



KING & SPALDING

VAN BAELE & BELLIS

Hogan Lovells

MAYER • BROWN

Steptoe
STEPTOE & JOHNSON LLP

DENTONS

VVGB
ADVOCATEN | AVOCATS



holman fenwick willan hfw

crowell & MORING

grayston & company

SQUIRE PATTON BOGGS

BAKER & MCKENZIE

McGUIREWOODS

C/M/S
Law . Tax

APPLETON LUFF
INTERNATIONAL LAWYERS

MANNHEIMER SWARTLING

JONES DAY

Commissioner Cecilia Malmström
European Commission
Rue de la Loi / Wetstraat 200
B-1049 Brussels
Belgium

Holman Fenwick Willan LLP
Blue Tower
Avenue Louise 326
Box 19
B-1050 Brussels
Belgium

By Registered Mail
By E-mail

Tel +32 2 643 3400
Fax +32 2 643 3488

hfw.com

Our Ref: 20151022_Proposal **E-mail:** folkert.graafsma@hfw.com **Date:** 22 October 2015

Subject: **PROPOSAL FOR IMPROVED ACCESS TO INVESTIGATION FILES
IN EU TRADE DEFENCE INSTRUMENT PROCEEDINGS**

Dear Commissioner Malmström,

We are writing on behalf of the majority of lawyers who regularly act in EU trade defence instrument ("TDI") proceedings to highlight the need for substantially enhanced transparency in these proceedings.

The EU's TDI proceedings are notoriously non-transparent. This lack of transparency has serious adverse effects: it restricts the essential ability of parties to assess substantive and procedural aspects of TDI proceedings and thereby also undercuts the credibility of the EU's TDI decisions in the eyes of the companies affected, the trade lawyers representing them and the EU's major trade partners.

1. PROBLEM: NO ACCESS TO THE ACTUAL DATA SUBMITTED BY OTHER PARTICIPANTS OR USED BY THE COMMISSION

In TDI proceedings the parties do not have access to the actual data submitted by other participants, nor to any directly relevant information prepared by the Commission services, such as calculations or mission

reports regarding on-site verification visits. Instead, parties' rights of access are limited to non-confidential summaries of other parties' submissions which omit crucial information pertaining to core aspects of anti-dumping and anti-subsidy proceedings (dumping, injury, causal link, participating parties, etc.). In these circumstances, the effective exercise of all interested parties' rights of defence is severely undermined.

2. CONSEQUENCES: KEY INFORMATION PERTAINING TO CORE ASPECTS OF ANTI-DUMPING AND ANTI-SUBSIDY PROCEEDINGS IS UNVERIFIABLE AND TOTALLY SHIELDED FROM LEGAL SCRUTINY

The impact of such lack of transparency is experienced at all key stages of EU TDI cases. For example:

- Parties do not have access to the underlying data used by the Commission or the Commission's detailed calculations of the respective dumping margins or injury margin, at either the provisional or definitive stage. In particular:
 - The majority of anti-dumping cases involve China, and use the analogue country methodology to calculate the "normal value". The data used to make that calculation is not disclosed. As a result, both exporting producers and complainants are deprived of the possibility to verify the calculation or present meaningful comments;
 - As far as the complainants are concerned, the data used to calculate the dumping margins for exporters in market economies, where the regular method for calculating "normal value" is used, is similarly not disclosed for review;
 - In proceedings where the injury margin plays a critical role in mitigating the anti-dumping duty pursuant to the EU's "lesser duty" rule, which is in about half of all investigations, key details of the calculation are completely unavailable.

Yet, the Commission's calculations form the basis of the duty applicable to products subject to trade remedies. Therefore, they are essential elements to which parties need access. EU complainant industries need to ensure that the duty is not lower than it should be; EU user industries and exporting producers need to ensure that it is not higher than what is needed to remove injurious dumping;

- When it comes to the injury assessment, interested parties often do not know the complete situation of the Union producers, to an extent that sometimes even the identities of the complainant, participating or sampled companies are not disclosed. As a result, to give but one example, commenting on the selection of the sample of the Union producers (which is one of the rights conferred to the interested parties) is simply impossible;
- Contrary to other major WTO Members, mission reports on exporter and domestic producer verification visits, where procedural or substantive differences of opinion often arise, are not provided to the interested parties; and, finally,
- Even powers of attorney can be self-declared as "confidential", thereby rendering the existence and nature of legal representation into a topic of guesswork and secrecy.

Other examples abound. To sum up, key information pertaining to core aspects of anti-dumping and anti-subsidy proceedings (dumping, injury, causal link, participating parties, etc.) is unverifiable and totally shielded from legal scrutiny. In fact, renowned US lawyers who encountered the EU system as early as 1990 went as far as describing EU anti-dumping and anti-subsidy proceedings as "*not unlike medieval Star Chambers trials in darkness insofar as the unenlightened but interested parties are concerned*".¹ Sadly, 25 years later, nothing has changed.

In practice, given the lack of essential data and the limited investigatory powers of the Hearing Officer, the sole means to secure adequate legal review of TDI determinations is to resort to proceedings before the Court of Justice of the European Union. When one considers that a judgment can take some years to appear, particularly if an appeal is made, this is wholly unsatisfactory as a solution to the transparency problem and beyond the means of most interested parties.

