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Trade, Labor and EU Law Perspectives

EU trade defence: Transparency for All?

Eva Monard (Jones Day) · Monday, December 4th, 2017

In the “Trade for all” strategy issued in October 2015, the EU Trade Commissioner Cecilia Malmström explained how the Juncker Commission would translate the strong commitment to transparency into concrete actions in the EU’s trade policy. The actions identified by the Commission to increase transparency in trade defence as laid down in the Trade for All policy were very promising:



- The creation of a dedicated web platform through which interested parties can access the non-confidential file.
- More transparency to the general public, consisting of two main elements:
 - Publication of the non-confidential version of complaints and requests for reviews; and
 - Possibly, an extension of access to the non-confidential file to the general public.
- Exploring a possible access for legal representatives to the confidential file.

Trade for All on transparency: current status

We are approaching the third anniversary of the Trade for All strategy. The Commission has in the meantime created an online platform through which interested parties can access the non-confidential file: the so-called “TRON.tdi” platform is up and running. The implementation of the TRON.tdi platform has been a great improvement in terms of access to the non-confidential file by interested parties. It is still far from perfect (sometimes it for instance takes months before a document is actually uploaded to TRON.tdi) but I am hopeful that these are just teething troubles that will be adequately addressed in the short term. Overall, the system has greatly facilitated access to the file by interested parties.

As regards the other initiatives referred to in Trade for All, the Commission’s track record three years down the road is much less encouraging. When it comes to the access to information by the general public, the anticipated publication of non-confidential versions of complaints and requests for review has been downgraded to the publication of an – often meaningless – summary thereof. The Commission has not taken any action to turn the non-confidential file into an actual “public” file. Access to the non-confidential file is still restricted to interested parties.

As regards the access to confidential information by legal representatives, recent evolutions at the Commission level are not encouraging, to say the least. The Trade for All strategy referred to the

creation of a system similar to the US' APO system, whereby legal representatives can access confidential information. Although it was phrased carefully, many stakeholders including myself believed (or at least hoped) this could mark a new era in EU trade defence. Further to this opening by the Commission, EU stakeholders have tabled specific proposals to implement this system, building on the system applied by DG Competition and relying on the experience with the APO system in the US. In the framework of specific trade defence investigation, many lawyers are pushing for increased transparency, including with respect to confidential information. However, DG Trade is unwilling to go in this direction.

Court of Justice of the European Union: push for transparency

The absence of any access to confidential information for legal representatives has many detrimental consequences. It implies that the Commission's calculations to assess the existence of price effects and injury or to determine the injury margin are not subject to any review. These calculations are complex and will inevitably include mistakes from time to time. These inadvertent mistakes can have a major impact on the outcome of trade defence investigations. It is in the interest of all stakeholders that trade defence measures are imposed on the basis of accurate and reliable findings. The Commission should encourage a review of its analysis, rather than opposing it. This would not only benefit the EU's trade defence policy but also more generally benefit the perception of the Commission as a transparent and reliable investigating authority that sets a good example for others to follow.

There are, however, no indications that my opinion is shared by the Commission's DG Trade, which keeps blocking any attempt in this direction. However, every cloud has a silver lining, also in trade defence. Recent court cases have tackled the Commission's refusal to provide certain information. The Court of Justice of the European Union has in recent years increasingly focused on the importance of transparency and rights of defence. This trend is also materializing in court cases involving trade defence. In cases like *Jinan v Council* and *Changmao Biochemical Engineering v Council*, the General Court has clarified that the protection of confidential data does not require the exclusion, in principle, of any possibility of disclosing that information.

Possibly even more importantly, the Court of Justice of the European Union is doing what the Commission refuses to do in trade defence investigations: granting access to confidential information to lawyers. The Court has started ordering the Commission to provide full access to confidential data and the resulting calculations and analyses as carried out in the trade defence investigation. This access is limited to lawyers and takes place in a way that makes sure that confidential data is not made public or shared with anyone but the legal representatives of the applicant.

The road ahead

Like Mr. Juncker, "I want the European Commission to lead the way as a modern, efficient and transparent public administration, open to all input that helps [it] deliver work of a consistently high quality, in full independence and impartiality".^[1] My recent experience with access to confidential information ordered by the Court has only strengthened my belief that trade defence investigations will greatly benefit from granting access to confidential information to outside counsel. Such access would contribute significantly to the high quality of trade defence proceedings that the Commission is striving for.

As the EU Trade Commissioner Cecilia Malmström correctly explained, “[t]rade and globalisation are issues very much debated these days”, which “puts pressure on [...] policy makers to make sure that you are involved, that we are transparent”. [2] Unfortunately, this pressure appears to be insufficient to result in – what I believe to be – the required level of transparency in EU trade defence. This undermines not only the reliability of trade defence investigations but, even more importantly, does not do justice to the exemplary role that the Commission may play at global level.

While the road to sufficient transparency may still be a bit longer than what many hoped for after the Trade for All communication, the pressure that is increasingly coming from the Court of Justice of the European Union may eventually prompt DG Trade to follow suit and adopt the necessary transparency mechanisms. You cannot aim for Trade for All without ensuring transparency for all.

[1] Mission Letter of Jean-Claude Juncker, President of the European Commission, to Cecilia Malmström, Commissioner for Trade, of 1 November 2014.

[2] Brussels, 29 May 2017, Speech by EU Trade Commissioner Cecilia Malmström: “Transparent EU Trade and Investment Policy”.

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