

Official Journal of the European Union

L 258



English edition

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Volume 60

6 October 2017

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II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

COUNCIL DECISION (EU) 2017/1792

of 29 May 2017

on the signing, on behalf of the Union, and provisional application of the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114, in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 21 April 2015 the Council authorised the Commission to open negotiations with the United States of America for an agreement on reinsurance. The negotiations were successfully concluded by an exchange of letters between the lead negotiators on 12 January 2017.
- (2) The Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance ('the Agreement') should be signed.
- (3) With a view to enabling the setting-up of the Joint Committee under the Agreement, which will provide a forum for the Union and the United States of America to exchange information on the proper implementation of the Agreement, and in order to allow for the implementation of harmonised practices by supervisory authorities in the Union as regards group supervision which are already possible under the current Union legal framework in that area, Articles 4 and 7 of the Agreement should be applied on a provisional basis, pending the completion of the procedures necessary for the conclusion of the Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The signing on behalf of the Union of the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance is hereby authorised, subject to the conclusion of the said Agreement.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the Union.

Article 3

Articles 4 and 7 of the Agreement shall be applied on a provisional basis in accordance with Articles 9 and 10 of the Agreement ⁽¹⁾, pending the completion of the procedures necessary for the conclusion of the Agreement.

Article 4

The Commission shall represent the Union within the Joint Committee provided for in Article 7 of the Agreement, after having heard the views of the Council working party on financial services, and shall inform that working party, whenever appropriate and at least on a yearly basis, of the progress made in the implementation of the Agreement.

Article 5

Any positions to be expressed on behalf of the Union shall be adopted in accordance with the Treaties and thus by the Council as provided in Article 16(1) of the Treaty on European Union or Article 218(9) of the Treaty on the Functioning of the European Union.

Article 6

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 29 May 2017.

For the Council
The President
C. CARDONA

⁽¹⁾ The date from which the Agreement will be provisionally applied will be published in the Official Journal of the European Union by the General Secretariat of the Council.

COUNCIL DECISION (EU) 2017/1793**of 15 September 2017****amending Decision (EU) 2017/1792 on the signing, on behalf of the Union, and provisional application of the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 read in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 21 April 2015, the Council authorised the Commission to open negotiations with the United States of America for an Agreement on reinsurance. The negotiations were successfully concluded by an exchange of letters between the lead negotiators on 12 January 2017.
- (2) The Agreement should be signed on behalf of the European Union in English, subject to its conclusion at a later date. For this purpose, Decision (EU) 2017/1792 ⁽¹⁾ should be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Decision (EU) 2017/1792 is amended as follows:

- (1) Article 2 is replaced by the following:

'Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the Union as well as the exchange of letters between the European Union and the United States of America concerning language arrangements. The signature of the Agreement shall take place together with the signature of the exchange of letters.'

- (2) the following article is inserted:

'Article 3a

The Agreement shall be signed in English. Pursuant to Union law, the Agreement is also drawn up by the Union in the Bulgarian, Croatian, Czech, Danish, Dutch, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages. These additional language versions should be authenticated by an exchange of diplomatic notes between the European Union and the United States of America. All authenticated versions shall be of equal value.'

Article 2

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 15 September 2017.

For the Council

The President

M. MAASIKAS

⁽¹⁾ Council Decision (EU) 2017/1792 of 29 May 2017 on the signing, on behalf of the Union, and provisional application of the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance (see page 1 of this Official Journal).

BILATERAL AGREEMENT
between the European Union and the United States of America on prudential measures regarding
insurance and reinsurance

Preamble

The European Union (EU) and the United States of America (United States or U.S.), Parties to this Agreement,

Sharing the goal of protecting insurance and reinsurance policyholders and other consumers, while respecting each Party's system for insurance and reinsurance supervision and regulation;

Affirming that for the United States, prudential measures applicable in the European Union, together with the requirements and undertakings provided for in this Agreement, achieve a level of protection for policyholders and other consumers with respect to reinsurance cessions and group supervision consistent with the requirements of the Federal Insurance Office Act of 2010;

Acknowledging the growing need for co-operation between EU and U.S. supervisory authorities including the exchange of confidential information, given the increased globalisation of insurance and reinsurance markets;

Taking into account that practical arrangements concerning cross-border cooperation are essential for supervision of insurers and reinsurers both during times of stability and during times of crisis;

Taking into account information exchanged on each Party's regulatory frameworks and after careful consideration of these frameworks;

Noting the benefits of enhancing regulatory certainty in the application of insurance and reinsurance regulatory frameworks for insurers and reinsurers operating in the territory of each Party;

Acknowledging risk mitigation effects of reinsurance agreements in a cross-border context provided applicable prudential conditions are fulfilled and taking into account protection of policyholders and other consumers;

Acknowledging that group supervision of insurers and reinsurers enables supervisory authorities to form sound judgments of the financial position of these groups;

Acknowledging the need for a group capital requirement or assessment for insurers and reinsurers forming part of a group that operates in the territory of both Parties, and that a group capital requirement or assessment at the level of the worldwide parent undertaking can be based on the approach of the Home Party;

Affirming the importance of specifications for the group capital requirement or assessment for group supervision and of, where warranted, the application of corrective or preventive or otherwise responsive measures by a supervisory authority based on that requirement or assessment; and

Encouraging exchange of information between supervisory authorities in order to supervise insurers and reinsurers in the interest of policyholders and other consumers,

HEREBY AGREE:

Article 1

Objectives

This Agreement addresses the following:

- (a) the elimination, under specified conditions, of local presence requirements imposed by a Party or its supervisory authorities on an assuming reinsurer which has its head office or is domiciled in the other Party, as a condition for entering into any reinsurance agreement with a ceding insurer which has its head office or is domiciled in its territory or for allowing the ceding insurer to recognise credit for reinsurance or credit for risk mitigation effects of such reinsurance agreement;

- (b) the elimination, under specified conditions, of collateral requirements imposed by a Party or its supervisory authorities on an assuming reinsurer which has its head office or is domiciled in the other Party, as a condition for entering into any reinsurance agreement with a ceding insurer which has its head office or is domiciled in its territory or for allowing the ceding insurer to recognise credit for reinsurance or credit for risk mitigation effects of such reinsurance agreement;
- (c) the role of the Host and Home supervisory authorities with respect to prudential group supervision of an insurance or reinsurance group whose worldwide parent undertaking is in the Home Party, including, under specified conditions, (i) the elimination at the level of the worldwide parent undertaking of Host Party prudential insurance solvency and capital, governance, and reporting requirements, and (ii) establishing that the Home supervisory authority, and not the Host supervisory authority, will exercise worldwide prudential insurance group supervision, without prejudice to group supervision by the Host Party of the insurance or reinsurance group at the level of the parent undertaking in its territory; and
- (d) the Parties' mutual support for the exchange of information between supervisory authorities of each Party, and recommended practices for such exchange.

Article 2

Definitions

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

- (a) 'Ceding insurer' means an insurer or reinsurer that is counterparty to an assuming reinsurer under a reinsurance agreement;
- (b) 'Collateral' means assets, such as cash and letters of credit, pledged by the reinsurer for the benefit of the ceding insurer or reinsurer to guarantee or secure the assuming reinsurer's liabilities to the ceding insurer arising from a reinsurance agreement;
- (c) 'Credit for reinsurance or credit for risk mitigation effects of reinsurance agreements' means the right of a ceding insurer under prudential regulatory framework to recognise amounts due from assuming reinsurers relating to paid and unpaid losses on ceded risks as assets or reductions from liabilities respectively;
- (d) 'Group' means two or more undertakings, at least one of which is an insurance or reinsurance undertaking, where one has control over one or more insurance or reinsurance undertakings or other non-regulated undertaking;
- (e) 'Group Supervision' means the application of regulatory and prudential oversight by a supervisory authority to an insurance or reinsurance group for purposes including protecting policyholders and other consumers, and promoting financial stability and global engagement;
- (f) 'Home Party' means the Party in whose territory the worldwide parent of the insurance or reinsurance group or undertaking has its head office or is domiciled;
- (g) 'Home supervisory authority' means a supervisory authority from the Home Party;
- (h) 'Host Party' means the Party in which the insurance or reinsurance group or undertaking has operations, but is not the territory in which the worldwide parent undertaking of the insurance or reinsurance group or undertaking has its head office or is domiciled;
- (i) 'Host supervisory authority' means a supervisory authority from the Host Party;
- (j) 'Insurer' means an undertaking which is authorised or licensed to take up or engage in the business of direct or primary insurance;
- (k) 'Parent' means a regulated or unregulated undertaking that directly or indirectly owns or controls another undertaking;
- (l) 'Personal Data' means any information relating to an identified or identifiable natural person;
- (m) 'Reinsurer' means an undertaking which is authorised or licensed to take up or engage in the business of reinsurance activities;

- (n) 'Reinsurance activities' means the activity consisting of accepting risks ceded by an insurer or by another reinsurer;
- (o) 'Reinsurance agreement' means a contract whereby an assuming reinsurer has accepted risk ceded by an insurer or reinsurer;
- (p) 'Supervisory authority' means any insurance and reinsurance supervisor in the European Union or in the United States;
- (q) 'Undertaking' means any entity engaged in economic activity;
- (r) 'U.S. State' means any State, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands;
- (s) 'Worldwide' means all operations or activities of a group wherever they occur; and
- (t) 'Worldwide parent undertaking' means the ultimate parent undertaking of a group.

Article 3

Reinsurance

1. Subject to the conditions in paragraph 4, a Party shall not, and shall ensure that its supervisory authorities or any other competent authorities do not, as a condition to allow an assuming reinsurer which has its head office or is domiciled in the territory of the other Party (hereunder for the purpose of Article 3, a 'Home Party Assuming Reinsurer') to enter into a reinsurance agreement with a ceding insurer which has its head office or is domiciled in its territory (hereunder for the purpose of Article 3, a 'Host Party Ceding Insurer'):

- (a) maintain or adopt any requirement to post collateral in connection with cessions from a Host Party Ceding Insurer to a Home Party Assuming Reinsurer and any related reporting requirement attributable to such removed collateral, or
- (b) maintain or adopt any new requirement with substantially the same regulatory impact on the Home Party Assuming Reinsurer as collateral requirements removed under this Agreement or any reporting requirement attributable to such removed collateral,

which, in the case of either (a) or (b), results in less favourable treatment of Home Party Assuming Reinsurers than assuming reinsurers which have their head office or are domiciled in the territory of the same supervisory authority as a Host Party Ceding Insurer. This paragraph does not prohibit a Party in whose territory a ceding insurer has its head office or is domiciled (hereunder for the purpose of Article 3, a 'Host Party') or its supervisory authorities from applying requirements as a condition to allow the Home Party Assuming Reinsurers to enter into a reinsurance agreement with a Host Party Ceding Insurer if the same requirements apply to reinsurance agreements between a ceding insurer and an assuming reinsurer which have their head office or are domiciled in the territory of the same supervisory authority.

2. Subject to the conditions in paragraph 4, a Host Party shall not, and shall ensure that its supervisory authorities or any other competent authorities do not, as a condition to allow a Host Party Ceding Insurer to take credit for reinsurance or for risk mitigation effects of reinsurance agreements concluded with a Home Party Assuming Reinsurer:

- (a) maintain or adopt any requirement to post collateral in connection with cessions from a Host Party Ceding Insurer to a Home Party Assuming Reinsurer and any related reporting requirement attributable to such removed collateral, or
- (b) maintain or adopt any new requirement with substantially the same regulatory impact on the Home Party Assuming Reinsurer as collateral requirements removed under this Agreement or any reporting requirement attributable to such removed collateral,

which, in the case of either (a) or (b), results in less favourable treatment of Home Party Assuming Reinsurers than assuming reinsurers which have their head office or are domiciled in the territory of the same supervisory authority as a Host Party Ceding Insurer. This paragraph does not prohibit a Host Party or its supervisory authorities from applying

requirements as a condition to allow a Host Party Ceding Insurer to take credit for reinsurance or risk mitigation effects of reinsurance agreements concluded with a Home Party Assuming Reinsurer if the same requirements apply to reinsurance agreements between a ceding insurer and an assuming reinsurer which have their head office or are domiciled in the territory of the same supervisory authority.

3. Subject to the conditions in paragraph 4, a Host Party shall not, and shall ensure that its supervisory authorities or any other competent authorities, as applicable, do not, as a condition of entering into a reinsurance agreement with a Host Party Ceding Insurer or as a condition to allow the Host Party Ceding Insurer to recognise credit for such reinsurance or credit for risk mitigation effect of such reinsurance agreement:

- (a) maintain or adopt any requirement for a Home Party Assuming Reinsurer to have a local presence, or
- (b) maintain or adopt any new requirement with substantially the same regulatory impact on the Home Party Assuming Reinsurer as local presence,

which, in the case of either (a) or (b), results in less favourable treatment of a Home Party Assuming Reinsurer than assuming reinsurers which have their head office or are domiciled in the territory of the supervisory authority of the Host Party Ceding Insurer or which have their head office or are domiciled in the territory of the Host Party and are licensed or permitted to operate in the territory of the supervisory authority of the Host Party Ceding Insurer. For a U.S. State, 'permitted to operate' shall mean, for purposes of this provision, admitted in that State.

