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NOTE

From: General Secretariat of the Council
To: Delegations
Subject: Annual Report of the Hearing Officer for the year 2023

Delegations will find attached, on behalf of the European Commission, the “Annual Report of the Hearing Officer” covering the year 2023, in accordance with the Terms of Reference of the Hearing Officer for Trade proceedings.



Annual Report of the Hearing Officer for Trade Proceedings 2023



Trade

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Annual Report of the Hearing Officer for Trade Proceedings

2023

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1. CONTEXT AND OVERVIEW

The primary role of the Hearing Officer is to ensure that the rights of defence of interested parties are respected, and thereby contribute to the implementation of the rules in trade proceedings in an objective and transparent manner.

The EU Charter of Fundamental Rights stipulates the following: the right of every person (i) 'to be heard, before any individual measure which would affect him or her adversely is taken', (ii) 'to have his or her affairs handled impartially, fairly and within a reasonable time' and (iii) 'to have access to his or her file, while respecting the legitimate interests of confidentiality and of professionally and business secrecy'.

For parties involved in trade proceedings, more precise rules are contained in the basic Regulations dealing with the different types of trade defence instruments, such as the anti-dumping, anti-subsidy and safeguards Regulations, or in the trade barriers Regulation¹. To underline the Commission's commitment to guaranteeing due process in trade proceedings and to improving their impartiality, the function of the Hearing Officer was created already in 2007, and their Terms of Reference (ToR) confirmed and modernised in 2019². The changes that were introduced in 2019 were based on the experience gained by the Hearing Officer over time. The interventions of the Hearing Officer's should become more effective, allowing for adequate follow-up where appropriate. This is in the interest of all parties to a proceeding to safeguard their rights of defence, and in the interest of the investigating authority, which is bound by legal deadlines. To this effect, a good balance between parties' rights and the time constraints of the proceeding is essential, especially considering the new deadlines that were introduced in the 'modernisation package' of the Trade Defence Regulations.

The current ToR of the Hearing Officer, which lay down their responsibilities and competencies, were adopted in 2019 and cover 10 basic Trade Regulations³. Since then, the ToR have remained unchanged. One of the basic Trade Regulations listed in the ToR, namely Regulation (EC) No 868/2004 of the European Parliament and the Council⁴, has been replaced by Regulation (EU) 2019/712 of the European Parliament and the Council of 17 April 2019⁵ concerning fair competition in air services, without however affecting the Hearing Officer's competence in the matter.

In 2020, the European Commission, with Regulation 2020/1173⁶, adopted an amendment to the anti-dumping⁷ and anti-subsidy⁸ basic Regulations on the duration of the period of pre-disclosure to interested parties, which was prolonged from three weeks to four weeks. These amendments also did not change the scope of competence of the Hearing Officer.

The Hearing Officer is attached, for administrative purposes, to the Commissioner responsible for trade policy; however, he/she enjoys independence in performing their duties and shall not take instructions in fulfilling their tasks.

The mentioned Terms of Reference lay down detailed rules on the interventions of the Hearing Officer in all aspects of a trade proceeding and throughout all phases of the proceedings. They further lay down the procedure for hearings conducted by the Hearing Officer. Furthermore, the Hearing Officer has been delegated decision-making powers on certain procedural issues, such as access to files, extension of deadlines and the confidential nature of a document. At the request of an interested party, the Hearing Officer can also examine information that is confidential by nature, and that cannot be disclosed to parties, and inform the party whether in the Hearing Officer's view the information has been correctly reflected in the findings of the Services. The Hearing Officer is, in addition, empowered to raise with the Commissioner responsible for trade policy and the Director General for Trade, any concerns about the conduct of content of any trade investigation.

The interventions of the Hearing Officer must be effective, allowing for adequate follow-up where appropriate. This is important for all parties to a proceeding to safeguard their rights of defence, and for the investigating authority, which is bound by legal deadlines. To this effect, finding a good balance between parties' rights and the time constraints of the proceeding is essential. At the same time, the Hearing Officer is not a part of the investigation process, but their role is to ensure that the rights of defence are respected by the Commission services.

