

## DECISIONS

## 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 PRESIDENT OF THE EUROPEAN COMMISSION,

Having regard to the Treaty on European Union,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Rules of Procedure of the Commission <sup>(1)</sup>, and in particular Article 22 thereof,

Whereas:

- (1) The right to good administration constitutes an established principle of European Union law, which includes the procedural rights of interested parties involved in administrative proceedings, the result of which may affect their interests.
- (2) This principle of European Union law is set out in Article 41 of the Charter of Fundamental Rights of the European Union <sup>(2)</sup>. The rights set out in Article 41(1) and (2) of the Charter of a person whose interests are affected by a trade proceeding are also either explicitly set out or should, since they are general principles of law, be applied in Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community <sup>(3)</sup>, Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community <sup>(4)</sup>, Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports <sup>(5)</sup>, Council Regulation (EC) No 625/2009 of 7 July 2009 on common rules for imports from certain third countries <sup>(6)</sup>, Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation <sup>(7)</sup>, Council Regulation (EC) No 385/96 of 29 January 1996 on protection against

injurious pricing of vessels <sup>(8)</sup>, Regulation (EC) No 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community <sup>(9)</sup>, Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007 <sup>(10)</sup>, Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters <sup>(11)</sup> and in Council Regulation (EC) No 427/2003 of 3 March 2003 on a transitional product-specific safeguard mechanism for imports originating in the People's Republic of China and amending Regulation (EC) No 519/94 on common rules for imports from certain third countries <sup>(12)</sup>.

- (3) Since 1 January 2007, the task to safeguard the effective exercise of the procedural rights of the interested parties and ensure that trade proceedings provided in the regulations listed above are handled impartially, fairly and within a reasonable time has been entrusted to an official of the Directorate-General for Trade experienced in trade defence issues, entitled 'Hearing Officer'.
- (4) In order to strengthen this role and reinforce the transparency and the procedural fairness of the relevant proceedings, it is now appropriate to strengthen this function of hearing officer inside the Commission and to lay down his attributions.
- (5) This function should be attributed to an independent person experienced in trade proceedings. The hearing officer should be appointed by the Commission in accordance with the rules laid down in the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union.

<sup>(1)</sup> OJ L 55, 5.3.2010, p. 60.

<sup>(2)</sup> OJ C 83, 30.3.2010, p. 391.

<sup>(3)</sup> OJ L 343, 22.12.2009, p. 51.

<sup>(4)</sup> OJ L 188, 18.7.2009, p. 93.

<sup>(5)</sup> OJ L 84, 31.3.2009, p. 1.

<sup>(6)</sup> OJ L 185, 17.7.2009, p. 1.

<sup>(7)</sup> OJ L 349, 31.12.1994, p. 71.

<sup>(8)</sup> OJ L 56, 6.3.1996, p. 21.

<sup>(9)</sup> OJ L 162, 30.4.2004, p. 1.

<sup>(10)</sup> OJ L 211, 6.8.2008, p. 1.

<sup>(11)</sup> OJ L 201, 26.7.2001, p. 10.

<sup>(12)</sup> OJ L 65, 8.3.2003, p. 1.