4. Paragraphs 1 to 3 apply subject to the following conditions:

- (a) the assuming reinsurer has and maintains on an ongoing basis,
 - (i) at least 226 million Euro, where the ceding insurer has its head office in the EU, or 250 million U.S. dollars, where the ceding insurer is domiciled in the United States, of own funds or capital and surplus, calculated according to the methodology of its home jurisdiction; or
 - (ii) if the assuming reinsurer is an association including incorporated and individual unincorporated underwriters:
 - (A) minimum capital and surplus equivalents (net of liabilities) or own funds, calculated according to the methodology applicable in its home jurisdiction, of at least 226 million Euro, where the ceding insurer has its head office in the EU, or 250 million U.S. dollars, where the ceding insurer is domiciled in the United States; and
 - (B) a central fund containing a balance of at least 226 million Euro, where the ceding insurer has its head office in the EU, or 250 million U.S. dollars, where the ceding insurer is domiciled in the United States;
- (b) the assuming reinsurer has and maintains on an ongoing basis:
 - (i) a solvency ratio of 100 percent SCR under Solvency II or an RBC of 300 percent Authorized Control Level, as applicable in the territory in which the assuming reinsurer has its head office or is domiciled; or
 - (ii) if the assuming reinsurer is an association including incorporated and individual unincorporated underwriters, a solvency ratio of 100 percent SCR under Solvency II or an RBC of 300 percent Authorized Control Level, as applicable in the territory in which the assuming reinsurer has its head office or is domiciled;
- (c) the assuming reinsurer agrees to provide prompt written notice and explanation to the supervisory authority in the territory of the ceding insurer if:
 - (i) it falls below the minimum capital and surplus or own funds, as applicable, specified in subparagraph (a), or the solvency or capital ratio, as applicable, specified in subparagraph (b); or
 - (ii) any regulatory action is taken against it for serious noncompliance with applicable law;

- (d) the assuming reinsurer provides written confirmation to the Host supervisory authority of consent to the jurisdiction of the courts of the territory in which the ceding insurer has its head office or is domiciled, in accordance with applicable requirements of that territory for providing such consent. Nothing in this Agreement shall limit or in any way alter the capacity of parties to a reinsurance agreement to agree to alternative dispute resolution mechanisms;
- (e) where applicable for 'service of process' purposes, the assuming reinsurer provides written confirmation to the Host supervisory authority of consent to the appointment of that supervisory authority as agent for service of process. The Host supervisory authority may require that such consent be provided to it and included in each reinsurance agreement under its jurisdiction;
- (f) the assuming reinsurer consents in writing to pay all final judgments, wherever enforcement is sought, obtained by a ceding insurer, that have been declared enforceable in the territory where the judgment was obtained;
- (g) the assuming reinsurer agrees in each reinsurance agreement subject to this Agreement that it will provide collateral for 100 percent of the assuming reinsurer's liabilities attributable to reinsurance ceded pursuant to that agreement if the assuming reinsurer resists enforcement of a final judgment that is enforceable under the law of the territory in which it was obtained or a properly enforceable arbitration award, whether obtained by the ceding insurer or by its resolution estate, if applicable;
- (h) The assuming reinsurer or its legal predecessor or successor, where applicable, provides the following documentation to the Host supervisory authority, if requested by that supervisory authority:
 - (i) with respect to the two years preceding entry into the reinsurance agreement and on an annual basis thereafter, its annual audited financial statements, in accordance with the applicable law of the territory of its head office, including the external audit report;
 - (ii) with respect to the two years preceding entry into the reinsurance agreement, solvency and financial condition report or actuarial opinion, if filed with the assuming reinsurer's supervisor;
 - (iii) prior to entry into the reinsurance agreement and not more than semi-annually thereafter, an updated list of all disputed and overdue reinsurance claims outstanding for 90 days or more, regarding reinsurance assumed from ceding insurers of the jurisdiction of the ceding insurer; and
 - (iv) prior to entry into the reinsurance agreement and not more than semi-annually thereafter, information regarding the assuming reinsurer's assumed reinsurance by ceding company, ceded reinsurance by the assuming reinsurer, and reinsurance recoverable on paid and unpaid losses by the assuming reinsurer, to allow for the evaluation of the criteria set forth in subparagraph (i) of paragraph 4;
- (i) the assuming reinsurer maintains a practice of prompt payment of claims under reinsurance agreements. The lack of prompt payment will be evidenced if any of the following criteria is met:
 - (i) more than 15 percent of the reinsurance recoverables are overdue and in dispute as reported to the supervisor;
 - (ii) more than 15 percent of the reinsurer's ceding insurers or reinsurers have overdue reinsurance recoverables on paid losses of 90 days or more which are not in dispute and which exceed for each ceding insurer 90,400 Euro, where the assuming reinsurer has its head office in the EU, or 100,000 U.S. dollars, where the assuming reinsurer is domiciled in the United States; or
 - (iii) the aggregate amount of reinsurance recoverables on paid losses which are not in dispute, but are overdue by 90 days or more, exceeds 45,200,000 Euro, where the assuming reinsurer has its head office in the EU, or 50,000,000 U.S. dollars, where the assuming reinsurer is domiciled in the United States;
- (j) the assuming reinsurer confirms that it is not presently participating in any solvent scheme of arrangement, which involves Host Party Ceding Insurers, and agrees to notify the ceding insurer and its supervisory authority and to provide 100 percent collateral to the ceding insurer consistent with the terms of the scheme should the assuming reinsurer enter into such an arrangement;

- (k) if subject to a legal process of resolution, receivership, or winding-up proceedings as applicable, the ceding insurer, or its representative, may seek and, if determined appropriate by the court in which the resolution, receivership, or winding-up proceedings is pending, may obtain an order requiring that the assuming reinsurer post collateral for all outstanding ceded liabilities; and
- (l) the assuming reinsurer's Home supervisory authority confirms to the Host Party supervisory authority on an annual basis that the assuming reinsurer complies with subparagraph (b).

5. Nothing in this Agreement precludes an assuming reinsurer from providing to supervisory authorities information on a voluntary basis.

6. Each Party shall ensure that, in its capacity as a Host Party, with respect to its supervisory authorities, where the Host supervisory authority determines that a Home Party Assuming Reinsurer no longer satisfies one of the conditions listed in paragraph 4, the Host supervisory authority only imposes any of the requirements addressed in paragraphs 1 to 3 if that Host supervisory authority follows the procedure set out in subparagraphs (a) to (c):

- (a) prior to imposing any such requirements the Host supervisory authority communicates with the assuming reinsurer and, except for exceptional circumstances in which a shorter period is necessary for policyholder and other consumer protection, provides the assuming reinsurer with 30 days from the initial communication to submit a plan to remedy the defect and 90 days from the initial communication to remedy the defect, and informs the Home supervisory authority;
- (b) only where, after the expiry of this period of 90 days or less under exceptional circumstances as set out in (a), the Host supervisory authority considers that no or insufficient action was taken by the assuming reinsurer, the Host supervisory authority may impose any of the requirements as set out in paragraphs 1 to 3; and
- (c) the imposition of any of the requirements set out in paragraphs 1 to 3 is explained in writing and communicated to the assuming reinsurer concerned.

7. Subject to applicable law and the terms of this Agreement, nothing in this Article shall limit or in any way alter the capacity of parties to a reinsurance agreement to agree on requirements for collateral or other terms in that reinsurance agreement.

8. This Agreement shall apply only to reinsurance agreements entered into, amended, or renewed on or after the date on which a measure that reduces collateral pursuant to this Article takes effect, and only with respect to losses incurred and reserves reported from and after the later of (i) the date of the measure, or (ii) the effective date of such new reinsurance agreement, amendment, or renewal. Nothing in this Agreement shall limit or in any way alter the capacity of parties to any reinsurance agreement to renegotiate such reinsurance agreement.

9. For greater clarity, in the event of termination of this Agreement, nothing in this Agreement prevents supervisory authorities, or other competent authorities, from requiring the local presence of Host Party assuming reinsurers, or requiring posting of collateral and related requirements, or compliance with other provisions of applicable law, with respect to any liabilities under reinsurance agreements described in this Agreement.

Article 4

Group supervision

For the purposes of Articles 9 and 10, the Parties set forth the following practices of group supervision:

- (a) Without prejudice to subparagraphs (c) to (h) and participation in supervisory colleges, a Home Party insurance or reinsurance group is subject only to worldwide prudential insurance group supervision including worldwide group governance, solvency and capital, and reporting, as applicable, by its Home supervisory authorities, and is not subject to group supervision at the level of the worldwide parent undertaking of the insurance or reinsurance group by any Host supervisory authority.

- (b) Notwithstanding subparagraph (a), Host supervisory authorities may exercise supervision with regard to a Home Party insurance or reinsurance group as set out in subparagraphs (c) to (h). Host supervisory authorities may exercise group supervision, where appropriate, with regard to a Home Party insurance or reinsurance group at the level of the parent undertaking in its territory. Host supervisory authorities do not otherwise exercise worldwide group supervision with regard to a Home Party insurance or reinsurance group, without prejudice to group supervision of the insurance or reinsurance group at the level of the parent undertaking in the territory of the Host Party.
- (c) Where a worldwide risk management system, as evidenced by the submission of a worldwide group Own Risk and Solvency Assessment (ORSA), is applied to a Home Party insurance or reinsurance group according to the applicable law, the Home supervisory authority that requires the ORSA provides a summary of the worldwide group ORSA:
 - (i) to the Host supervisory authorities, if they are members of the insurance or reinsurance group's supervisory college, without delay, and;
 - (ii) to the supervisory authorities of significant subsidiaries or branches of that group in the Host Party, at the request of those supervisory authorities.

Where no such worldwide group ORSA is applied to a Home Party insurance or reinsurance group, according to applicable law, the relevant U.S. State or EU Member State's supervisory authority provides equivalent documentation which is prepared consistent with applicable law of the Home supervisory authority as referred to in subparagraphs (i) and (ii) above.

- (d) The summary of the worldwide group ORSA, or the equivalent documentation as set out in subparagraph (c), includes the following elements:
 - (i) a description of the insurance or reinsurance group's risk management framework;
 - (ii) an assessment of the insurance or reinsurance group's risk exposure; and
 - (iii) a group assessment of risk capital and a prospective solvency assessment.
- (e) Notwithstanding subparagraph (a), if the summary of the worldwide group ORSA, or, where applicable, equivalent documentation as set out in subparagraph (c), exposes any serious threat to policyholder protection or financial stability in the territory of the Host supervisory authority, that Host supervisory authority may impose preventive, corrective, or otherwise responsive measures with respect to insurers or reinsurers in the Host Party.

Prior to imposing such measures, the Host supervisory authority consults the insurance or reinsurance group's relevant Home supervisory authority. The Parties encourage supervisory authorities to continue to address prudential insurance group supervision matters within supervisory colleges.

- (f) Prudential insurance group supervision reporting requirements as set out in the applicable law in the territory of the Host Party do not apply at the level of the worldwide parent undertaking of the insurance or reinsurance group unless they directly relate to the risk of a serious impact on the ability of undertakings within the insurance or reinsurance group to pay claims in the territory of the Host Party.
- (g) A Host supervisory authority retains the ability to request and obtain information from an insurer or reinsurer pursuing activities in its territory, whose worldwide parent undertaking has its head office in the territory of the Home Party, for purposes of prudential insurance group supervision, where such information is deemed necessary by the Host supervisory authority to protect against serious harm to policyholders or serious threat to financial stability or a serious impact on the ability of an insurer or reinsurer to pay its claims in the territory of the Host supervisory authority. The Host supervisory authority bases such information request on prudential supervisory criteria and, whenever possible, avoids burdensome and duplicative requests. The requesting supervisory authority informs the supervisory college of such a request.

Notwithstanding subparagraph (a), the failure of an insurer or reinsurer to comply with such an information request may result in preventive, corrective or otherwise responsive measures being imposed within the Host supervisory authority's territory.

- (h) With regard to a Home Party insurance or reinsurance group with operations in the Host Party and that is subject to a group capital assessment in the Home Party which fulfils the following conditions:
- (i) the group capital assessment includes a worldwide group capital calculation capturing risk at the level of the entire group, including the worldwide parent undertaking of the insurance or reinsurance group, which may affect the insurance or reinsurance operations and activities occurring in the territory of the other Party; and
 - (ii) the supervisory authority in the territory of the Party where the group capital assessment as set out in subparagraph (i) above is applied has the authority to impose preventive, corrective, or otherwise responsive measures on the basis of the assessment, including requiring, where appropriate, capital measures;

the Host supervisory authority does not impose a group capital assessment or requirement at the level of the worldwide parent undertaking of the insurance or reinsurance group according to the applicable law in its territory.

Where a Home Party insurer or reinsurer is subject to a group capital requirement in the territory of the Home Party, the Host supervisory authority does not impose a group capital requirement or assessment at the level of the worldwide parent undertaking of the insurance or reinsurance group.