1. REGULATION (EU) 2015/1843 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation, OJ L 272, p.1.
2. DECISION (EU) 2019/339 OF THE PRESIDENT OF THE EUROPEAN COMMISSION of 21 February 2019 on the function and Terms of Reference of the Hearing Officer in certain trade proceedings, OJ L 60, 28.2.2019, p.20.
3. A list of Trade Regulations covered is provided in Article 1 of the ToR.
4. Regulation (EC) No 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing prices causing injury to Community air carriers in the supply of air services from countries not members of the European Community (OJ L 162, 30.4.2004, p. 1).
5. Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004 (OJ L 123, 10.5.2019, p.4).
6. Commission Delegated Regulation (EU) 2020/1173 of 4 June 2020 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidized imports from countries not members of the European Union as regards the duration of the period of pre-disclosure.
7. Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union.
8. Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidized imports from countries not members of the European Union.
9. Website of the Hearing Officer for trade proceedings

The main principles laid down in the current ToR are as follows:

- The Hearing Officer acts upon request of parties. Such requests for intervention of the Hearing Officer must be submitted in good time and expeditiously, so as not to jeopardise the orderly conduct of the proceeding;
- Interested parties should therefore request the intervention of the Hearing Officer at the earliest possible time following the occurrence of the event justifying such intervention;
- Hearings with the Hearing Officer should in principle only take place if the issues could not be settled with the Commission services in due course;
- Hearing requests should in principle be made within the relevant timeframes set for the procedure – although there may be valid reasons for late requests which the Hearing Officer considers.

The Hearing Officer will in principle not accept or consider evidence that has not been submitted to the Commission services in due course in the proceeding.

While the Hearing Officer continues to assess each request on its own merits, these elements should encourage parties to come forward at the right point in time so that their arguments can be properly taken into account and given the appropriate follow-up.

The more information is given to parties on how the general principles that determine the exercise of its functions by the Hearing Officer are translated into practice, the better they will be able to raise issues of concern to them in an appropriate manner.

This report has been drafted in accordance with Article 18(1) of the ToR and contains a summary of the activities in 2023 and main observations.

2. EVOLUTION OF ACTIVITIES IN 2023

Historically, the vast majority of intervention requests concerned trade defence proceedings (anti-dumping, anti-subsidy, reviews, re-opening of cases), this held true also in 2023.

The large majority of these requests concerned issues related to objections to the Commission's determination of facts and findings, breaches of the right to be informed, disclosure issues, extensions of deadlines, and objections to use of the best facts available methodology.

In 2023, compared to years 2021 and 2022, 16% of all ongoing investigations led to intervention requests, which followed an established fluctuation rhythm (21% in 2022; 24% in 2021 and 13% in 2022). Slightly higher proportion of trade proceedings affected by intervention requests may be also explained by fewer on-going trade proceedings altogether.

The Hearing Officer received altogether 16 such requests in 2023 (not all of them for hearings but also for other types of interventions) and held no hearings. The Hearing Officer found that the rights of defence of parties had been respected.

3. HEARINGS

In 2023, the Hearing Officer did not hold any hearing. Before granting a hearing and in accordance with the ToR, the Hearing Officer, where appropriate, encouraged the parties to first address their concerns to the Commission services, if not yet done. In 2023, this principle proved to be exceptionally effective, and the parties succeeded to resolve their concerns directly with the investigation teams, or, alternatively, withdrew their request for an intervention of the Hearing Officer altogether.

It is unlikely, however, that such situation is becoming a permanent trend, as at the time of this report, several hearings in 2024 have already been held.

4. OTHER INTERVENTIONS

Replies to Intervention requests not leading to a hearing

The Hearing Officer received certain intervention requests that did not aim to consider a hearing.

Notably, on two occasions, the interventions requests contained no specific issues of concern, the interested parties sought the involvement of the Hearing Officer as an additional guarantee of fair proceedings.

In these cases, the involvement of the Hearing Officer proved not to be necessary.

In response to some intervention requests concerning extension of deadlines, the Hearing Officer, again in accordance with the ToR, recommended that the parties try and settle the issues with the services first, and they obtained the extensions of deadlines directly, when necessary.

Extension of deadlines

The Hearing Officer did not grant any extension of deadline.

Generalized Systems of Preferences +

No request under the Generalized System of Preferences was filed in 2023.

Safeguards

No requests under the safeguards Regulation were filed in 2023.