- (6) In order to ensure the independence of the hearing officer, he should be attached, for administrative purposes, to the member of the Commission responsible for trade policy.
- (7) The main attributions of the hearing officer provided for in this decision are to advise the Commissioner responsible for trade policy and the Director-General of Trade DG; to guarantee procedural rights; to allow access to the file; to take a decision on the confidential nature of a document; to review the position of the administration on the extension of deadlines. The hearing officer should seek to ensure that in the preparation of draft Commission legal acts or proposals, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned.
- (8) In order to enhance the procedural guarantees for the exercise of the procedural rights of interested parties, it is necessary to determine the types of hearings and to fix the rules for the organisation, conduct and follow-up on hearings with the hearing officer.
- (9) The power of the hearing officer to decide on issues concerning access to the file, confidentiality and deadlines should provide the parties involved in a trade proceeding with an additional procedural guarantee without prejudice to the time constraints of the proceeding.
- (10) The reports should ensure that the main issues dealt with by the hearing officer and his main recommendations are brought to the attention of the decision-makers and thus provide an additional guarantee for the respect of the rights of parties affected by a trade proceeding. The annual reports should also inform the EU Member States, the European Parliament and the public about the activities of the hearing officer.
- (11) When disclosing information on natural persons, particular attention should be paid to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data <sup>(1)</sup>.
- (12) This Decision should be without prejudice to the general rules granting or excluding access to Commission documents,
2. The task of the hearing officer is to safeguard the effective exercise of the procedural rights of the interested parties provided for in the regulations listed below (hereinafter the 'basic Regulations') and ensure that the trade proceedings under those regulations are handled impartially, fairly and within a reasonable time. Those basic Regulations are the following:
- (a) Regulation (EC) No 1225/2009, and notably Articles 5(10 and 11), 6(5, 6, 7 and 8), 8(3, 4 and 9), 18, 19, 20 and 21;
- (b) Regulation (EC) No 597/2009, and notably Articles 10(12 and 13), 11(5, 6, 7, 8 and 10), 13(3, 4 and 9), 28, 29, 30 and 31;
- (c) Regulation (EC) No 260/2009, and notably Articles 6 and 9;
- (d) Regulation (EC) No 625/2009, and notably Articles 5 and 7;
- (e) Regulation (EC) No 3286/94, and notably Articles 8 and 9;
- (f) Regulation (EC) No 385/96, and notably Articles 5(12 and 13), 6(5, 6, 7 and 8), 12, 13 and 14;
- (g) Regulation (EC) No 868/2004, and notably Articles 7 and 8;
- (h) Regulation (EC) No 732/2008, and notably Articles 18, 19 and 20;
- (i) Regulation (EC) No 1515/2001, and notably Articles 1(2) and 2(2);
- (j) Regulation (EC) No 427/2003, and notably Articles 5(5), 6(4, 5 and 6), 17(2 and 3) and 18.

## Article 2

### Definitions

For the purposes of this Decision the following definitions shall apply:

- (a) 'trade proceeding' means any investigation or an administrative procedure performed by the Commission services under any of the basic Regulations;
- (b) 'interested party' means any person whose interests are affected by a trade proceeding, as defined in the applicable basic Regulation;
- (c) 'rights of the interested parties' means the procedural rights and the right of every person to have its affairs handled impartially, fairly and within a reasonable time in trade proceedings.

HAS ADOPTED THIS DECISION:

### Article 1

#### The Hearing officer

1. A specific function of hearing officer in trade proceedings is created inside the Commission.

<sup>(1)</sup> OJ L 8, 12.1.2001, p. 1.

*Article 3***Appointment – Termination of appointment and Deputising**

1. The hearing officer shall be appointed by the Commission in accordance with the rules laid down in the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union.
2. The appointment of the hearing officer shall be published in the *Official Journal of the European Union*. Any interruption, termination of appointment or transfer of the hearing officer by whatever procedure shall be the subject of a reasoned decision of the Commission. That decision shall be published in the *Official Journal of the European Union*.
3. The hearing officer shall be attached, for administrative purposes, to the member of the Commission responsible for trade policy.
4. Where the hearing officer is unable to act, the member of the Commission responsible for trade policy, where possible after consultation with the hearing officer, shall designate another official, who is not involved in the case concerned and has sufficient experience in trade proceedings, to carry out the hearing officer's duties.

*Article 4***Principles of intervention of the hearing officer**

1. In performing his duties, the hearing officer shall act independently. The hearing officer shall not take instructions in fulfilling his tasks.
2. In performing his duties, the hearing officer shall take account of the need for effective application of the basic Regulations in accordance with the Union legislation in force and the principles laid down by the Court of Justice of the European Union.
3. In the exercise of his function, the hearing officer shall have access without restriction and undue delay to any files pertaining to a trade proceeding at any time of the proceeding.
4. The hearing officer shall make decisions as provided for in this Decision and may make recommendations to the Commission services responsible for the investigation on any issue concerning the rights of the interested parties who requested his intervention. The hearing officer shall seek to ensure that in the preparation of draft Commission legal acts or proposals, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned.
5. The hearing officer shall be kept informed by the Director responsible or his delegate about the development of the procedure in which the hearing officer has intervened until the adoption of a final legal act by the Commission or the Council, as applicable. The hearing officer shall be informed without delay of any substantial change of the Commission's position at the definitive stage of the trade proceedings in order to assess any potential impact on the rights of the interested parties.