- (i) Notwithstanding any provision in this Agreement, this Agreement does not and is not intended to limit or restrict the ability of EU supervisory authorities to exercise supervisory or regulatory authority over entities or groups that own or control credit institutions in the EU, have banking operations in the EU, or whose material financial distress or the nature, scope, size, scale, concentration, interconnectedness or mix of activities have been determined could pose a threat to the financial stability of the EU, including through exercise of: Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (CRD IV), Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (CRR), Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending

Regulation (EU) No 1093/2010 and Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, or other related laws and regulations.

Notwithstanding any provision in this Agreement, this Agreement does not and is not intended to limit or restrict the ability of the applicable U.S. supervisory authority to exercise supervisory or regulatory authority over entities or groups that own or control depository institutions in the United States, have banking operations in the United States, or whose material financial distress or the nature, scope, size, scale, concentration, interconnectedness, or mix of activities have been determined could pose a threat to the financial stability of the United States, including through exercise of authority pursuant to the Bank Holding Company Act (12 U.S.C. § 1841 et seq.), the Home Owners' Loan Act (12 U.S.C. § 1461 et seq.), the International Banking Act (12 U.S.C. § 3101 et seq.), the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. § 5301 et seq.), or other related laws or regulations.

Article 5

Exchange of Information

1. The Parties shall encourage supervisory authorities in their respective jurisdictions to cooperate in exchanging information pursuant to the practices set forth in the Annex. The Parties understand that the use of such practices will enhance cooperation and information sharing, while respecting a high standard of confidentiality protection.

2. Nothing in this Agreement addresses requirements that may apply to the exchange of personal data by supervisory authorities.

Article 6

Annex

The Annex to this Agreement shall form an integral part of this Agreement.

Article 7

Joint Committee

1. The Parties hereby establish a Joint Committee, composed of representatives of the United States and representatives of the European Union, which shall provide the Parties with a forum for consultation and to exchange information on the administration of the Agreement and its proper implementation.
2. The Parties shall consult within the Joint Committee regarding this Agreement:
 - (a) upon mutual agreement of the Parties if either Party proposes consultation;
 - (b) at least once within 180 days after the date of entry into force or provisional application of this Agreement, whichever is earlier, and once per year thereafter, unless the Parties otherwise decide;
 - (c) if a written request for mandatory consultation is made by either Party; and
 - (d) if either Party provides written notice of intent to terminate.
3. The Joint Committee may address:
 - (a) matters related to the implementation of the Agreement;
 - (b) the effects of the Agreement, in the Parties' jurisdictions, on insurance and reinsurance consumers, and the commercial operations of insurers and reinsurers;
 - (c) any amendments to this Agreement proposed by either Party;
 - (d) any matter that requires mandatory consultation;
 - (e) a notice of intent to terminate this Agreement; and
 - (f) other matters as may be decided by the Parties.
4. The Joint Committee may adopt rules of procedure.
5. The Joint Committee shall be chaired in turn on an annual basis by each of the Parties, unless decided otherwise. The Joint Committee may be convened by its Chair at such time and manner as may be decided by the Parties.
6. The Joint Committee may convene any working group to facilitate its work.

Article 8

Entry into force

This Agreement shall enter into force seven days after the date the Parties exchange written notifications certifying that they have completed their respective internal requirements and procedures, or on such other date as the Parties may agree.

Article 9

Implementation of the Agreement

1. From the date of entry into force or provisional application of this Agreement, whichever is earlier, the Parties shall encourage relevant authorities to refrain from taking any measures which are inconsistent with any of the conditions or obligations of the Agreement, including with respect to the elimination of collateral and local presence requirements pursuant to Article 3. This may include, as appropriate, exchanges of letters between relevant authorities on matters pertaining to this Agreement.

2. From the date of entry into force or provisional application of this Agreement, whichever is earlier, the Parties shall take all measures, as appropriate, to implement and apply this Agreement as soon as possible in accordance with Article 10.
3. From the date of entry into force or provisional application of this Agreement, whichever is earlier, the United States shall encourage each U.S. State to promptly adopt the following measures:
 - (a) the reduction, in each year following the date of entry into force or provisional application of this Agreement, of the amount of collateral required by each State to allow full credit for reinsurance by 20 percent of the collateral that the U.S. State required as of the January 1 before signature of this Agreement; and
 - (b) the implementation of relevant U.S. State credit for reinsurance laws and regulations consistent with Article 3, as the method for adopting measures in conformity with paragraphs 1 and 2 of that Article.
4. Provided that this Agreement has entered into force, on a date no later than the first day of the month, 42 months after the date of signature of this Agreement, the United States shall begin evaluating a potential preemption determination under its laws and regulations with respect to any U.S. State insurance measure that the United States determines is inconsistent with this Agreement and results in less favourable treatment of an EU insurer or reinsurer than a U.S. insurer or reinsurer domiciled, licensed, or otherwise admitted in that U.S. State. Provided that this Agreement has entered into force, on a date no later than the first day of the month 60 months after the date of signature of this Agreement, the United States shall complete any necessary preemption determination under its laws and regulations with respect to any U.S. State insurance measure subject to such evaluation. For the purposes of this paragraph, the United States shall prioritise those States with the highest volume of gross ceded reinsurance for purposes of potential preemption determinations.

Article 10

Application of the Agreement

1. Except as otherwise specified, this Agreement shall apply on the date of the entry into force, or 60 months from the date of signature of this Agreement, whichever is later.
2. Notwithstanding Article 8 and paragraph 1 of this Article:
 - (a) the European Union shall provisionally apply Article 4 of this Agreement until the date of entry into force of this Agreement and then apply Article 4 thereafter by ensuring that supervisory authorities and other competent authorities follow the practices set forth therein from the seventh day of the month following the date on which the Parties have notified each other that their internal requirements and procedures necessary for the provisional application of this Agreement have been completed.

The United States shall provisionally apply Article 4 of this Agreement until the date of entry into force of this Agreement and then apply Article 4 thereafter by using best efforts and encouraging supervisory authorities and other competent authorities to follow the practices set forth therein from the seventh day of the month following the date on which the Parties have notified each other that their internal requirements and procedures necessary for the provisional application of this Agreement have been completed;
 - (b) On the date of entry into force of this Agreement, or 60 months after signature of this Agreement, whichever is later:
 - (i) the obligations of a Party set forth in Article 3, paragraphs 1 and 2 and Article 9 shall be applicable only if, and thereafter for as long as, the supervisory authorities of the other Party exercise supervision as set forth in Article 4 and satisfy the obligations set forth in Article 3, paragraph 3;
 - (ii) the practices of a Party set forth in Article 4 and the obligations set forth in Article 3, paragraph 3 shall be applicable only if, and thereafter for as long as, the supervisory authorities of the other Party satisfy the obligations set forth in Article 3, paragraphs 1 and 2; and
 - (iii) the obligations of a Party set forth in Article 3, paragraph 3 shall be applicable only if, and thereafter for as long as, the supervisory authorities of the other Party exercise supervision as set forth in Article 4 and satisfy the obligations set forth as in Article 3, paragraphs 1 and 2;
 - (c) where under Article 4, subparagraph (i), measures are applied by the applicable U.S. supervisory authorities outside the territory of the United States to an EU insurance or reinsurance group, the distress or activities of which the Financial Stability Oversight Council has determined could pose a threat to the financial stability of the United

States, through application of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. § 5301 et seq.), either Party may terminate this Agreement under an accelerated mandatory consultation and termination. Where, under Article 4, subparagraph (i), measures are applied by an EU supervisory authority outside the territory of the European Union to a U.S. insurance or reinsurance group, in relation to a threat to the financial stability of the EU, either Party may terminate this Agreement under an accelerated mandatory consultation and termination;

- (d) until the date set forth in subparagraph (b), and without prejudice to the mechanisms set forth therein, the reinsurance provisions of Article 3, paragraphs 1 and 2 shall apply with respect to an EU reinsurer in a U.S. State on the earlier of:
 - (i) adoption by such U.S. State of a measure consistent with Article 3, paragraphs 1 and 2; or
 - (ii) the effective date of any determination by the United States under its laws and regulations that such U.S. State insurance measure is preempted because it is inconsistent with this Agreement and results in less favourable treatment of an EU insurer or reinsurer than a U.S. insurer or reinsurer domiciled, licensed, or otherwise admitted in that U.S. State;
- (e) from the date of provisional application as set out in subparagraph (a) and for 60 months thereafter, in the application of Article 4, subparagraph (h), supervisory authorities in the European Union shall not impose a group capital requirement at the level of the worldwide parent undertaking of the insurance or reinsurance group, with regard to a U.S. insurance or reinsurance group with operations in the European Union;
- (f) from the date of signature of this Agreement, during the 60 month period referred to in subparagraph (b), if a Party does not meet the obligations of Article 3, with respect to local presence requirements, the supervisory authorities of the other Party may, after mandatory consultation, impose a group capital assessment or group capital requirement at the level of the worldwide parent undertaking on an insurance or reinsurance group which has its head office or is domiciled in the other Party;
- (g) Article 3, paragraph 3 shall be implemented and applicable in the territory of the EU no later than 24 months from the date of signature of this Agreement, provided that the Agreement has been provisionally applied or has entered into force;
- (h) subject to subparagraphs (b) and (d), Article 3, paragraphs 1 and 2 shall be implemented and fully applicable in all of the territory of both Parties no later than 60 months from the date of signature of this Agreement by both Parties, provided that the Agreement has entered into force; and
- (i) as from the date of entry into force or provisional application of this Agreement, whichever is earlier, both Parties shall apply Articles 7, 11 and 12.

3. Where a Party does not adhere to paragraph 2 by the dates stipulated therein, the other Party may seek mandatory consultation through the Joint Committee.

Article 11

Termination and Mandatory Consultation

1. Following mandatory consultation, either Party may terminate this Agreement at any time by giving written notification to the other Party, subject to the procedures of this Article. Unless otherwise agreed by the Parties in writing, such termination shall be effective in 180 days, or 90 days with respect to termination described in Article 10, subparagraph 2(c), after the date of such notification. In particular, the Parties may terminate this Agreement where either Party has failed to fulfil its obligations under this Agreement or has taken measures inconsistent with the objectives of this Agreement.

2. Prior to notifying a decision to terminate this Agreement, including with respect to the provisions of Article 10, a Party shall notify the Chair of the Joint Committee.

3. The Parties shall take the necessary steps to communicate to interested parties the effect of termination on insurers and reinsurers in their respective jurisdictions.

4. Mandatory consultation through the Joint Committee shall be required if requested by either Party to the Chair of the Joint Committee, and shall commence not later 30 days, or 7 days if requested as described in Article 10, subparagraph 2(c), after such request unless the Parties agree otherwise. The Party requesting mandatory consultation

shall provide written notice of the bases for the mandatory consultation. The mandatory consultation may be hosted at a site determined by the Parties, and if the Parties cannot agree on a location, then the Party requesting mandatory consultation shall propose three neutral sites outside of the territory of either Party, and the other Party shall select one of the proposed three neutral sites.

5. Mandatory consultation will be required prior to the termination of this Agreement, including with respect to the provisions of Article 10.

6. If a Party refuses to participate in a mandatory consultation as provided in this Article, then the Party seeking to terminate may proceed to terminate the Agreement as provided in paragraph 1 of this Article.

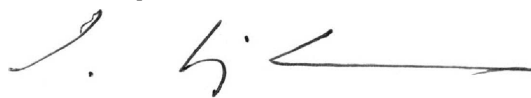
Article 12

Amendment

1. The Parties may agree, in writing, to amend this Agreement.
2. If a Party wishes to amend this Agreement, it shall notify the other Party in writing of a request to begin negotiations to amend the Agreement.
3. A request to begin negotiations to amend the Agreement shall be notified to the Joint Committee.

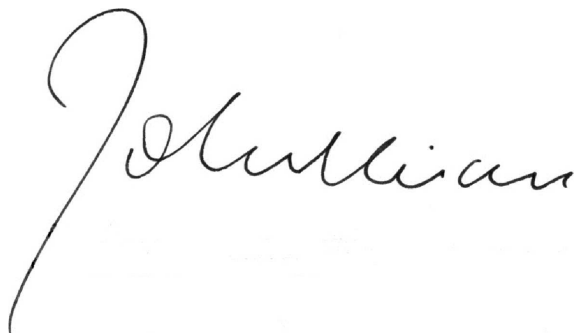
Done at Washington on the twenty second day of September in the year two thousand and seventeen.