Trade Barriers Regulation

No requests under the Trade Barriers Regulation were filed in 2023.

Confrontational Hearing requests

No requests for any confrontational hearing were filed in 2023.

5. OTHER ACTIVITIES

Consultation on policy issues

The Hearing Officer was not consulted on policy issues in 2023.

Formal Recommendations

In 2023, the Hearing Officer did not make formal recommendations.

Decisions

The Terms of Reference confer on the Hearing Officer certain decision-making powers on a number of issues (for example disputes on access to file, confidential nature of a document, deadlines). The Hearing Officer did not adopt any decisions in 2023.

Outreach and Training Activities

The Hearing Officer presented the Annual Activity Report for the year 2023 to the Working Party on Trade Questions, and it was published on the Hearing Officer's website. Training on the role of the Hearing Officer was likewise offered to all newcomers of the Trade Defence Services. Finally, increasing visibility, and modernisation of the Hearing Officer Website was carried out, leading to an improved access to the information contained therein and to an update of the content.

Cooperation with the Commission services responsible for investigations

The cooperation with the Commission services was commendable. Oversights that came to the attention of the Hearing Officer were corrected and the services agreed, for example, to expand disclosures, thereby respecting the rights of defence of the parties.

A formal consultation mechanism is in place obliging the Director responsible for policy changes or updates to consult the Hearing Officer, notably if they are likely to impact the rights of parties. As a matter of course, the Hearing Officer continues to be involved in all inter-service consultations initiated by DG Trade Directorate G, and in all proposals sent to the Commission for adoption. Although it did not happen in the past years, the Hearing Officer may also be consulted and intervene in other inter-service consultations.

All staff of the Hearing Officer has been administratively attached to a DG Trade Unit. In 2019, the European Court of Auditors had concluded that, despite the administrative attachment of the Hearing Officer's staff to DG Trade, at the time directly to a Director, the Hearing Officer acts independently from a functional point of view. This independence relies on the personalities of the persons involved rather than on the institutional setting. From a practical point of view, there has been no undue impact on the work of the Hearing Officer staff.

Transparency

Continuing overall progress can be noted in relation to trade defence policy. Parties can see the agenda of the Trade Defence Committee meetings which are put online. Likewise, the parties can also see the refund Decisions online. Investigation timelines are published on the DG TRADE website and case documents are updated to accommodate new rules. In addition, the Hearing Officer acts upon requests of parties to verify the information in the confidential files of a proceeding in accordance with Article 15 of the ToR.

Parties' right to good administration

The specific role of the Hearing Officer is to safeguard the application of the principle of EU law, namely the right to good administration.

The Trade Defence Services continue to make considerable efforts towards standardisation of procedures and thus more predictability for the parties. Extensive guidance is provided to case-handlers including on jurisprudence and new policy developments. Further explanations have been embedded in the DG TRADE internet site. This is essential to create trust in the Commission's proceedings. Nevertheless, quality management regarding substance and process remain essential to this effect.

Guidance for Interested Parties

The Hearing Officer has taken up an initiative to provide more step-by-step explanations as regards their role and competences to potential interested parties by adding guidelines on the website of the Hearing Officer.

These guidelines aim to proactively inform interested parties about the involvement of the hearing officer in the proceedings, anticipate questions and answers likely to be raised by these interested parties, and to enable them to bring across their concerns in a clear and comprehensive manner to the attention of the Hearing Officer.

6. ANNEX

Trade proceedings concerned by intervention requests in 2023

The following tables demonstrate the actual numbers and the ratios between the ongoing trade proceedings and intervention requests received by the Hearing Officer compared to the last 5 years. The methodology in place is the same one as the one used before for comparison and cross-reference purposes.