3. SOLUTION: DISCLOSURE OF CONFIDENTIAL INFORMATION TO TRADE PRACTITIONERS IN DATA ROOMS ON THE CONDITIONS OF CONFIDENTIALITY, NON-DISCLOSURE AND SUBJECT TO SANCTIONS FOR NON-COMPLIANCE

In TDI proceedings, the EU ought to have a leading role in guiding other WTO Members. If the EU were to increase transparency, many other jurisdictions which follow EU trade defence law and practice would likely do the same. Moreover, EU exporters are increasingly becoming a target of TDI proceedings in third countries and they are often in a precarious situation regarding transparency of those proceedings. Enhanced EU practice in this respect could thus improve the situation for its own exporters as well.

The current practices of DG TRADE contrast sharply with the best practices elsewhere within the Commission, notably in DG COMP, which has implemented a carefully managed transparency system for disclosure of confidential information in the context of complex antitrust and merger investigations.² We see no justification why a similar level of transparency could not be achieved in EU TDI investigations.

Therefore, in light of our many years of practical experience and in the interest of enhancing the transparency and quality of EU trade defence proceedings, we, the below EU trade practitioners dealing with DG TRADE on a continuing basis, enclose a document proposing to update the rules governing access to confidential information in TDI investigations. It is important to realise that this proposal has emerged as a result of numerous discussions amongst the undersigned and at this stage represents a practical compromise amongst us as to the minimum necessary measures that should be taken in order to achieve greater transparency. Our proposal is therefore modest, while building extensively on the existing transparency practices of DG COMP.

We look forward to your response and would much appreciate an opportunity to discuss our proposal further with you.

Yours faithfully,

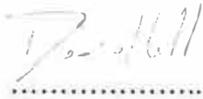
¹ Hippler Bello at 352 in *Access to Business Confidential Information in Antidumping Proceedings*, in Jackson, Vermulst, *Anti-Dumping Law and Practice: A Comparative Study*, The University of Michigan Press, Simon & Schuster, (eds.1990).

² See Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation, <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>.

**2015 PROPOSAL FOR IMPROVED ACCESS TO
INVESTIGATION FILES IN EU TDI PROCEEDINGS**

- Cc:
- First Vice-President Commissioner Frans Timmermans; Better Regulation, Interinstitutional Relations, Rule of Law and Charter of Fundamental Rights
 - Vice-President Commissioner Jyrki Katainen; Jobs, Growth, Investment and Competitiveness
 - Commissioner Věra Jourová; Justice, Consumers and Gender Equality
 - Maria Åsenius; Head of Cabinet of Trade Commissioner Cecilia Malmström
 - Nele Eichhorn; Member of Cabinet of Trade Commissioner Cecilia Malmström

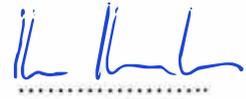
2015 PROPOSAL FOR IMPROVED ACCESS TO
INVESTIGATION FILES IN EU TDI PROCEEDINGS



David Luff
Ed Sim/ Jay Nee
Appleton Luff



Ross Denton / Jasper Helder
Nina Niejahr
Baker & McKenzie



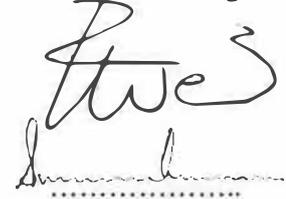
Kai Neuhaus
CMS Hasche Sigle



Jeff Snyder/ Charles De Jager
Elena Klonitskaya
Salomé Cissal de Ugarte
Crowell & Moring



Edward Borovikov
Bogdan Evtimov
Dentons



Christian Ewert
Stuart Newman
FTA



Davide Rovetta
Maurizio Gambardella
Grayston & Company

Lode van de Hende
Jennifer Paterson
Herbert Smith Freehills LLP



Lourdes Catrain
Hogan Lovells



Folkert Graafsma/ Joris Cornelis
K. Adamantopoulos
Holman Fenwick Willan LLP



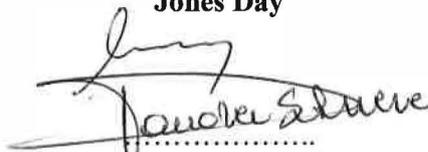
Renato Antonini
Eva Monard
Jones Day



Charles Julien
King & Spalding



Urszula Sieradzka
Andreas Johansson
Mannheimer Swartling



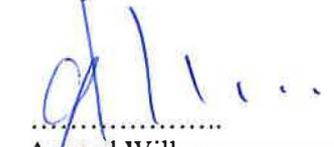
Paulette VanderSchueren
Nikolay Mizulin
Mayer Brown



Philip Bentley
Clive Stanbrook
McDermott Will & Emery



Yves Melin/ V. Akritidis
McGuireWoods LLP



Arnoud Willems
Sidley Austin LLP



Robert McLean
Squire Patton Boggs



James Searles
Simon Hirsbrunner
Steptoe & Johnson LLP



Philippe de Baere
Van Bael & Bellis



Edwin Vermulst
Juhi Sud / Marco Bronckers
VVGB