6. The hearing officer shall advise the member of the Commission responsible for trade policy and where appropriate the Director-General concerning the follow-up on his recommendations and, when necessary, on possible remedies.

7. The hearing officer shall be consulted by the Director responsible on changes or updates of policy regarding procedural matters and substantive issues having an impact on the rights of interested parties as defined in Article 2 of this Decision. The hearing officer may be consulted on any other issue arising from a trade proceeding.

8. The hearing officer may present to the member of the Commission responsible for trade policy, and the Director-General for Trade where necessary, observations and recommendations on any matter arising out of a trade proceeding.

*Article 5***Conditions of intervention of the hearing officer – Timing – Information**

1. The hearing officer shall act on request by interested parties, the member of the Commission responsible for trade policy, the Director-General, the Director responsible of a trade proceeding or his delegate, or a Director of other services consulted on a trade proceeding.
2. The hearing officer may intervene at any moment of a trade proceeding with due regard to the time constraints of such a proceeding.
3. The hearing officer shall be bound by the deadlines applied in trade proceedings in accordance with the basic Regulations.
4. Any final legal act or proposal of the Commission shall be accompanied by a note from the hearing officer stating whether he intervened in the proceeding concerned and what was the nature of his intervention.

*Article 6***Hearings**

1. The hearing officer may upon request or in the cases and under the conditions set out in the basic Regulations, organise and conduct two types of hearings: hearings between an individual interested party or a group of interested parties with similar interests and the Commission services responsible for the investigation, and hearings among interested parties with different interests.
2. A hearing can cover any issue which arises at any moment of a trade proceeding and could affect the rights of the interested parties.
3. Natural persons invited to attend a hearing shall either appear in person or be represented by a legal representative. Legal persons invited to attend a hearing shall be represented by a duly authorised agent appointed from among their permanent staff.

4. Natural or legal persons invited to attend a hearing organised by the hearing officer may be assisted by a legal adviser or another qualified person outside their permanent staff admitted by the hearing officer.

5. This Article is without prejudice to the right to a hearing under the basic Regulations.

#### Article 7

##### **Hearings with an individual interested party or a group of interested parties with similar interests**

1. The hearing officer may organise and conduct a hearing between an individual interested party or a group of interested parties with similar interests and the Commission services responsible for the investigation and where necessary other services, upon a reasoned request of the interested party or the group of interested parties with similar interests.

2. A hearing with a group of interested parties with similar interests on a specific issue may be requested by an individual interested party and shall take place provided that at least another individual interested party with similar interests agrees to participate.

#### Article 8

##### **Hearings among interested parties with different interests**

1. A hearing among interested parties with different interests may be organised and chaired by the hearing officer to allow opposing views to be presented and rebuttal arguments offered. The period within which such a hearing should be held shall be specified in the Notice of Initiation of the trade proceeding.

2. A hearing among interested parties with different interests may be organised in each trade defence proceeding after hearing the Commission services responsible for the investigation.

3. A hearing among interested parties with different interests on a specific issue may also be requested by an individual interested party and shall take place provided that at least another individual interested party with different interests agrees to participate.

4. The Commission services responsible for the investigation and where necessary other services shall attend the hearing.

5. The competent representatives of the Member States may attend any hearing among interested parties with different interests as observers.

#### Article 9

##### **Preparation of hearings**

1. After hearing the Director responsible or his delegate, the hearing officer shall determine the date, the duration and the place of the hearing. Where a postponement is requested by the interested parties or the Commission services, the hearing officer shall decide whether or not to allow it.

2. Where appropriate, the hearing officer may hold a preparatory meeting with the interested parties or with the Commission services responsible for the investigation and other services in order to identify and clarify, as far as possible, any questions of fact or law to be addressed during the hearing. To this effect, the hearing officer may request from the participants in a hearing any information necessary for the preparation of the hearing.

3. The hearing officer shall prepare the agenda of each hearing which shall be made available to all participants prior to the hearing.

4. The hearing officer may, within a reasonable time after the deadline for the submission of comments on a disclosure and before a hearing among parties, invite the participants to submit questions on the information provided by other interested parties.

