or future investigations, or a private or public letter of reprimand; and (v) actions such as a warning letter³⁰.

If the DOC believes an APO violation has occurred it will issue a letter informing the person in question accordingly and offering a right of reply – including a hearing. Interim sanctions, before any final decision is taken may be imposed (such as barring the person further access to BPI, from representing a person before the DOC or appearing himself before the DOC, and returning BPI) which the person in question has the right to oppose. The initial decision is issued to the APO Sanction Board with copies sent to the parties in question who have the right to reply within 30 days. Within 30 days subsequent to that deadline the final decision is issued. This may be published in the Federal Register and provided to the ethics panel or disciplinary body of the appropriate bar or other professional associations and to any Federal agency likely to have an interest in the matter³¹. The procedure under the ITC is similar: first a letter warning the person in question that a breach may have occurred, with the right of reply; then a letter stating a breach has occurred, with the right of reply limited to one claiming mitigating circumstances; and finally a determination of the sanction, if any, to impose. These are published in the Federal Register.

²⁷ 19 C.F.R. § 207.7(a)(3)

²⁸ 19 C.F.R. § 207.7(b)

²⁹ 19 C.F.R. § 207.7(c)

³⁰ 19 C.F.R. § 354.3 and 19 C.F.R. § 207.7(d)

³¹ 19 C.F.R. § 354.7 – 354.18

4.2 IMPLEMENTING APO IN THE EU

The FTA believes that there need be little difference between the way in which the APO system of the US is operated and the way in which it should operate in the EU. Indeed, considering the success of the US system, it would seem imprudent to do otherwise.

The responsibility for issuing APOs in the EU would be the responsibility of the Director to the EU Commission's Trade Defence Directorate. 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 BPI in future cases, etc. – together with publication of the offence in the EU's Official Journal.

It would also be important to retain the same criteria concerning eligible 'authorised persons' having access to BPI. Although these are certain to consist predominately of lawyers, here the FTA would consider that consultants and 'trade specialists' working for a trade association representing the interested party should also be accepted – as is permitted under the US system. Since the same non-disclosure (etc.) requirements would apply, together with sanctions for violations, this should be possible. It goes without saying that such individuals and their respective employers would need to ensure correct and secure storage of BPI.

As regards how authorised persons would obtain BPI it is unlikely that the Commission would have the resources to distribute all BPI submissions to all individuals on the APO service list. To that effect, here also the US system could be followed whereby all parties submitting BPI to the Commission would submit the same information to the parties on the APO service list. The exception to this rule, as in the US, would be information received by the Commission from non-interested parties and that collected by the Commission itself.

4.3 OBJECTIONS TO AN EU APO

The idea of utilising an APO system in the EU has been put forward before (by the FTA and others) and has been rejected by the EU Commission and opposed by certain sections of the EU industry. It is perhaps not too surprising that the latter would object since there is a perception (accurate or otherwise) that the lack of transparency and the broad degree of discretion afforded by the basic Regulation to the Commission³² allows for occasions when anti-dumping measures may be imposed *per se*, or at levels higher than they would otherwise be – two outcomes that are desirable to those parties. However, particularly if a proposal has met with opposition from Member States at an earlier stage of the investigation, there are also suspicions that investigations are terminated, or duties lowered, under dubious circumstances. For this reason EU industry should also consider APO to be a worthy addition to the EU system.

That the former would reject the suggestion is at the very least suspicious; if one conducts investigations in an accurate and honest manner why should one object to independent scrutiny?

Whichever party is objecting, three reasons are generally put forward: distribution of confidential material; unenforceability of sanctions; increased cost. It is therefore worth examining those objections to determine their validity.

³² This has been consistently confirmed by the European Courts; see *Fedial v Commission* (C-191/82) of 14/07/88 and more recently *VTZ and Others v Council* (T-432/12) of 30/04/15.