For the European Union



Ambassador Lauri Lepik

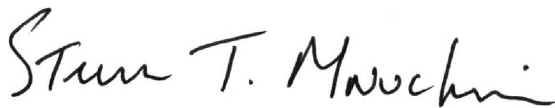
Embassy of Estonia to the United States



Ambassador David O'Sullivan

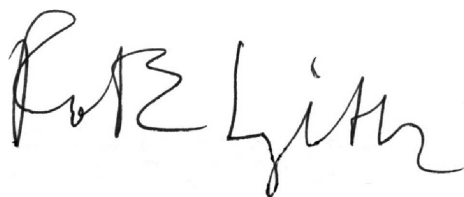
Delegation of the European Union to the United States

For the United States of America



Secretary Steven T. Mnuchin

U.S Department of the Treasury



Ambassador Robert E. Lighthizer

United States Trade Representative

ANNEX

Model Memorandum of Understanding Provisions on Exchange of Information between Supervisory Authorities

Article 1

Objective

1. The Supervisory Authority of (U.S. State) and the national Supervisory Authority of (EU Member State), the Authorities signing this Memorandum of Understanding, recognise the need for co-operation in exchange of information.
2. The Authorities recognise that practical arrangements concerning cross-border cooperation and information exchange are essential for both crisis situations and day-to-day supervision.
3. The purpose of this Memorandum of Understanding is to facilitate cooperation in the exchange of information between the Authorities to the extent permitted by Applicable Law and consistent with supervisory and regulatory purposes.
4. The Authorities recognise that nothing in this Memorandum of Understanding addresses requirements that may apply to the exchange of personal data by supervisory authorities.
5. Applicable Law on exchange and protection of Confidential Information is in place in the territory of the Authorities, with the aim of protecting the confidential nature of data exchanged between Authorities under this Memorandum of Understanding. Amongst other things, this Applicable Law seeks to ensure that:
 - (a) The exchange of Confidential Information is only for purposes directly related to the fulfilment of the supervisory functions of the Authorities; and
 - (b) All persons gaining access to such Confidential Information in the course of their duties will maintain the confidentiality of such information, except in certain defined circumstances as set forth in Article 7.

Article 2

Definitions

For the purpose of this Memorandum of Understanding, the following definitions should apply:

- (a) 'Applicable Law' means any law, regulation, administrative provision or other legal practice applicable in the jurisdiction of an Authority relevant to insurance and reinsurance supervision, the exchange of supervisory information, the protection of confidentiality and the handling and disclosure of information;
- (b) 'Confidential Information' means any Provided Information regarded as confidential by the jurisdiction of the Requested Authority;
- (c) 'Insurer' means an undertaking which is authorised or licensed to take up or engage in the business of direct or primary insurance;
- (d) 'Person' means a natural person, legal entity, partnership, or unincorporated association;
- (e) 'Personal Data' means any information relating to an identified or identifiable natural person;
- (f) 'Provided Information' means any information provided by a Requested Authority to a Requesting Authority in response to a request for information;
- (g) 'Regulated Entity' means an insurer or reinsurer authorised or supervised by a Supervisory Authority of the European Union or the United States;
- (h) 'Reinsurer' means an undertaking which is authorised or licensed to take up or engage in the business of reinsurance activities;
- (i) 'Requested Authority' means the Authority to whom a request for information is made;
- (j) 'Requesting Authority' means the Authority making a request for information;
- (k) 'Supervisory Authority' means any insurance and reinsurance supervisor in the European Union or in the United States; and
- (l) 'Undertaking' means any entity engaged in economic activity.

*Article 3***Cooperation**

1. Subject to Applicable Law, the Requested Authority should consider requests from the Requesting Authority seriously and should respond in a timely fashion. It should provide the Requesting Authority with the fullest possible response to a request for information consistent with its regulatory functions.
2. Subject to Applicable Law, the existence and content of any request for information should be treated as confidential by both the Requested and the Requesting Authorities, unless both Authorities mutually decide otherwise.

*Article 4***Use of Provided Information**

1. The Requesting Authority should only make requests for information if it has a legitimate regulatory or supervisory purpose for the request directly relevant to a Requesting Authority's lawful supervision of a Regulated Entity. It is generally not considered a legitimate regulatory or supervisory purpose for a Requesting Authority to seek information on individuals, unless the request is directly relevant to the fulfilment of supervisory functions.
2. The Requesting Authority should use Provided Information only for lawful purposes related to the Authority's regulatory, supervisory, financial stability, or prudential functions.
3. Subject to Applicable Law, any Provided Information exchanged belongs to, and will remain the property of, the Requested Authority.

*Article 5***Request for Information**

1. Requests for information by the Requesting Authority should be in writing, or in accordance with paragraph 2 where it is urgent, and include the following elements:
 - (a) the Authorities involved, the field of supervision concerned and the purpose for which the information is sought;
 - (b) the name of the person or Regulated Entity concerned;
 - (c) details of the request which may include a description of the facts underlying the request, specific questions under investigation, and an indication of any sensitivity about the request;
 - (d) the information requested;
 - (e) the date by which the information is requested and any relevant legal deadlines; and
 - (f) if relevant, whether, how, and to whom any of the information may be passed consistent with Article 7.
2. For urgent requests, a request can be presented orally, and should be followed by written confirmation without undue delay.
3. The Requested Authority should handle the request as follows:
 - (a) The Requested Authority should confirm receipt of the request.
 - (b) The Requested Authority should assess each request on a case-by-case basis to determine the fullest extent of information that can be provided under the terms of this Memorandum of Understanding and the procedures applicable in the jurisdiction of the Requested Authority. In deciding whether and to what extent to fulfil a request, the Requested Authority may take into account:
 - (i) whether the request conforms with the Memorandum of Understanding;
 - (ii) whether compliance with the request would be so burdensome as to disrupt the proper performance of the Requested Authority's functions;
 - (iii) whether it would be otherwise contrary to the essential interest of the Requested Authority's jurisdiction to provide the information requested;

- (iv) any other matters specified by the Applicable Law of the Requested Authority's jurisdiction (in particular those relating to confidentiality and professional secrecy, data protection and privacy, and procedural fairness); and
 - (v) whether complying with the request may otherwise be prejudicial to the performance by the Requested Authority of its functions.
- (c) Where a Requested Authority denies or is unable to provide all or part of the requested Information, the Requested Authority should, to the extent practical and appropriate subject to Applicable Law, explain its reasons for not providing the information and consider possible alternative ways to meet the supervisory objective of the Requesting Authority. A request for Information may, in particular, be denied by the Requested Authority where the request would require the Requested Authority to act in a manner that would violate its Applicable Law.

Article 6

Treatment of Confidential Information

1. As a general rule, any information received under this Memorandum of Understanding should be treated as Confidential Information except where otherwise indicated.
2. The Requesting Authority should take all lawful and reasonably practicable actions to preserve the confidentiality of Confidential Information.
3. Subject to Article 7 and Applicable Law, the Requesting Authority should restrict access to Confidential Information received from a Requested Authority to persons working for the Requesting Authority or acting on its behalf who:
 - (a) are subject to the Requesting Authority's obligations in its jurisdiction to prevent unauthorized disclosure of Confidential Information;
 - (b) are under the supervision and control of the Requesting Authority;
 - (c) have a need for such information that is consistent with, and directly related to, a lawful regulatory or supervisory purpose; and
 - (d) are subject to ongoing confidentiality requirements after leaving the Requesting Authority.

Article 7

Onward Sharing of Provided Information

1. Except as provided in Article 7(2), a Requesting Authority should not transmit to a third party Provided Information received from the Requested Party, unless:
 - (a) the Requesting Authority has obtained prior written consent from the Requested Authority for onward sharing of such information unless the request is urgent, in which case it can be presented orally followed by written confirmation without delay; and
 - (b) the third party commits to abide by restrictions which maintain a substantially similar level of confidentiality as the one to which the Requesting Authority is subject to as set forth in this Memorandum of Understanding.
 2. Subject to Applicable Law, if the Requesting Authority is subject to a legally compelled demand for or under a legal obligation to disclose Provided Information, the Requesting Authority should provide the Requested Authority with as much notice as reasonably practical of such demand and any related proceedings to facilitate opportunities to intervene and assert privilege. If the Requested Authority's consent to the production of Provided Information is not given, the Requesting Authority should take all reasonable steps where appropriate to resist disclosure, including by employing legal means to resist such disclosure and to assert and protect the confidentiality of any Confidential Information subject to potential disclosure.
-

Brussels, 18 September 2017

The Honorable Ambassador Lighthizer
United States Trade Representative
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508
USA

Dear Ambassador Lighthizer,

I am pleased to proceed with the signature of the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance ('the Agreement'), attached in the Annex to this letter. The final legal text, in English, was agreed by the United States and European Union representatives on 12 January 2017.

The Parties have completed any internal procedures necessary for signing the Agreement. The Parties acknowledge the linguistic regime of the European Union. The European Commission has noted the statement in the Council Decision adopted on 15 September 2017, which sets forth with respect to the Agreement:

This Agreement shall be signed in English. Pursuant to Union law, this Agreement is also drawn up by the Union in the Bulgarian, Croatian, Czech, Danish, Dutch, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages. These additional language versions should be authenticated by an exchange of diplomatic notes between the European Union and the United States. All authenticated versions shall be of equal value.

The United States confirms its commitment to work with the European Union, in light of the Council decision, to address requests for the authentication of additional language versions of the Agreement.

I am pleased to confirm that signature of the Agreement in English shall be the basis on which the Parties exchange letters to begin provisional application. The procedures for entry into force of the Agreement, like the procedures for provisional application following signature, are independent from the authentication of other language versions.

The present exchange of letters will be published by the European Union, together with the text of the Agreement.

I have sent the same letter to Secretary Mnuchin.

Yours faithfully,



Valdis DOMBROVSKIS

Vice-President of the European Commission

Brussels, 18 September 2017

The Honorable Steven Mnuchin
Secretary of the U.S. Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Mnuchin,

I am pleased to proceed with the signature of the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance ('the Agreement'), attached in the Annex to this letter. The final legal text, in English, was agreed by the United States and European Union representatives on 12 January 2017.

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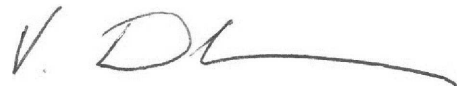
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I have sent the same letter to Ambassador Lighthizer.

Yours faithfully,



Valdis DOMBROVSKIS

Vice-President of the European Commission

September 22, 2017

Valdis Dombrovskis
Vice-President
European Commission
Brussels, Belgium

Dear Vice-President Dombrovskis:

We are pleased to proceed with the signature of the Bilateral Agreement between the United States of America and the European Union on prudential measures regarding insurance and reinsurance ('the Agreement'), attached in the Annex to this letter. The final legal text, in English, was agreed by the United States and European Union representatives on 12 January 2017.

The Parties have completed any internal procedures necessary for signing the Agreement. The Parties acknowledge the linguistic regime of the European Union. The European Commission has noted the statement in the Council Decision adopted on 15 September 2017, which sets forth with respect to the Agreement:

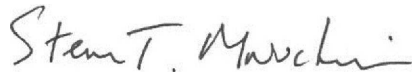
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The United States confirms its commitment to work with the European Union, in light of the Council decision, to address requests for the authentication of additional language versions of the Agreement.

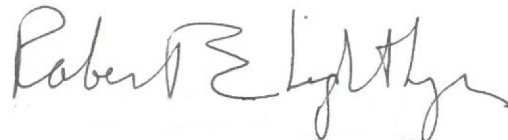
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The present exchange of letters will be published by the European Union, together with the text of the Agreement.

Sincerely,



Secretary Steven T. MNUCHIN
U.S. Department of the Treasury



Ambassador Robert E. LIGHTHIZER
United States Trade Representative

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2017/1794

of 5 October 2017

fixing the interest rates to be used for calculating the costs of financing intervention measures comprising buying-in, storage and disposal for the 2018 EAGF accounting year

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 ⁽¹⁾, and in particular Article 20(1) and (4) thereof,

After consulting the Committee on the Agricultural Funds,

Whereas:

- (1) Article 3(1)(a) of Commission Delegated Regulation (EU) No 906/2014 ⁽²⁾ provides that expenditure relating to the financing costs incurred by Member States in mobilising funds to buy in products is to be determined in accordance with the methods set out in Annex I to that Regulation.
- (2) Point I.1 of Annex I to Delegated Regulation (EU) No 906/2014 provides that the financing costs in question are to be calculated on the basis of a uniform interest rate for the Union fixed by the Commission at the beginning of every accounting year. This interest rate corresponds to the average of the 3-month and 12-month forward Euribor rates, recorded in the 6-month reference period to be determined by the Commission, preceding the notification from the Member States provided for in the first paragraph of point I.2 of that Annex, with a weighting of one third and two thirds respectively.
- (3) In order to determine the interest rates applicable for a given accounting year, the first paragraph of point I.2 of Annex I to Delegated Regulation (EU) No 906/2014 provides that Member States have to notify the Commission, at its request, of the average interest rate they actually bore during the reference period referred to in point I.1 of that Annex, no later than the deadline referred to in that request.
- (4) Furthermore, in accordance with the second paragraph of point I.2 of Annex I to Delegated Regulation (EU) No 906/2014, in the absence of any notification from a Member State, in the form and by the deadline referred to in the first paragraph of that point, the interest rate borne by that Member State has to be considered to be 0 %. Where a Member State declares that it did not bear any interest costs because it did not have agricultural products in public storage during the reference period, the Commission has to fix that interest rate in accordance with the third paragraph of that point.
- (5) In accordance with point I.3 of Annex I to Delegated Regulation (EU) No 906/2014, the interest rate determined on the basis of point I.2 of that Annex is to be compared with the uniform interest rate fixed on the basis of point I.1 of that Annex. The interest rate applicable to each Member State has to be the lower of these two interest rates. However, for the purpose of reimbursing Member States expenditure, negative interest rates cannot be taken into account.
- (6) The interest rates applicable for the 2018 EAGF accounting year should be fixed taking those various factors into account.
- (7) In order to avoid a legal vacuum with regard to the interest rate applicable for calculating the costs of financing intervention measures, it is appropriate that the new rate applies retroactively from 1 October 2017,

⁽¹⁾ OJ L 347, 20.12.2013, p. 549.