5. Where appropriate, in view of the need to ensure that the hearing among parties is properly prepared and particularly that questions of fact are clarified as far as possible, the hearing officer may, after hearing the Director responsible or his delegate, supply in advance to the parties invited to the hearing a list of the questions on which he wishes them to make known their views.

6. The hearing officer may also ask for prior written notification of the essential contents of the intended statement of the participants in any hearing.

7. The Hearing Officer may invite external experts to the hearings. Interested parties and the Commission services may request the hearing officer to admit external experts to hearings. The hearing officer shall decide on such requests. The external experts invited to a hearing shall be required to sign a confidentiality agreement.

8. The external experts may be asked to provide any relevant analysis, reports or publications which shall be included in the file and made available to all participants whenever possible prior to the hearing.

#### Article 10

##### **Conduct of hearings**

1. The hearing officer shall be fully responsible for the conduct of the hearing. The hearing officer shall ensure that the hearing is properly conducted in order to contribute to the fairness of the hearing itself and of any decision taken subsequently.

2. Hearings shall not be public. The hearing officer shall decide which persons should be heard on behalf of an interested party and whether the persons concerned should be heard separately or in the presence of other persons invited to attend. In the latter case, regard shall be had to the legitimate interest of the interested parties in the protection of their business secrets and other confidential information.



3. The hearing officer may allow the participants to pose and answer questions during the hearing.

4. If the hearing officer has admitted external experts, he shall ensure that these experts have the opportunity to present their views and answer to questions of other participants in the hearing.

5. Where appropriate after a hearing, in view of the need to ensure the right to be heard, after hearing the Director responsible or his delegate, the hearing officer may afford interested parties the opportunity of submitting further written comments. The hearing officer shall fix a date by which such submissions may be made. Written comments received after that date may not be taken into account.

#### Article 11

##### Follow-up on hearings

1. The hearing officer shall produce a transcript or a meaningful summary of the hearings:

(a) where hearings among interested parties with different interests are organised, a transcript or a meaningful summary shall be made available to all participants in the hearing and shall be included in the file open for consultation by interested parties;

(b) where hearings between an individual interested party or a group of interested parties with similar interests and the Commission services are organised, a transcript or a meaningful summary shall be made available to all participants in the hearing. These participants may submit a reasoned request for confidentiality of certain information contained in the transcript or the summary. The hearing officer shall decide on these requests after hearing the Commission services responsible for the investigation and where necessary other services. The non-confidential version of the transcript or summary of the hearing shall be included in the file for consultation by interested parties.

2. The hearing officer may convey recommendations to the Commission services responsible for the investigation in accordance with Article 4(4) of this Decision. The Commission services responsible for the investigation shall inform the hearing officer within a reasonable period of time before the adoption of a final legal act whether and how they have taken these recommendations into account and shall provide the hearing officer with a copy of the draft legal act.

3. The hearing officer shall submit regular reports to the member of the Commission responsible for trade policy with a copy to the Director-General on hearings with individual parties or a group of interested parties with similar interests as provided for in Article 18 of this Decision, unless the case requires an immediate recommendation to the member of the Commission responsible for trade policy or the Director-General.

4. Any recommendations made to the Commission services responsible for the investigation and the reports and observations to the member of the Commission responsible for trade policy and the Director-General made by the hearing officer shall be considered confidential internal documents.

5. If a hearing among parties is organised, the hearing officer shall prepare a written final report on the respect of the rights of the interested parties. This report may be modified by the hearing officer in the light of any amendments to the draft legal act up to the time of a final legal act.

#### Article 12

##### Access to file

1. A party that claims to be an interested party may request the hearing officer to review any refusal of the Commission services responsible for the investigation to provide that party, within a reasonable time, with access to the file open for consultation or to a particular document in the possession of the Commission. The hearing officer shall examine the case and shall make a decision on whether to grant partial or full access or refuse access to the file or the requested document.

2. The hearing officer shall set the time limits within which such access shall be provided by the Commission services responsible for the investigation.

#### Article 13

##### Confidentiality

1. The hearing officer shall be bound by the general rules regarding the confidentiality of information submitted by interested parties in administrative proceedings before the Commission.