4.3.1 DISTRIBUTION OF CONFIDENTIAL MATERIAL

It has been suggested that authorised persons (who, it has to be said, are most likely to be lawyers) were they to have APO at their disposal would distribute confidential information. This cannot be regarded as a sensible argument as it is highly unlikely that a member of the legal profession would risk the reputation and possibly career of oneself – and that of the employer – by doing so.

In this regard, however, there is the matter of the issue raised in the letter of the Council of Bars and Law Societies of Europe (CCBE) to the EU Commission of 19 March 2008³³. With respect to the condition within the EU Commission's APO proposal that legal representatives could not divulge confidential information to their clients, it claims *"...in certain Member States lawyers cannot withhold any information from their clients."* With the proviso that the FTA has not conducted an in depth analysis of all the rules that apply to lawyers in all of the 28 Member States, this is a rather surprising statement particularly since the CCBE's own Code of Conduct which is *"a binding text on all Member States: [to which] all lawyers who are members of the bars of those countries...have to comply."*³⁴ says *"A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity."*³⁵. In any event, the FTA finds it highly unlikely that exceptions to the rule noted in the CCBE letter do not exist, or cannot be introduced, to permit lawyers from those countries to use the APO.

Of course, one cannot rule out completely the possibility that confidential information will be distributed, either deliberately or inadvertently, without looking at evidence to the contrary. Fortunately, the US ITC publishes in the Federal Register annual accounts of all the breaches that have occurred the previous year and it would seem reasonable to take these as a guideline. They show that from 1993 to 2013 (2014 figures are not yet published) there were on average nine breaches per year. Considering that approximately 4500 APOs are issued per year³⁶, this is a remarkably low number. Furthermore, an appraisal of those breaches shows that not only is the ITC extremely strict in its interpretation of what it considers to be a breach, but that the instances are almost exclusively minor (e.g. attorneys/associates within the firm in question who have not signed the APO accessing confidential data, misfiling of confidential data, incorrect 'bracketing' of data, failure to destroy or return confidential data within the specified deadline) and unintentional. It would also appear that those breaches are reported to the ITC immediately upon their discovery by the (inadvertent) perpetrator – illustrating that US attorneys take the APO system very seriously indeed. However, the FTA could find no instance (going back to 1994)³⁷ of a breach concerning the deliberate distribution of confidential information to a client or competitor of a client³⁸.

There are two side issues to be discussed under this section. The first is that although anti-dumping litigation is normally conducted by specialist members of the legal profession, the use of APO is also permitted by persons who are not lawyers but instead consultants or experts representing interested parties. It is, of course, a matter for those interested parties as to whether they employ the services of such individuals rather than a member of the legal profession but it should be noted that similar sanctions will apply to them as to lawyers.

The second is that it has been suggested that concerns regarding the distribution of confidential information to unauthorised persons may dissuade interested parties from filing such data and force the EU Commission to conduct investigations on 'facts available'. However, the FTA is sceptical that this problem would arise if companies were made aware that resort to 'facts available' usually results in a less than desirable outcome.

³³ In itself this letter is interesting since it refers to a proposal by the EU Commission to introduce what is evidently APO, and one that is, based on the comments therein, quite extensive (though the proposal seems to have had a rather limited distribution).

³⁴ *Code of Conduct for European Lawyers* – Introduction to version dated 31 January 2008.

³⁵ Article 2.3.2

³⁶ Source: ITC Dockets Office – estimated figure that includes APOs issued during interim and sunset reviews, and does not include APOs issued to clerical personnel.

³⁷ We were unable to obtain copies of the Federal Registers of 1993, 1992 and 1991 (the first account of APO breaches).

³⁸ There were two breaches of an inadvertent nature: 67 FR 39425 (June 6, 2002) – the confidential version of a pre-hearing brief was faxed to a client association; 59 FR 16834 (April 8, 1994) – confidential information was faxed to a client's marketing department.