⁽²⁾ Commission Delegated Regulation (EU) No 906/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to public intervention expenditure (OJ L 255, 28.8.2014, p. 1).

HAS ADOPTED THIS REGULATION:

Article 1

For expenditure relating to the financing costs incurred by Member States in mobilising funds to buy in products chargeable to the 2018 accounting year of the European Agricultural Guarantee Fund (EAGF), the interest rates provided for in Annex I to Delegated Regulation (EU) No 906/2014 in accordance with Article 3(1)(a) of that Regulation shall be fixed at 0 %.

Article 2

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

It shall apply from 1 October 2017.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 October 2017.

For the Commission

The President

Jean-Claude JUNCKER

COMMISSION IMPLEMENTING REGULATION (EU) 2017/1795**of 5 October 2017****imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia**

THE EUROPEAN COMMISSION,

Having regard to 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 ⁽¹⁾, and in particular Article 9(4) thereof,

After consulting the Member States,

Whereas:

1. PROCEDURE**1.1. Initiation**

- (1) On 7 July 2016, the European Commission ('the Commission') initiated an anti-dumping investigation with regard to imports into the Union of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia, Serbia and Ukraine ('the countries concerned') on the basis of Article 5 of Regulation (EU) 2016/1036 of the European Parliament and of the Council ('the basic Regulation'). It published a Notice of Initiation in the *Official Journal of the European Union* ⁽²⁾ ('the Notice of Initiation').
- (2) The investigation was initiated following a complaint lodged on 23 May 2016 by the European Steel Association ('Eurofer' or 'the complainant') on behalf of more than 90 % of the total Union production of certain hot-rolled flat products of iron, non-alloy or other alloy steel.

1.2. Interested parties

- (3) In the Notice of Initiation, the Commission invited interested parties to come forward in order to participate in the investigation. It specifically informed the complainant, other known Union producers, the known exporting producers, the authorities of the countries concerned, known importers, suppliers and users, traders and associations known to be concerned about the initiation and invited them to participate.
- (4) Interested parties were given the opportunity to make their views known in writing and to request a hearing with the Commission and/or the Hearing Officer in trade proceedings. All interested parties who so requested and showed that there were particular reasons why they should be heard were granted a hearing.

1.3. Sampling

- (5) In the Notice of Initiation, the Commission stated that it might sample the interested parties in accordance with Article 17 of the basic Regulation.

⁽¹⁾ OJ L 176, 30.6.2016, p. 21.

⁽²⁾ Notice of initiation of an anti-dumping proceeding concerning imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia, Serbia and Ukraine (OJ C 246, 7.7.2016, p. 7).

(a) *Sampling of Union producers*

- (6) In the Notice of Initiation, the Commission stated that it had provisionally selected a sample of Union producers. The Commission selected a sample on the basis of the highest representative production and sales volumes whilst ensuring a geographical spread. The Commission invited interested parties to comment on the provisional sample, but no comments were received.
- (7) As a result, the final sample consisted of six Union producers located in five different Member States. It accounts for over 45 % of Union production.

(b) *Sampling of unrelated importers*

- (8) The Commission asked unrelated importers to provide the information specified in the Notice of Initiation in order to decide whether sampling was necessary and, if so, to select a sample. All of the seven importers which came forward were members of a consortium named 'Consortium for Imports of Hot-Rolled Flats' ('the Consortium'). This Consortium has been established *ad hoc* for the purpose of the investigation by more than 30 users and unrelated importers mainly but not exclusively located in Italy. They consist mainly of SMEs.
- (9) Stencor London Ltd, member of the Consortium volunteered to fully cooperate by submitting a questionnaire reply. This unrelated importer was located in London, UK and traded the product concerned for a value amounting to more than 30 million GBP during the investigation period. This unrelated importer was visited on spot.

(c) *Sampling of exporting producers*

- (10) Given the small number of known exporting producers in Iran, Russia, Serbia and Ukraine no sampling was envisaged for those countries.
- (11) Given the potentially large number of exporting producers in Brazil, the Commission asked all exporting producers in Brazil to provide the information specified in the Notice of Initiation in order to decide whether sampling was necessary and, if so, to select a sample. In addition, the Commission asked the Mission of Brazil to the European Union to identify and/or contact other exporting producers, if any, that could be interested in participating in the investigation.
- (12) Five producers provided the information and agreed to be included in the sample. The Commission found that two of these companies were related and therefore considered them as one (group of) exporting producers.
- (13) In accordance with Article 17(1) of the basic Regulation, the Commission selected a sample of three exporting producers on the basis of the largest representative volume of exports to the Union which could reasonably be investigated within the time available. In accordance with Article 17(2) of the basic Regulation, all known exporting producers and the Brazilian authorities were consulted on the selection of the sample. No comments were received.
- (14) The selected sample represents 97,3 % of the total exports of Brazil to the Union as reported by the four cooperating exporting producers.

1.4. Replies to the questionnaire

- (15) The Commission sent questionnaires to the complainant, all sampled Union producers, all known exporting producers in Iran, Russia, Serbia and Ukraine and the three sampled producers in Brazil, to users and importers that made themselves known within the deadlines set out in the Notice of Initiation.
- (16) Questionnaire replies were received from Eurofer, the six sampled Union producers and their related steel service centres, one user on behalf of the Consortium, one sampled unrelated importer and nine groups of exporting producers in the countries concerned.
- (17) Furthermore, the Consortium submitted comments after the initiation of this proceeding. In addition, several other users, mainly from Poland and the Baltic States, the Employers' Confederation of Latvia and the Association of Mechanical Engineering and Metalworking Industries of Latvia also submitted comments after the initiation of the proceeding.

1.5. Verification visits

- (18) The Commission sought and verified all the information deemed necessary for a determination of dumping, resulting injury and Union interest. Verification visits pursuant to Article 16 of the basic Regulation were carried out at the premises of the following companies:

Union producers:

- ThyssenKrupp Steel Europe AG, Duisburg, Germany
- Tata Steel IJmuiden BV, Velsen-Noord, the Netherlands
- Tata Steel UK Limited, Port Talbot, South Wales, United Kingdom
- ArcelorMittal Mediterranée SAS, Fos-sur-Mer, France
- ArcelorMittal Atlantique Et Lorraine, Dunkerque, France
- ArcelorMittal España SA, Gozón, Spain

User:

- Marcegaglia Carbon Steel Spa, Gazoldo degli Ippoliti, Italy

Unrelated importer:

- Stemcor London Ltd, London, UK

Exporting producer in Iran:

- Mobarakeh Steel Company, Mobarakeh, Esfahan, Iran

Related trader in the Union:

- Tara Steel Trading GmbH, Dusseldorf, Germany

Exporting producers in Russia:

- 'Public Joint Stock Company Magnitogorsk Iron & Steel Works' ('PJSC MMK' or 'MMK'), Magnitogorsk
- Novolipetsk Steel, (hereinafter also referred to as 'NLMK'), Lipetsk
- PAO Severstal, ('Severstal') Cherepovets.

Related steel service centre/trader/importer in the Union:

- SIA Severstal Distribution, Riga, Latvia

Related traders/importers outside the Union:

- NOVEX Trading (Swiss) SA ('Novex'), Lugano, Switzerland
- MMK Steel Trade AG, Lugano, Switzerland
- Severstal Export GmbH ('SSE'), Lugano, Switzerland.

Exporting producer in Serbia:

- Zelezara Smederevo d.o.o., Smederevo, Serbia

Related importer in the Union:

- Pikaro, s.r.o., Kosice, Slovakia

Exporting producers in Ukraine:

Metinvest Group

- Integrated Iron and Steel Works 'Zaporizhstal', PJSC, Zaporozhye, Ukraine
- Ilyich Iron and Steel Works of Mariupol, PJSC, Mariupol, Ukraine (verified remotely from the offices of Metinvest International SA, Geneva, Switzerland)

Related trader in Ukraine:

- Limited Liability Company Metinvest-SMC, LLC, Kiev, Ukraine

Related trader outside the Union:

- Metinvest International SA, Geneva, Switzerland

Related importer in the Union:

— Ferriera Valsider S.p.A, Vallese di Oppeano VR, Italy

Exporting producers in Brazil

— ArcelorMittal Brasil S.A, Serra, Brazil

— Companhia Siderúrgica Nacional, São Paulo, Brazil

— Usinas Siderúrgicas de Minas Gerais S.A., Belo Horizonte, Brazil

Related steel service centre/trader/importer in the Union:

— Lusosider Aços Planos S.A, Lisbon, Portugal

1.6. Investigation period and period considered

- (19) The investigation of dumping and injury covered the period from 1 July 2015 to 30 June 2016 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2013 to the end of the investigation period ('the period considered').

1.7. Registration of imports

- (20) On 11 October 2016, the complainant submitted a request for registration of imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel from the countries concerned under Article 14(5) of the basic Regulation. On 21 November 2016, the complainant provided updated import data concerning its request for registration. After carefully analysing the request and supporting data, the Commission concluded that the conditions for registration were only fulfilled in respect of imports from Brazil and Russia.
- (21) Accordingly, on 6 January 2017, the Commission published a Commission Implementing Regulation making imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil and Russia subject to registration ⁽¹⁾ as of 6 January 2017 onwards.

1.8. Subsequent procedure

- (22) On 4 April 2017, the Commission informed all interested parties through an information document ('the Information Document') that it would continue the investigation without imposing provisional measures on imports into the Union of the product concerned originating in the countries concerned. The Information Document contained the essential facts and considerations on the basis of which the Commission decided to continue the investigation without the imposition of provisional measures.
- (23) Subsequent to the disclosure of the Information Document, interested parties made written submissions providing comments on the information and findings disclosed. Interested parties who requested to be heard were also granted a hearing.
- (24) On 4 May 2017, a hearing in the presence of the Hearing Officer in trade proceedings was held with the complainant. On 15 May 2017, hearings were held with two Russian exporting producers, namely MMK and PAO Severstal. On 1 June 2017, a hearing took place with the Consortium. On 8 June 2017, a second hearing was held with the complainant. Moreover, on 13 June 2017, a hearing was held with the Ukrainian exporting producer Metinvest Group.
- (25) The Commission considered all oral and written comments to the Information Document submitted by interested parties before reaching its final determination. These comments are addressed in this regulation.
- (26) In addition, the Commission requested users who came forward at initiation stage to provide more data on the mechanical engineering sector and other sectors in order to assess the potential impact of measures on downstream sectors other than tubes and pipes more precisely. It also invited interested parties to comment on the appropriate form of measures, if any.

⁽¹⁾ Commission Implementing Regulation (EU) 2017/5 of 5 January 2017 making imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Russia and Brazil subject to registration (OJ L 3, 6.1.2017, p. 1).

- (27) After the disclosure of the Information Document, 18 additional users came forward and requested to be registered as interested parties. Registration as interested party was granted to 17 out of the 18. Seven out of these 18 users asked for anonymity since they feared retaliation. This request was granted to six out of the seven. The remaining one was not registered as interested party as it did not justify, despite several reminders, its request for anonymity.
- (28) Moreover, the Commission continued to seek and verify all information it deemed necessary for reaching its definitive findings. For this purpose, it sent additional post-investigation period ('post-IP') questionnaires to the six sampled Union producers, to 74 users (including members of the Consortium) and 12 users' associations.
- (29) Post-investigation period questionnaire replies were received from all six Union producers and from 23 users. In addition, two out of the 12 users' associations provided additional information. Furthermore, the complainant, one Union producer ⁽¹⁾, and selected users (mainly ⁽²⁾ based on geographical spread) were informed that the Commission services would come to verify relevant data on spot.
- (30) Thereafter, five additional verification visits were carried out during the period 29 May – 9 June 2017 at the premises of the following interested parties in the European Union:
- ThyssenKrupp Steel Europe AG, Duisburg, Germany (Union producer)
 - HUS Ltd, Plovdiv, Bulgaria (user, member of the 'Consortium', as mentioned in recital (8))
 - Technotubi SpA, Alfianello, Italy (user, member of the Consortium)
 - An Italian user; not member of the Consortium and who had requested anonymity
 - Eurofer
- (31) All parties were informed of the essential facts and considerations on the basis of which the Commission intended to impose definitive anti-dumping measures. They were also granted a period within which they could make representations subsequent to the final disclosure.
- (32) Following the final disclosure on 17 July 2017 ('the final disclosure'), another hearing in the presence of the Hearing Officer in trade proceedings was held on 27 July 2017 with the complainant. In that hearing, Eurofer raised a couple of procedural and substantive points.
- (33) With respect to the former, it argued that the Commission had failed to give effect to the recommendations of the Hearing Officer in trade proceedings which the latter issued after the hearing of 4 May 2017 (see recital (24)). In his report of 23 June 2017, the Hearing Officer was of the opinion that the services should disclose the dumping and injury margins before the Union interest test is carried out '*without actual data used in the calculations*' ⁽³⁾. Moreover, he urged the Commission services '*to disclose the final document to the interested parties timely providing sufficient time for comments, at least 30 days instead of customary 10 days' period*' ⁽⁴⁾.
- (34) The Commission noted that it had received the recommendations of the Hearing Officer on 23 June 2017, which was close to the date of the final disclosure (17 July 2017). On the injury margin, it decided that there was little purpose in disclosing the raw figures without underlying calculations at the end of June as an extra-step, when the interested parties were to receive the full calculations on the injury margin anyway with full final disclosure in the near future through final disclosure. During the hearing of 27 July 2017, Eurofer indeed confirmed that it had received comprehensive information on the injury margin with the General Disclosure Document and that the issue had become moot. On the deadline for comments upon final disclosure, Article 20(5) of the Basic Regulation provides representations made after final disclosure shall be taken into consideration only if received 'within a period to be set by the Commission in each case, which shall be at least 10 days'. The final disclosure

⁽¹⁾ This Union producer was selected as it was one of the sampled Union producers arguing that they could increase their capacity in a short term period.