Figure 1: Dynamics of intervention requests and interventions in 2023

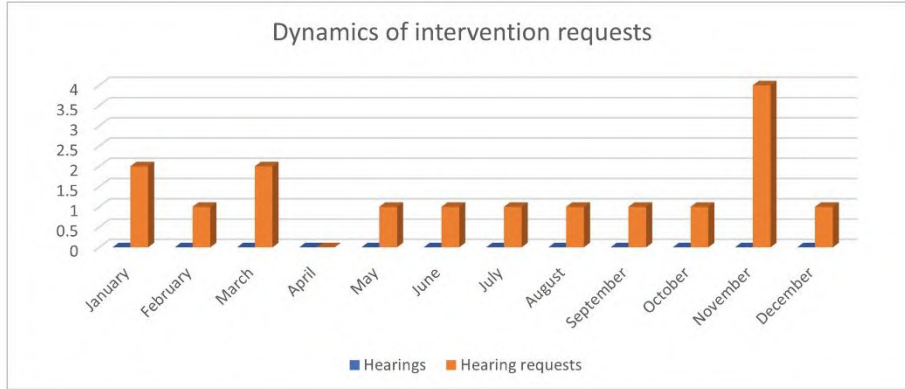


Figure 2: Trade proceedings concerned by intervention requests vs. ongoing proceedings (actual numbers)

The table represents the ratio between all ongoing trade proceedings in 2023 and the number of proceedings affected by intervention requests, as well as the total number of intervention requests vs intervention requests resulting in Hearings.

The absolute number of intervention requests that took place in 2023 fell in comparison with previous years and no hearings were held.

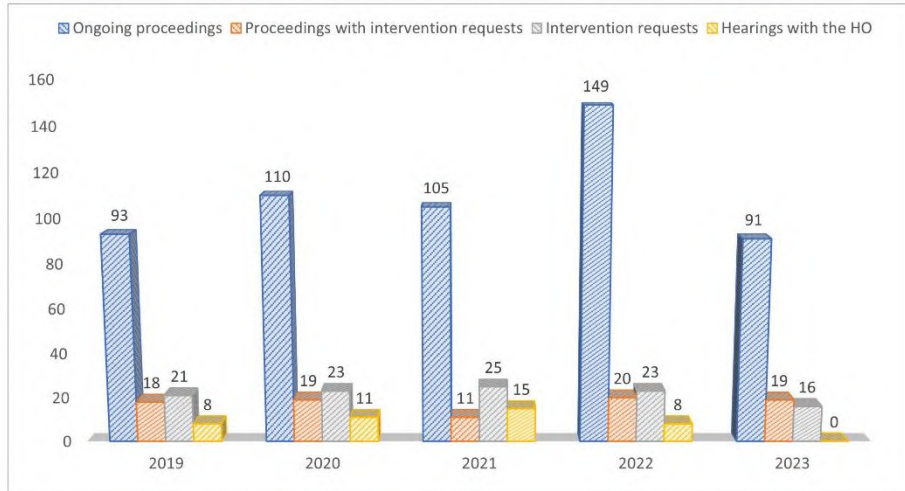


Figure 3: Trade proceedings concerned by intervention – requests vs. ongoing investigations (in %)

The number of intervention requests in relation to ongoing proceedings is indicative only. As well as in year 2023, in some requests, several interested parties participated and occasionally represented different types of interested parties in the same proceeding.

The actual number of cases as shown in this table corresponds to the cases investigated by Trade Defence in 2023. The table demonstrates certain stability in the number of intervention requests over the last three years.

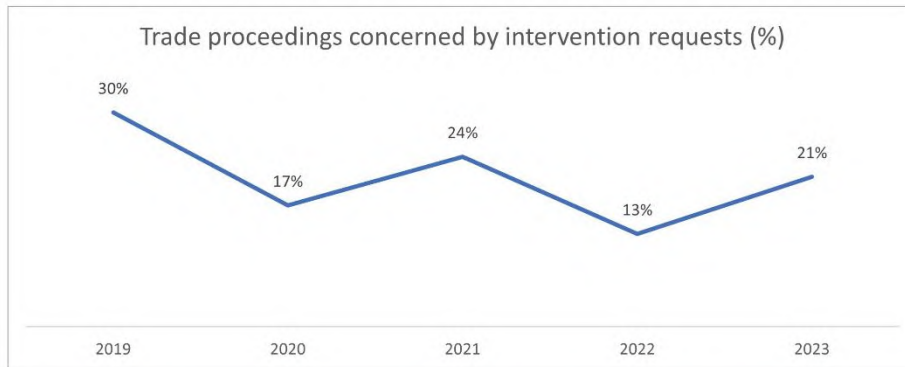


Figure 4: Trade proceedings concerned by intervention request vs. ongoing proceedings and the number of intervention requests vs. hearings

There were no hearings held with the Hearing Officer Hearings in 2023.