4.3.2 UNENFORCEABILITY OF SANCTIONS

Without an adequate, and enforceable, set of sanctions that may be imposed upon individuals (be they members of the legal profession, consultants or experts) that breach the provisions of the APO, confidence in such a system is likely to be lacking – even despite the existence of any Code of Conduct that may exist for those individuals. However, there would seem to be some doubt as to the possibility to impose sanctions on the legal profession. This doubt has been raised on more than one occasion by the EU Commission and other commentators. Considering that it can be reasonably assumed that the CCBE are the governing experts in this field and considering that the aforementioned letter is in direct response to the only time, to the best of our knowledge, the integration of APO to the EU system has been considered by the EU Commission, one can assume that the EU Commission's doubts as to the possibility to impose sanctions on the legal profession derive from the opinion expressed in that letter.

The letter is unequivocal that the Commission cannot impose sanctions on the legal profession. That may well be the case if one refers to the Commission in and of itself. However, the FTA fails to see how the legal profession can be exempt from sanctions that are elaborated within and enforced by EU legislation. The solution, therefore, would seem to be that the EU Commission drafts legislation that draws up suitable sanctions for breaches of APO and that this, after going through the normal adoption process, is enforced by EU Member States and by the legal profession itself (i.e. the bar authorities). In any event, such legislation would need to be adopted in order to sanction individuals who are not members of the legal profession (i.e. consultants and experts) who would also be permitted to use the APO.

Alternatively, one can look to the self-governing nature of the legal profession for a solution. In other words the codes of conduct that underlie this governance may be adapted specifically to include sanctions for breaches of APO. It would certainly be beneficial to the legal profession for APO to be adopted by the EU and therefore it would be in the legal profession's best interest to set up a system that would safeguard the effective operation of such a system. This could be incorporated into the CCBE Code of Conduct and/or the code of conducts that exist for the bars within each Member State. Since all lawyers are members of a bar, they would then be bound by the provisions within said codes. It would seem prudent, however, to limit the use of APO by lawyers only to those who are based in the EU and are a member of an EU bar.

Concerning non-lawyer consultants and experts, although they would not be susceptible of disciplinary action before a legal bar it is entirely possible that they could be members of an ethical board to whom their misconduct could be referred and who could impose sanctions. In addition it should certainly be possible to sanction them by preventing them, their employer and/or employees from acting before the Commission for a certain number of years and to deny them access to BPI. In addition, severe financial penalties could also be considered. Here again, access to the APO system should be restricted to individuals based in the EU.

4.3.3 INCREASED COST

Both the EU Commission and in particular the EU industry have raised the concern that costs to interested parties would increase as a result of using APO. These fears are especially directed toward small and medium enterprises (SMEs). The FTA is certainly sympathetic in this respect but at the same time it considers that those fears are exaggerated.

It is certainly true that APO will open up for examination considerably more information than that which is available under the current system where access is available only to the non-confidential file. It is also true that employing a lawyer to examine that data will likely increase costs. However, assuming one does not simply give one's lawyer carte blanche to examine whatever he wants and charge accordingly, those costs can be controlled. It is far more likely that a maximum cost would be agreed upon between lawyer and client, and/or that the client would instruct the lawyer to examine only certain parts of the file in order to keep costs at a minimum.

This principle would apply also for SMEs except that the maximum cost agreed upon, or the extent to which the file would be examined, will be necessarily lower than for large companies. The solution to this is surely that those SME companies group together and collectively employ a lawyer to do the work. For EU industry SMEs, the work conducted by a lawyer examining evidence on the file submitted by the third country exporters and by EU importers and retailers would apply to each of the SME companies concerned – i.e. there would be no need to examine that evidence for each individual SME on a separate basis. For EU importer and retailer SMEs, the same principle would apply with respect to third country exporters and the EU industry. In this way, use of the system would be more affordable for individual SMEs – indeed, it is conceivable that the collective funds available for such action could be higher than those available by a large company acting alone.

Alternatively, one must not forget that use of APO is not restricted to members of the legal profession. Whilst it would be recommended to employ a lawyer in such matters, one may also employ a consultant or expert to do the work. Though care should be taken that these individuals are suitably adept in the highly specialised area of anti-dumping (and it should be said that the same care should be given to one's choice of lawyer) it is quite possible that costs will be lower. In addition, if one is a member of trade association – and it is likely that most SMEs are – one could use the services of an expert within that association. Here, most likely, there would be no fee for the work conducted; it would be covered by the annual membership fee.