2. The hearing officer may be requested by an interested party or the Commission services responsible for the investigation to make a decision on the confidential nature of a document in the possession of the Commission services responsible for the investigation.

#### Article 14

##### Non-confidential summaries of confidential information

1. An interested party may request the hearing officer to review the assessment of the Commission services responsible for the investigation on whether a non-confidential summary of confidential information submitted in the course of an investigation is in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

2. If the Commission services responsible for the investigation intend to disregard a document or information for which an interested party has refused to provide a meaningful non-confidential summary, the latter may request the hearing officer to decide on the matter.

3. The hearing officer shall examine the request. If he considers that the non-confidential summary is not sufficiently detailed, the hearing officer shall give the interested party that provided the summary an opportunity to comment and improve its summary within a reasonable time.

4. If the interested party that submitted the confidential information provides a deficient summary, provides justifications that cannot be accepted, or does not act, the hearing officer shall decide whether or not to disregard confidential information for which no meaningful non-confidential summary has been provided in accordance with the relevant provisions of the basic Regulations.

#### Article 15

##### **Access to information confidential by nature, not susceptible to summary information**

At the request of an interested party the hearing officer can examine information that is confidential by nature and not susceptible to summary, to which that party has no access, in order to verify how that information was used by the Commission services responsible for the investigation.

The hearing officer shall inform the requesting interested party of whether, in his view:

- (a) the information withheld from the party is relevant to that party's defence; and
- (b) where relevant, the investigation services have correctly reflected the information in the facts and considerations on which they have based their conclusions.

#### Article 16

##### **Extension of deadlines**

1. A request for extension of time limits or postponement of the dates for replying to questionnaires, to submitting additional information, for on-the-spot visits, or for comments on disclosures shall first be addressed by any interested party to the Commission services responsible for the investigation. Such a request must be made in due time before the expiry of the original time limit. Where such a request is rejected or where the interested party considers that the extension given is too short, it may submit, before the expiry of the original time limit, a reasoned request to the hearing officer to review the matter. After hearing the Director responsible or his delegate, the hearing officer may extend the time limits or reject the request.

2. The Commission services shall not act in the matter referred before the hearing officer has decided.

3. The hearing officer shall decide with due regard to the specific circumstances of the request concerned and the time constraints of the proceeding.

#### Article 17

##### **Participation in the meetings of committees**

The hearing officer may attend the committee meetings. Where appropriate, the hearing officer may reply to questions of Member States as far as these questions concern the nature of his intervention in the proceedings.

#### Article 18

##### **Reports of the hearing officer**

1. At the end of each year, the hearing officer shall prepare an Annual Report. The Annual Report shall contain information on the cases in which the hearing officer intervened, the type of decisions and recommendations he made and any recommendation for improving the trade proceedings. The Report shall be addressed to the member of the Commission responsible for trade policy. The Director-General for Trade and the Directorates concerned shall receive a copy of the Report.

2. Summaries of the Annual Report shall be communicated to the Member States and the European Parliament and published on the website of the hearing officer.

3. The hearing officer shall prepare regular reports for the member of the Commission responsible for trade policy summarising his activities and the issues which arose during these activities. The report shall outline the main policy issues, the decisions and the recommendations made by the hearing officer and how these recommendations were taken into account by the Commission services responsible for the investigation. A copy of this report shall be addressed to the Director-General for Trade.

4. The hearing officer shall report on any hearing among interested parties with different interests and, in the fulfilment of his advisory role, may report to the member of the Commission responsible for trade policy and the Director-General on any other issue arising out of a trade proceeding or otherwise relevant for the effective application of European Union law principles in trade proceedings.

5. The final report of the hearing officer in hearings among parties shall be submitted to the member of the Commission responsible for trade policy, the Director-General for Trade and the Director responsible. It shall be communicated to the competent representatives of the Member States and the interested parties.

#### Article 19

##### **Transitional provisions**

This Decision shall apply to proceedings which are ongoing at the time of its entry into force but in which no final disclosure has been made.

Procedural steps taken before the entry into force of this Decision shall continue to have effect.

*Article 20***Entry into force**

This Decision shall enter into force on the day following its publication in the *Official Journal of the European Union*.

Done at Brussels, 29 February 2012.

*For the Commission*  
*The President*  
José Manuel BARROSO

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