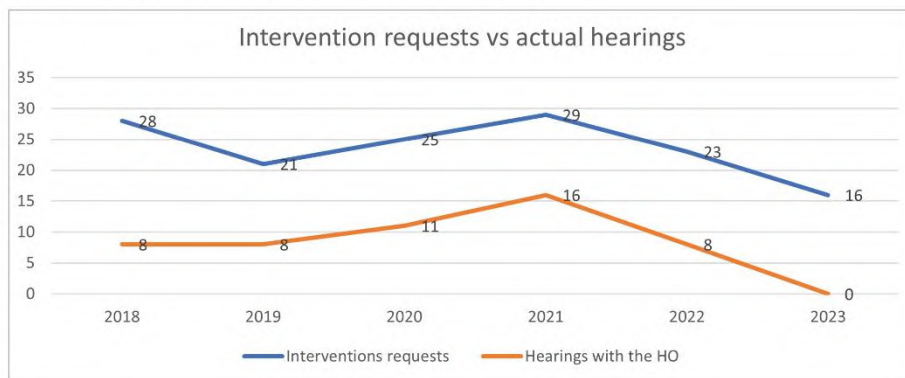


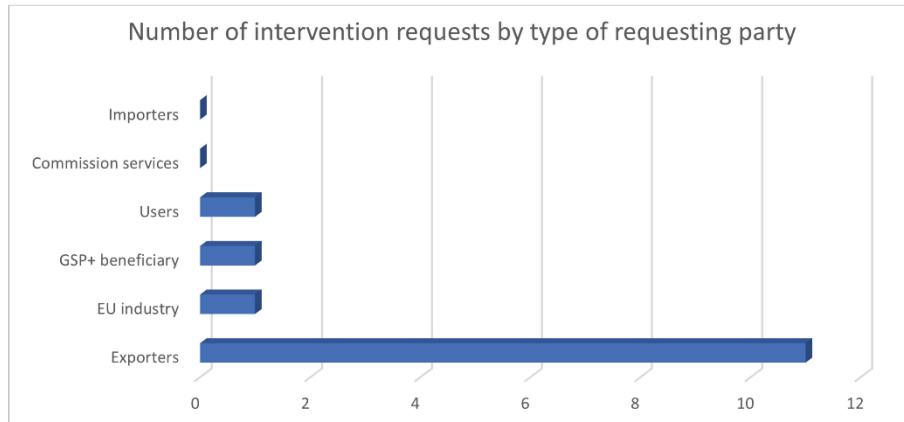
Table 5: Interventions by case type

In 2023, the Hearing Officer was requested to intervene in almost all types of trade proceedings and issues.

Type		TDI Cases still ongoing 4.1.2023	TDI Cases initiated 2023	Sum of cases ongoing during 2023	Cases in which the HO was requested to intervene in 2022	in %
Initial cases (Art 5 AD, Art 10 AS)		14	14	28	5	18%
Reviews	Absorption	1	0	1	0	0%
	Circumvention	4	10	14	7	50%
	Expiry	10	13	23	2	9%
	Interim	4	3	7	1	14%
	Safeguard	1	0	1	1	100%
	New exporter	5	0	5	0	0%
Re-opening of a case	3	1	4	1	25%	
UT Withdrawal/ Implementation	1	0	1	1	100%	
Pre-Initiation	0	0	0	0	0%	
Refund		5	0	5	1	20%
Others (TBR, GSP safeguards and specific cases)	0	2	2	0	0%	
Total	48	43	91	19	21%	

Interventions by type of requesting party

In 2023, the largest group of interested parties requesting an intervention were exporting producers, directly concerned with ongoing investigations.



Intervention requests by issues raised

Most requests, as in previous years, concerned requests for additional information and objections to the facts and findings of the investigation. Some of the requests also concerned the right to be informed or issues related to the Disclosure and extension of deadline.

In many requests, several different issues were raised simultaneously. Finally, in some cases, the same interested party reached out several times for an intervention of the Hearing Officer during the same proceeding with different issues.

Notably, there were 2 intervention requests where the interested parties did not raise any issues and later withdrew their requests.