Finally, it should be noted that use of the APO would not be mandatory; one could still take part in an investigation and refer to the non-confidential file in which respect costs would be the same as they are today under the current system.

4.3.4 HEARING OFFICER

The conclusion of the 'Evaluation Study' that was conducted by the consultant BKP in 2011³⁹ with respect to the implementation of APO is that it should be suspended until a review of the role of the Hearing Officer is conducted. The FTA considers that the Hearing Officer has brought a welcome improvement to the EU system, particularly since his powers were increased in March 2012⁴⁰. However, it is not, and cannot be, a substitute for APO. The role is essentially limited to whether non-confidential summaries are sufficient and whether confidential material is relevant to a particular interested party and if so whether the conclusions drawn by the Commission services thereon are correct. It also depends on a specific request by an interested party to examine the situation in those respects – which suggests a certain level of knowledge is needed by said interested party.

4.3.5 OTHER CONSIDERATIONS

One possible disadvantage suggested by the BKP study, is the potential for increased litigation as a result of lawyers having access to the entire files; i.e. finding reasons to litigate. Aside from the issue as to whether this is indeed a disadvantage – after all it is likely that such access would make future litigation easier which can be seen as a positive development – the FTA does not consider that it would automatically result in a significant increase of litigation. Instead, as the BKP study also notes, it is more likely that it will lead to a decrease in litigation owing to the increased chance that errors will be recognised before the final imposition of measures – assuming, of course, those errors are rectified.

It has also been questioned whether the increased workload that will inevitably arise as a result of APO could be dealt with by the existing resources within the anti-dumping units of the EU Commission. Whilst

³⁹ *Evaluation of the European Union's Trade Defence Instruments – Final Evaluation Study*, bkp Development Research & Consulting, 27 Feb. 2012

⁴⁰ Decision of the President of the European Commission of 29 February 2012 on the function and terms of reference of the hearing officer in certain trade proceedings (2012/199/EU)

the point may be a fair one, it would be disappointing in the extreme if it were used as an excuse not to implement APO; after all, if the Commission is serious in its stated desire to increase transparency and if it wishes to be seen, as it should, as an authority that conducts investigations in an accurate and fair way, then increased resources could be found.

Another concern that has been raised is that the increased scrutiny of the information on file and the decisions taken by the EU Commission based thereon, would increase discussions between the complainant industry, the interested party(ies) opposing any potential measures (and the legal representatives thereof), and the EU Commission. As a consequence, the discretion that the Commission currently enjoys could be significantly reduced. As noted above (see 4.3) the Courts have confirmed the Commission has a significant amount of discretion when conducting anti-dumping investigations. However, the concerns raised in this regard are worrying; i.e. one has to consider whether they are made with a wish to use the shroud of secrecy that currently exists to maintain the very nature of that discretion – which would be open to scrutiny if APO is introduced – rather than the use of discretion in and of itself. With this mind, the FTA considers that APO would be a distinctly positive development; it is the very fact that the EU Commission enjoys such a wide degree of (hidden) discretion, often as a result of the lack of any effective and independent scrutiny of its actions, that APO is needed in the EU.

CONCLUSION

It is clear that the EU's anti-dumping system is lacking in transparency to the extent that permits an independent analysis of the data collected, and the decisions taken on the basis of that data. This places those who are affected by any measures imposed under that system at a significant disadvantage when defending their interests.

- The EU should introduce a system that is similar to that in the US; the Administrative Protective Order (APO).
- Authorised persons will have access to data collected by the Commission throughout the course of an anti-dumping investigation.
- Such data will be protected from unauthorised disclosure by the presence of sanctions for violations.
- The use of such a system would not necessarily be prohibitively expensive.
- APO would introduce a fairer and more accurate system of anti-dumping investigations and measures.
- APO would restore the confidence of EU companies in the Commission's administration of the anti-dumping system

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