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German Paper Manufacturer Takes Duty Fight to Supreme Court (1)

*Dumping*

## **German Paper Manufacturer Takes Duty Fight to Supreme Court (1)**

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### **Snapshot**

- Papierfabrik August Koehler SE challenges \$80 million in anti-dumping duties
  - Case could affect Commerce Department's ability to punish non-cooperating companies
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By Brian Flood

German manufacturer Papierfabrik August Koehler SE is taking its fight against U.S. anti-dumping duties all the way to the Supreme Court, according to Sept. 21 court filings.

The case could affect not just \$80 million in duties on Papierfabrik's lightweight thermal paper, but also the Commerce Department's authority to hike duties on any companies that don't cooperate with its investigations.

Lightweight thermal paper is commonly used for printed receipts.

It would be significant if the Supreme Court agreed to hear the Papierfabrik case. The court only grants review of a very few number of cases, and it hasn't tackled an international trade case since 2009.

Papierfabrik is asking the high court for a summary reversal, that is, a ruling without the need for extensive briefings or oral arguments. The Supreme Court has not yet announced whether it will take up the case.

At issue is the department's use of "adverse facts available," that is, select information that tends to result in a higher duty margin.

### **Cooperate, or Else**

If Commerce doesn't have enough information to fully calculate a foreign producer's or exporter's anti-dumping duty rate, it can take information from other source to fill in the gaps. If the agency thinks the foreign company didn't cooperate to the best of its ability, it can use adverse facts available. In part, this is designed to encourage companies to cooperate with these proceedings.

F. Amanda DeBusk, chairman of Dechert's international trade and global regulation group and counsel for Papierfabrik, told Bloomberg Law that Commerce's use of adverse facts available has been steadily rising in recent years, as the agency has taken an increasingly aggressive approach to enforcing the anti-dumping duty law

**Leslie Alan Glick, co-chair of the law firm Butzel Long's international trade and customs team, told**

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**Bloomberg Law that adverse facts available acts “like a sword hanging over” companies, pushing them to answer Commerce’s questions quickly and thoroughly, or risk very expensive duty rates.**

Commerce used this tool to significantly raise duties against Papierfabrik, from just 4.33 percent to 75.36 percent, after finding that the company hid several “home market” sales, that is, sales made in Germany that could have affected the company’s duty rate. Papierfabrik said the sales were “misclassified by a small group of employees acting in violation of company policy without the knowledge or approval of senior management.”

Papierfabrik said Commerce broke the law, because even where it uses adverse facts available, it has to corroborate that the information it uses will lead to a fairly accurate assessment of the company’s dumping. Papierfabrik claims that the lower Court of International Trade wrongly upheld Commerce’s calculations, even though it acknowledged that it led to an “extremely aberrant” dumping margin, and that the Federal Circuit Court of Appeals “brazenly abdicated its responsibility to exercise meaningful review” by summarily affirming that ruling.

In a statement provided to Bloomberg Law, Koehler’s attorney, Mike McGinley of Dechert LLP said the trade court was putting its view of the statute’s purpose, that is, to deter noncompliance. “This case would allow the Supreme Court to rein in bureaucratic excess that the Federal Circuit has wrongly declined to address,” said McGinley.

Commerce’s decision to use adverse facts available is often part of lawsuits at the Court of International Trade, and South Korea currently has a challenge to the U.S.’s use of this practice—and specifically, how it was applied to duties on South Korean steel and power transformers—pending at the World Trade Organization.

## **SCOTUS Long Shot**

The Supreme Court begins its next term Oct. 1. **Glick told Bloomberg Law that he doubts the high court, with all that it has on its agenda, would take up this case.**

But McGinley told Bloomberg Law that several factors might attract the court here. Because this case comes out of the Federal Circuit courts, which have exclusive authority to hear trade cases, McGinley said, the Supreme Court doesn’t have to wait for a circuit split, that is, different circuit courts providing conflicting rulings on the same issue.

He also said that this case deals with three important issues—“aggressive overreach” by a federal agency, a trial court that took the wrong approach to interpreting the statute, and an appeals court that issued a one-sentence ruling on an important legal issue without meaningful review.

However, the Supreme Court in December 2017 rejected a previous challenge brought by Papierfabrik against Commerce’s use of adverse facts available.

Counsel for the Justice Department, which defended Commerce’s position, was not immediately available for comment.

The case is *Papierfabrik August Koehler SE v. United States*, U.S., No. 18A42, *cert. petition filed* 9/21/18.

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