⁽²⁾ Moreover, the two users, members of the Consortium were against the imposition of measures. However, the other Italian user, who came forward late in the process, was in favour of the imposition of measures.

⁽³⁾ Hearing report of the Hearing Officer in trade proceedings, 23 June 2017, HO/AK ju-ca-11.ho(2017)3604029, p. 3.

⁽⁴⁾ Hearing report of the Hearing Officer in trade proceedings, 23 June 2017, HO/AK ju-ca-11.ho(2017)3604029, p. 4.

was submitted to the interested parties on 17 July 2017 with a deadline to comment on 7 August 2017, i.e. providing for three weeks. While this deadline falls short of the 30 days recommended by the Hearing Officer, it nevertheless gave twice as much time than the statutory minimum. The Commission therefore considered to have complied with the essence of the Hearing Officer's recommendation, namely to provide for 'sufficient' time to make useful comments on a document which reproduced in large parts the information the Commission had already shared with the parties in the Information Document of 4 April (see recital (22)).

- (35) With respect to the substantive issues raised before the Hearing Officer, the Commission decided to address them in the relevant parts of this regulation below, as they were raised again in the written comments received upon final disclosure.
- (36) On 3 August 2017, a hearing was held with the Iranian exporting producer, namely the Mobarakeh Steel Company. The Iranian exporting producer raised at a hearing the issue of a clerical error made in its dumping calculation. The exporting producer explained that certain values were mistakenly rounded, probably due to their length.
- (37) The Commission analysed this claim and concluded that indeed there was a clerical error in the dumping calculation for the Iranian exporting producer, which had to be corrected. As such, the dumping calculation and calculations based on it needed to be recalculated with the following outcome: the revised dumping margin and anti-dumping duty rate for Mobarakeh Steel Company amounted to 17,9 %, and, consequently, the revised MIP, adjusted for the increase in raw material prices amounted to 468.49 euro per tonne.
- (38) All parties were accordingly informed of this revision by means of an additional final disclosure on 4 August 2017 and were invited to comment thereon.
- (39) The Commission considered all oral and written comments to the final disclosure and the additional final disclosure submitted by interested parties before reaching its final determination. These comments are addressed in this regulation, and, where appropriate, modified its findings accordingly.

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product concerned

- (40) Hot-rolled flat steel products are produced through hot rolling; this is a metal forming process in which hot metal is passed through one or more pairs of hot rolls to reduce the thickness and to make the thickness uniform, whereby the temperature of the metal is above its recrystallization temperature. They can be delivered in various forms: in coils (oiled or not oiled, pickled or not pickled), in cut lengths (sheet) or narrow strips.
- (41) There are two main uses of the hot-rolled flat steel products. First, they are the primary material for the production of various value added downstream steel products, starting with cold-rolled ⁽¹⁾ flat and coated steel products. Second, they are used as an industrial input purchased by end users for a variety of applications, including in construction (production of steel tubes), shipbuilding, gas containers, cars, pressure vessels and energy pipelines.
- (42) The Commission excluded tool steel and high-speed steel from the product scope of the anti-dumping proceeding concerning imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China ⁽²⁾.
- (43) In the absence of any comments regarding the product scope and the like product during this particular investigation, and in order to have the same product scope in the various proceedings, concerning certain hot-rolled flat products of iron, non-alloy or other alloy steel, the Commission also decided to exclude tool steel and high-speed steel from the product scope in this case.
- (44) Interested parties were informed of these exclusions through the Information Document. The Commission did not receive any comments in this regard.

⁽¹⁾ Cold rolling process is defined by passing a sheet or strip that has previously been hot rolled and pickled — through cold rolls, i.e. below the softening temperature of the metal.

⁽²⁾ Commission Implementing Regulation (EU) 2016/1778 of 6 October 2016 imposing a provisional anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other steel originating in the People's Republic of China (OJ L 272, 7.10.2016, p. 33).

- (45) The product concerned ('HRF') was thus defined as certain flat-rolled products of iron, non-alloy steel or other alloy steel, whether or not in coils (including 'cut-to-length' and 'narrow strip' products), not further worked than hot-rolled, not clad, plated or coated originating in Brazil, Iran, Russia and Ukraine.

The product concerned does not include:

- products of stainless steel and grain-oriented silicon electrical steel,
- products of tool steel and high-speed steel,
- products, not in coils, without patterns in relief, of a thickness exceeding 10 mm and of a width of 600 mm or more, and
- products, not in coils, without patterns in relief, of a thickness of 4,75 mm or more but not exceeding 10 mm and of a width of 2 050 mm or more.

The product concerned is currently falling within CN codes 7208 10 00, 7208 25 00, 7208 26 00, 7208 27 00, 7208 36 00, 7208 37 00, 7208 38 00, 7208 39 00, 7208 40 00, 7208 52 10, 7208 52 99, 7208 53 10, 7208 53 90, 7208 54 00, 7211 13 00, 7211 14 00, 7211 19 00, ex 7225 19 10, 7225 30 90, ex 7225 40 60, 7225 40 90, ex 7226 19 10, 7226 91 91 and 7226 91 99.

2.2. Like product

- (46) The investigation showed that the following products have the same basic physical characteristics as well as the same basic uses:
- (a) the product concerned;
 - (b) the product produced and sold on the domestic market of the countries concerned;
 - (c) the product produced and sold in the Union by the Union industry.
- (47) In the absence of any comments, the Commission confirmed that the product concerned produced and sold in the countries concerned and the one produced and sold by the Union industry are like products, within the meaning of Article 1(4) of the Basic Regulation.

3. DUMPING

3.1. General methodology

- (48) The Commission set out in this section the general methodology it used for the dumping calculations. Where warranted, any country- or company-specific issues relevant for those calculations were addressed in the country-specific sections below.

3.1.1. Normal value

- (49) The Commission first examined whether the total volume of domestic sales for each cooperating exporting producer was representative, in accordance with Article 2(2) of the basic Regulation. The domestic sales are representative if the total domestic sales volume of the like product to independent customers on the domestic market per exporting producer represents at least 5 % of its total export sales volume of the product concerned to the Union during the investigation period.

The normal value for the non-representative types (i.e. those of which domestic sales constituted less than 5 % of export sales to the Union or were not sold at all in the domestic market) was calculated on the basis of the cost of manufacturing per product type plus an amount for selling, general and administrative costs and for profits. For domestic sales made in the ordinary course of trade the profit per product type for the product types concerned was used. For all other transactions that were not made in the ordinary course of trade, an average profit was used.

The Commission subsequently identified the product types sold domestically that were identical or comparable with the product types sold for export to the Union and examined whether the domestic sales by each cooperating exporting producer for each product type were representative, in accordance with Article 2(2) of the basic Regulation. The domestic sales of a product type are representative if the total volume of domestic sales of that product type to independent customers during the investigation period represents at least 5 % of the total volume of export sales of the identical or comparable product type to the Union.

- (50) The Commission next defined the proportion of profitable sales to independent customers on the domestic market for each product type during the investigation period in order to decide whether to use actual domestic sales prices for the calculation of the normal value, in accordance with Article 2(4) of the basic Regulation.
- (51) The normal value was based on the actual domestic price per product type, irrespective of whether those sales were profitable or not, if:
- (d) the sales volume of the product type, sold at a net sales price equal to or above the calculated cost of production, represented more than 80 % of the total sales volume of this product type; and
 - (e) the weighted average sales price of that product type is equal to or higher than the unit cost of production.
- (52) In this case, the normal value was the weighted average of the prices of all domestic sales of that product type during the investigation period.
- (53) The normal value was based on the actual domestic price per product type of only the profitable domestic sales of the product types during the investigation period, if:
- (a) the volume of profitable sales of the product type represents 80 % or less of the total sales volume of this type: or
 - (b) the weighted average price of this product type is below the unit cost of production.
- (54) When there were no or insufficient sales of a product type of the like product in the ordinary course of trade or where a product type was not sold in representative quantities on the domestic market, the Commission constructed the normal value in accordance with Article 2(3) and (6) of the basic Regulation.
- (55) Normal value was constructed by adding the following to the average cost of production of the like product of each cooperating exporting producer during the investigation period:
- (a) the weighted average selling, general and administrative ('SG&A') expenses incurred by each cooperating exporting producer on domestic sales of the like product, in the ordinary course of trade, during the investigation period; and
 - (b) the weighted average profit realised by each cooperating exporting producer on domestic sales of the like product, in the ordinary course of trade, during the investigation period.

3.1.2. *Export price*

- (56) The exporting producers exported to the Union either directly to independent customers or through related companies acting as traders and/or importers.
- (57) When the exporting producer exported the product concerned directly to independent customers in the Union, including through traders, the export price was established on the basis of prices actually paid or payable for the product concerned when sold for export to the Union, in accordance with Article 2(8) of the basic Regulation.
- (58) When the exporting producers exported the product concerned to the Union through a related company acting as an importer, the export price was constructed on the basis of the price at which the imported product was first resold to independent customers in the Union, in accordance with Article 2(9) of the basic Regulation. The export price was also, in accordance with the same Article, constructed when the product concerned was not resold in the condition in which it was imported. In such cases, adjustments to the price were made for all costs incurred between importation and resale, including SG&A expenses, and for profits.

3.1.3. *Comparison*

- (59) The Commission compared the normal value and the export price of the exporting producers on an ex-works basis.

- (60) Where justified by the need to ensure a fair comparison, the Commission adjusted the normal value and/or the export price for differences affecting prices and price comparability, in accordance with Article 2(10) of the basic Regulation.

3.2. Brazil

- (61) There were five exporting producers in Brazil during the investigation period. After the selection of the sample, one exporting company, Aperam Inox América do Sul S.A., explained to the Commission that it had mistakenly reported sales to Africa that were only in transit through the Union as export sales to the Union. Therefore, during the investigation period, it had no exports of the product concerned to the Union. It also explained that it has a common shareholding with ArcelorMittal Brasil S.A ('AMB'). Based on this, the Commission decided to treat these two companies as related companies.

Usinas Siderúrgicas de Minas Gerais S.A. ('Usiminas') and Companhia Siderúrgica Nacional ('CSN') also have a common shareholding. Usiminas claimed that they should be considered as unrelated companies because there is currently a proceeding with the Brazilian competition authority that prevents CSN from exercising any rights in relation to Usiminas. The Commission verified the claim and the evidence provided by Usiminas and concluded that CSN was not able to exercise their rights in relation to Usiminas. The Commission accepted the claim and treated these companies as unrelated. Both companies did not object when the Commission informed its decision in the document informing the companies about non imposition of provisional measures. The decision, on whether these two companies are related or not, may change in subsequent reviews in case the Brazilian competition authority would rule differently in the future.

- (62) On the domestic market, all exporting producers sold the like product directly and through related and unrelated traders. Most of the sold like product was further processed into a product which either remained the like product or became another downstream product.
- (63) Usiminas exported the product concerned to the Union directly to independent customers. The other two exporting producers mostly exported to the Union unprocessed (non-slit) coils, which were either resold or further processed by their related company in the Union.

3.2.1. Normal value

- (64) Normal value for the three exporting producers was established in line with the general methodology set out in section 3.1.1. above.
- (65) For the three exporting producers, the normal value was based on the domestic price for respectively 14 %, 35 % and 91 % of the product types exported to the Union representing respectively 54 %, 78 % and 99 % of the exported sales volume to the Union. The normal value for the remaining product types was constructed as set out under recitals (54) and (55).
- (66) After the disclosure of the Information Document, Usiminas claimed that the SG&A amount was not calculated at an *ex-works* level and that certain costs were not related to the product concerned and therefore should have been excluded from the SG&A amount.
- (67) The Commission accepted the claim and corrected the SG&A amount accordingly.
- (68) After the disclosure of the Information Document, CSN claimed that the last version of the SG&A table submitted during the verification visit should have been used for establishing the SG&A amount. This version would be more accurate because certain costs related to exports were only allocated to export sales and not to domestic sales.
- (69) The Commission rejected this claim because the allocation method of the last version of the SG&A table submitted by the company could not be verified as it was provided at the end of the verification visit. Instead, the Commission calculated the SG&A amount based on a previous version that was submitted during the verification visit and which could be verified. However, this version contained some errors and these were manually corrected by the Commission and disclosed to CSN. CSN did not further comment on this disclosure. The Commission did not allocate export cost to domestic sales in the calculation. The allocation method used by the Commission was not disputed by CSN.

3.2.2. Export price

- (70) The export price for the three exporting producers was established in line with the general methodology set out in section 3.1.2. above.
- (71) For Usiminas, who sold the product concerned to the Union directly to independent customers, the export price was established in accordance with Article 2(8) of the basic Regulation.
- (72) The other two exporting producers sold the product concerned to the Union via related parties. Nevertheless, also for these exporting producers the export price was established in accordance with Article 2(8) of the basic Regulation because the Commission could verify that the prices between related parties were at arm's length and reflected market prices.

3.2.3. Comparison

- (73) The Commission compared the normal value and the export price of the exporting producers on an *ex-works* basis.
- (74) Where justified by the need to ensure a fair comparison, the Commission adjusted the normal value and/or the export price for differences affecting price comparability, in accordance with Article 2(10) of the basic Regulation. Adjustments were made for transport, insurance, handling, loading and ancillary costs (in the range between 3,4 % and 4,6 % as expressed on the net turnover), discounts, rebates and quantities (in the range between 0,2 % and 3,5 % as expressed on the net turnover) and credit costs (in the range between 1,8 % and 2,3 % as expressed on net turnover).
- (75) All exporting producers made a claim under Article 2(10)(b) of the basic Regulation for a duty drawback adjustment, arguing that the existence of a duty drawback scheme for certain raw materials would imply that all their domestic sales would incorporate an indirect tax compared to the export sales.
- (76) The exporting producers were however unable to demonstrate that the mere existence of the duty drawback scheme would affect price comparability. In addition, during the verification visit, the exporting producers confirmed that the duty drawback scheme does not affect the sales price. This claim could therefore not be accepted.
- (77) Usiminas made a claim under Article 2(10)(d)(i) of the basic Regulation for a level of trade adjustment, arguing that all their domestic sales were made to end users, whilst all their export sales to the Union were to related or unrelated traders.
- (78) The exporting producer was however unable to demonstrate any consistent and distinct price differences for different levels of trade on either its domestic or export market. This claim could therefore not be accepted.
- (79) After the disclosure of the Information Document, Usiminas claimed that the credit cost adjustment should also be deducted when constructing the normal value.
- (80) The Commission rejected the claim because the credit cost adjustment is an adjustment made to actual prices to reflect the agreed credit period irrespective of the actual date of payment. It is a pure price adjustment which is not warranted when the normal value is constructed.

3.2.4. Dumping margin

- (81) For the exporting producers, the Commission compared the weighted average normal value of each type of the like product with the weighted average export price of the corresponding type of the product concerned, in accordance with Article 2(11) and (12) of the basic Regulation.
- (82) In its comments to the final disclosure, CSN claimed that the revised CIF values used for the calculation of the underselling margin should also have been used for the dumping margin calculation. The claim was accepted and the dumping calculation was corrected accordingly.
- (83) The weighted average dumping margin for the cooperating producers, not included in the sample, was calculated in accordance with Article 9(6) of the basic Regulation. This margin was established on the basis of the margins established for the three sampled exporting producers.

- (84) The level of cooperation in Brazil is high because the exports of the cooperating exporting producers constituted almost 100 % of the total Brazilian exports to the Union during the investigated period. On this basis, the Commission decided to set the country wide dumping margin applicable to all other companies at the same level as that established for the sampled company with the highest dumping margin, i.e. Usiminas.
- (85) The dumping margins, expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

Company	Dumping margin
ArcelorMittal Brasil S.A	16,3 %
Aperam Inox América do Sul S.A.	16,3 %
Companhia Siderúrgica Nacional	73,0 %
Usinas Siderúrgicas de Minas Gerais S.A.	65,9 %
Other cooperating company (Gerdau Açominas S.A.)	49,3 %
All other companies	73,0 %

3.3. Iran

- (86) There is only one exporting producer of the product concerned in Iran, which cooperated fully with this investigation. The majority of its sales to the Union were direct sales to independent buyers, however some were done via a related trader based in Germany.

3.3.1. Normal value

- (87) Normal value for the sole exporting producer was established in line with the general methodology set out in section 3.1.1. above. As a result, the normal value for 61 % of product types representing 67 % of the volume exported by the exporting producer to the Union was based on the domestic price in the ordinary course of trade. The normal value for the remaining product types was constructed. However, if the weighted average price of a product type was below the unit cost of production the normal value was constructed in line with the methodology set out in recital (55) above.
- (88) The exporting producer also argued the Commission used a wrong SG&A expenses ratio for the ordinary course of trade test and for the construction of the normal value. This indeed was a rounding error, which was subsequently corrected. This change had no impact on the dumping margins established in recital (98).

3.3.2. Export price

- (89) The export price was established using the general methodology set out in section 3.1.2. above and in particular Article 2(8) of the basic Regulation.

3.3.3. Comparison

- (90) The Commission compared the normal value and the export price of the sole exporting producer on an ex-works basis.
- (91) Where justified by the need to ensure a fair comparison, the Commission adjusted the normal value and/or the export price for differences affecting price comparability, in accordance with Article 2(10) of the basic Regulation. Adjustments were made for transport, insurance handling, loading and ancillary expenses (in the range between 1 % and 3 %), packaging (in the range between 0 % and 1 %), credit costs (in the range between 1 % and 3 %), commissions (in the range between 0,1 % and 2 %), other discounts (in the range between 0 % and 0,5 %), other factors (in the range between 0 % and 1 %). An adjustment on the basis of Article 2(10)(i) was also made for export sales via the related trader in the Union (in the range between 2 % and 6 %).

- (92) In its comments on the final disclosure the complainant argued that these adjustments appear to be high and called on the Commission to give further explanation for these adjustments. The Commission cannot give further details concerning these adjustments without disclosing business confidential information. All these adjustments were analysed and verified by the Commission in line with its duty under Article 9(6) of the basic Regulation.
- (93) In its comments on the Information Document, the exporting producer argued that, when constructing the normal value, the Commission did not deduce the allowances related to cost. This claim is factually incorrect as the Commission did deduce these allowances. The exporting producer reiterated this claim in its comment on the final disclosure. The Commission explained its methodology on this point to the exporting producer and no further comments were received.
- (94) When assessing the allowances the Commission reviewed the evidence related to the adjustment based on the duty drawback scheme. The evidence at the Commission's disposal demonstrated that, whilst the exporting producer received what it claimed to be a reimbursement of duties, there is no evidence that it has paid any duty in the first place as, according to the information the exporting producer submitted, all the main raw materials were sourced domestically. Therefore, the duty was not 'borne [...] by materials physically incorporated [in the product]' within the meaning of Article 2(10)(b) of the basic Regulation, which is a precondition for the adjustment. Such adjustment was therefore not made.

3.3.4. Dumping margin

- (95) The Commission compared the weighted average normal value of each type of the like product with the weighted average export price of the corresponding type of the product concerned, in accordance with Article 2(11) and (12) of the basic Regulation.
- (96) In its comments on the final disclosure, the exporting producer pointed to a clerical error in the dumping calculation. The Commission corrected the clerical error, which was due to unnecessary rounding of certain long values, and amended its calculation accordingly. All interested parties were informed of this change with an additional final disclosure.
- (97) The level of cooperation from Iran was very high as the exports of the cooperating exporting producer constituted approximately 100 % of the total exports to the Union during the investigation period. On this basis, the Commission established the country wide dumping margin at the same level as for the sole exporting producer.
- (98) The dumping margins, expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

Company	Dumping margin
Mobarakeh Steel Company	17,9 %
All other companies	17,9 %

- (99) In their comments on the Information Document, the complainant argued that the dumping margin calculated on the basis of the data they have collected was significantly higher. The interested party called on the Commission to provide further details on how the dumping margin for Iran was calculated.
- (100) The Commission based its calculation on actual company data that was verified on the spot. The interested party in question did not have access to this level of information and this potentially explains the discrepancy. The Commission cannot provide more details regarding the calculation without disclosing the exporting producer's business confidential information.
- (101) In their comments on the additional final disclosure the complainant requested further information on this clerical rounding error pointing out that a 5 percentage points reduction in the level of the dumping margin is unlikely to be due to a rounding error.
- (102) The Commission cannot disclose the detailed dumping calculation to other than the directly concerned interested party since this will disclose business confidential information. As explained in recital (96) above, the error

concerned the unnecessary rounding of certain long values with more than 13 digits (for example 112.769.871.468,69 was erroneously taken in the calculation as 1,13). Such long values concerned the most important export transactions converted in the local Iranian currency for the dumping calculation. Thus the 5,1 percentage points drop of the dumping margin.

3.4. Russia

- (103) There are three exporting producers of the product concerned in Russia, which cooperated fully with this investigation. They account for almost the totality of all imports of the product concerned from Russia into the Union during the investigation period.

3.4.1. Normal value

- (104) Normal value for all three exporting producer was established in line with the general methodology set out in section 3.1.1. above. As a result, the normal value for the majority of product types exported to the Union for all three exporting producers was based on the domestic price (76 % representing 98,9 % of the exported quantities, 49 % representing 86,7 % of the exported quantities and 73 % representing 96,6 % of the exported quantities respectively).
- (105) The normal value for the remaining types was constructed under the methodology described above in recitals (54) and (55) either because there were no domestic sales or the sales quantities on the domestic market were too small to be considered representative (less than 75 MT per product type).

3.4.2. Export price

- (106) The exporting producers exported to the Union either directly, via related importers in the Union, or via related traders/importers based in Switzerland. The related companies in Switzerland purchased the product concerned from the exporting producers and further sold it to the Union and other countries.
- (107) The export price was established using the general methodology set out in section 3.1.2. above.
- (108) Following the disclosure of the Information Document, Severstal contested the applicability of adjustments made for SG&A expenses and profit under Article 2(9) of the basic Regulation for sales via their related Swiss trader/importer, SSE.
- (109) In their view, the adjustments are only appropriate on a transaction-specific basis for transactions where the terms of sale require that a product be delivered after customs clearance, i.e. for transactions where the related party acts as an importer. However, for the majority of the sales via their related trader/importer in Switzerland the delivery terms do not require the trader/importer in Switzerland to clear the goods at customs. At the same time, Severstal claimed that their related traders/importers based in Switzerland should be considered as part of the producer's exporting network and not as importers.
- (110) The Commission rejected this claim. The investigation established that SSE did perform import functions for the sales of the product concerned during the investigation period. The different incoterms (CIF, CFR, FOB, DAP or CIF) do not alter the fact that SSE was operating as a related importer to the Union market. In light of the fact that the trader/importer is related to the exporting producer, Article 2(9) of the basic Regulation implies that the data of such trader/importer is unreliable and therefore an adjustment was warranted.
- (111) The Commission further found that SSE could not be considered as part of the producer's exporting network. There is no exclusive relationship between the parent company and the subsidiary in Switzerland as regards sales to the EU. The investigation established there were also other sales departments within the group dealing with exports to the EU. More particularly, the parent company in Russia maintained three different export channels to the EU for the product concerned, namely direct sales, sales via the related service centre in Latvia and sales via their related trader/importer in Switzerland.
- (112) The Commission therefore concluded that adjustments for SG&A and profit for all types of sales transactions via the related Swiss trader/importer should be applied in accordance with Article 2(9) of the basic Regulation.
- (113) Upon disclosure, Severstal reiterated its strong disagreement about the Commission's application of Article 2(9) of the basic Regulation. Moreover, it alleged an incoherent treatment by the Commission when compared with other exporting producers with related importers/traders either inside or outside the Union.

- (114) The Commission confirmed its approach that related traders/importers could be treated under Article 2(9) of the basic Regulation when they perform import functions, even if they are situated outside the Union. As set out in recital (110) that was the case for SSE, whereas the related traders/importers from other exporting producers were in different situations, depending on the varying functions of each company.
- (115) Moreover, Severstal took issue with the Commission's determination that SSE could not be considered part of its exporting network. However, for the Commission Severstal's underlying reasoning, such as full control of SSE by the mother company and allocation of profits and losses to the mother company did not outweigh the factors set out in recital (111) pointing to the contrary. Accordingly, SSE cannot be considered as the internal export department of Severstal.
- (116) Following the disclosure of the Information Document, the exporting producer NLMK also contested the applicability of adjustments made for SG&A expenses and profit under Article 2(9) of the basic Regulation for sales via their related Swiss subsidiary Novex.
- (117) It claimed that Novex did not act as a related importer, to the extent that it did not import the product concerned into the Union. In so far as the application of Article 2(9) implies that a related party must be acting as an importer, no adjustment on the basis of Article 2(9) could be applied to Novex's export price.
- (118) In support of this claim NLMK argued that on the export markets, it sells iron and steel products systematically through two related traders, namely Novex in Switzerland and Novexco (Cyprus) Limited, in Cyprus. Novex is in charge of exports sales to the Union, whereas Novexco sells to the rest of the world. These companies act as NLMK's export sales department and there is no other function or department within the NLMK Group in charge of dealing with such export sales. There is no direct export sale by NLMK of iron and steel products.
- (119) Novex and Novexco are 100 % subsidiaries of NLMK, to which NLMK has entrusted its export sales function not only for the product concerned but for all the product portfolio of NLMK. These two related companies act under NLMK's economic control, both by virtue of the NLMK Group's capital structure and from an economic standpoint. Importantly, Novex and Novexco market only products sourced from their related companies within the NLMK Group. Thus, they perform no autonomous economic activity that could be carried out independently outside of the NLMK Group.
- (120) While all of NLMK's export sales of iron and steel products are made through Novex and Novexco, these related companies normally do not act as importers of those products in the EU or elsewhere, with the exception of grain oriented electrical steel products (GOES), which are sold on DDP delivery terms. All other export sales carried out by Novex and Novexco are based on delivery terms that do not involve them acting as importers with respect to the relevant iron and steel products.
- (121) NLMK considered therefore that Novex could not be qualified as the 'importer' of the relevant products, to the extent it did not perform the customs clearance of the goods or any other functions performed by an importer.
- (122) Moreover, NLMK argued that Novex's staff participates in the strategy sales planning committee of the NLMK Group and contributes, based on its knowledge of the export markets, to the Group's sales planning and pricing. Thus, NLMK is not only fully aware of the Novex price to the first unrelated customer but such price is set together by NLMK and Novex staff acting together. At the same, in the sector of the product concerned, the main customers, at least in the case of NLMK exports to the Union, are trading companies, which prefer to customs clear the products themselves so as to optimize costs. Also, purchasing the product concerned on FOB terms, port of export, or CIF terms allows trading companies on a short notice to sell the cargo to any destination that offers the best price which might not necessarily be in the Union. There is therefore little value for traders in having the product being customs cleared by the supplier into the Union.
- (123) In summary, NLMK considered that whereas GOES is mostly supplied to the processors directly, other iron and steel products are mostly supplied to unrelated traders in the Union. The difference in customers types result in

a difference in terms of agreed Incoterms and corresponding role played by Novex and Novexco. This result in a situation where, according to NLMK, the situation witnessed in the GOES investigation is not representative of the actual role of Novex, as undertaken with regard to the product concerned or other iron and steel products. NLMK concluded that Novex should be treated as an internal sales department of NLMK.

- (124) The Commission recalled that the assessment of whether or not a producer and a related trader should be treated as a single economic entity and the related trader as an internal sales department of the producer must consider the general functions of the related trader and, therefore, must also take into account activities relating to products other than the product concerned. ⁽¹⁾
- (125) While the investigation confirmed that Novex did not perform import functions for the product concerned in the investigation period, the following should be noted as to the qualification of Novex for the purpose of this case. Novex is established as a trader under Swiss law. ⁽²⁾ According to its articles of association, its object is the purchase, sale, distribution and commerce of steel products and raw materials, in Switzerland and abroad. There is no formal limitation in terms of suppliers of the products to be traded. Furthermore, NLMK and Novex signed comprehensive framework contracts that govern the sale and purchase between the parties. For example, these contracts establish detailed procedures for claims of non-compliant goods, provides for penalties in cases of delays of payment or delivery of goods, as well as for third party arbitration in case of disputes. The Commission further noted that the principal activities of Novex according to its 2015 Financial Statements are the trading of steel, including any interest earning activities, and that a significant part of its purchases of steel are from companies in the NLMK Group.
- (126) Furthermore, NLMK has itself recognised in their submission dated 7 June 2017 that for GOES products, Novex acts as a related importer, a fact that corroborates the conclusion that Novex is not akin to an internal sales department of NLMK.
- (127) For these reasons, the Commission concluded that the relationship between Novex and NLMK was not one of an integrated and internal sales department that could make the two legal entities constitute a single economic entity, but was instead considered equivalent to that of an agent working on a commission basis within the meaning of Article 2(10)(i) of the basic Regulation.
- (128) Following final disclosure, NLMK reiterated its claim that it and its related trader Novex constitute a single economic entity. It felt that the Commission had failed to take into account the economic reality of the relationship between the two entities. In particular, it criticised that the Commission's approach on Novex was formalistic and theoretical. Novex was not registered as a trading company and the lack of a formal limitation was immaterial, as they did not source from other sources in reality. Moreover, even if there were a contract between NLMK and Novex, there would be an effective solidarity between the two entities. Novex's results were allegedly fully consolidated in the group's accounts.
- (129) The Commission rejected these claims. In order to assess the relationship between Novex and NLMK, the existence of a framework contract governing the sale and purchase between the two cannot be dismissed as theoretical or formal. Rather, it shows that the two entities have different functions and that there was no relationship of subordination between them. Moreover, it is uncommon for an internal sales department to carry out import functions, which Novex did at least for one steel product (GOES). Finally, Novex could at any time decide to buy HRF from other sources, which an integrated export sales department would not. Accordingly, the Commission maintained its position that an adjustment under Article 2(10)(i) of the basic Regulation was justified.
- (130) Following final disclosure, also MMK contested, for the first time, the application of Article 2(9) basic Regulation in relation to its related trader MMK Trade Steel AG. Echoing the legal views of Severstal, it also maintained that full control by the mother company and the allocation of profits and losses to the Russian parent showed that MMK Trade Steel AG was part of a single exporting network.

⁽¹⁾ See judgment of 25 June 2015, *PT Musim Mas v Council*, T-26/12, EU:T:2015:437, paragraph 52. See also WTO Report of the Panel in DS442, *European Union — Anti-dumping Measures On Imports Of Certain Fatty Alcohols From Indonesia*, paragraphs 7.89 et seq.

⁽²⁾ Until 2008 Novex was independent from NLMK when NLMK acquired the whole of Novexco (Cyprus) limited ('Novexco') and Novex Trading (Swiss) S.A. ('Novex') by way of purchase of shares. See case No COMP/M.5101 — NOVOLIPETSK STEEL/NOVEXCO/NOVEX TRADING.

- (131) The Commission reiterated its legal position that related traders/importers could be treated under Article 2(9) of the basic Regulation when they perform import functions, even if they are situated outside the Union. MMK Trade Steel AG fell into that category as already found in the investigation into cold-rolled flat steel products from the People's Republic of China ⁽¹⁾.
- (132) It follows that the Commission could also not accept the claim that MMK and MMK Trade Steel AG would form a single economic entity. In any event, MMK also operated its own export department in Russia and sold part of its steel to Europe directly. Accordingly, MMK Trade Steel AG cannot be considered as the internal export department of MMK.

3.4.3. Comparison

- (133) The Commission compared the normal value and the export price of the exporting producers on an ex-works basis.
- (134) Where justified by the need to ensure a fair comparison, the Commission adjusted the normal value and/or the export price for differences affecting price comparability, in accordance with Article 2(10) of the basic Regulation. Adjustments were made for physical characteristics (in the range between 0 % and 2 %), transport, insurance handling, loading and ancillary expenses (in the range between 1 % and 8 %), packaging (in the range between 0 % and 1 %), credit costs (in the range between 0 % and 2 %), commissions (in the range between 0 %-4 %), other factors (in the range between 0 % and 1 %).
- (135) Following the disclosure of the Information Document, Severstal claimed that some SG&A adjustments were incorrectly made, namely finance income and transport costs adjustments.
- (136) According to the company, the finance income should have been taken into account for the determination of the SG&A percentage. Moreover, this income for the related subsidiary in Switzerland was at the same time an expense for Severstal as reported in the G-PL table in its questionnaire response, which had in turn been taken into account when determining whether sales on the domestic market were made in the ordinary course of trade.
- (137) The Commission rejected this claim. Severstal produces and sells a great range of products and was not able to demonstrate that the financial income in question, which is a general loan extended from the Swiss subsidiary to the parent company, was related to the product concerned.
- (138) Following disclosure, Severstal repeated its claim and argued that the above-mentioned financial income is 'interests from loans granted to finance long production cycle products of Severstal, which the product concerned is part of'. Moreover, it asked to allocate the relevant amount to the product concerned only. For the Commission, though, this claim could not be entertained lacking any more detail why a general loan for 'long production cycle products' was also related to the product concerned.
- (139) With regard to transport cost adjustment, Severstal claimed that the Commission had deducted a wrong amount of transport costs as a portion of the SG&A.
- (140) The Commission accepted Severstal's claim regarding transport costs and used the actual transport costs as reported by the company for the calculations. To avoid double counting, they were set at zero, as they had already been taken into consideration in the calculation for allowances.

3.4.4. Dumping margin

- (141) For the exporting producers, the Commission compared the weighted average normal value of each type of the like product with the weighted average export price of the corresponding type of the product concerned, in accordance with Article 2(11) and (12) of the basic Regulation.
- (142) The level of cooperation in Russia is high because the exports of the cooperating exporting producers constituted almost 100 % of the total exports to the Union during the investigated period. Therefore, the Commission decided to set the country wide dumping margin applicable to all other companies at the same level as that established for the company with the highest dumping margin, i.e. Public Joint Stock Company Magnitogorsk Iron & Steel Works (PJSC MMK) group.

⁽¹⁾ Commission Implementing Regulation (EU) 2016/1328 of 29 July 2016 (OJ L 210, 4.8.2016, p. 1), recitals 64-67, referring, among others, to MMK's related Swiss importer/trader.

- (143) The dumping margins, expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

Company	Dumping margin
Public Joint Stock Company Magnitogorsk Iron Steel Works (PJSC MMK)	33,0 %
PAO Severstal	5,3 %
Novolipetsk Steel	15,0 %
All other companies	33,0 %

3.5. Serbia

- (144) There is only one exporting producer of the product concerned in Serbia, which cooperated fully with this investigation. The majority of its sales to the Union were direct sales to independent buyers, however, some were done via a related importer based in Slovakia.

3.5.1. Normal value

- (145) Normal value for the sole exporting producer was established in line with the general methodology set out in section 3.1.1. above. As a result, the normal value for 23 % of product types representing 71 % of the volume exported by the exporting producer to the Union was based on the domestic price in the ordinary course of trade. Whenever the total volume of domestic sales of a product type to independent customers during the investigation period represented less than 5 % of the total volume of export sales of the identical or comparable product type to the Union the normal value for that type was constructed by using that type's SG&A and profit rather than the weighted average SG&A and profit. However, if the weighted average price of a product type was below the unit cost of production the normal value was constructed in line with the methodology set out in recital (55) above.

3.5.2. Export price

- (146) The export price was established using the general methodology set out in section 3.1.2. above and in particular Article 2(8) of the basic Regulation. For sales via the related importer, the export price was constructed on the basis of Article 2(9) of the basic Regulation.

3.5.3. Comparison

- (147) The Commission compared the normal value and the export price of the sole exporting producer on an ex-works basis.
- (148) Where justified by the need to ensure a fair comparison, the Commission adjusted the normal value and/or the export price for differences affecting price comparability, in accordance with Article 2(10) of the basic Regulation. Adjustments were made for transport, insurance handling, loading and ancillary expenses (in the range between 5 % and 9 %), credit costs (in the range between 0 % and 1,5 %), bank charges (in the range between 0 % and 1 %), commissions (in the range between 0,5 % and 2 %).

3.5.4. Dumping margin

- (149) The Commission compared the weighted average normal value of each type of the like product with the weighted average export price of the corresponding type of the product concerned, in accordance with Article 2(11) and (12) of the basic Regulation.
- (150) The level of cooperation from Serbia was very high as the exports of the cooperating exporting producer constituted approximately 100 % of the total exports to the Union during the investigation period. On this basis, the Commission established the country wide dumping margin at the same level as for the sole exporting producer.

- (151) The dumping margins, expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

Company	Dumping margin
Zelezara Smederevo d.o.o.	38,7 %
All other companies	38,7 %

3.6. Ukraine

- (152) There is one group of three related exporting producers of the product concerned in Ukraine (collectively referred to in this section as 'the exporting producer'), which cooperated fully with this investigation. Two of the production sites are based in Mariupol in the Donetsk region, which, during the investigation, was a conflict zone. Following a request of the exporting producer, the Commission decided to exclude from the calculations one of these sites, which had only minor export volumes to the Union.
- (153) In their comments on the Information Document, the complainant requested the Commission to explain its decision to exclude one Ukrainian company from the calculation of the dumping margin.
- (154) The Commission excluded the company because the minor portion of its sales in relation to the sales of the group would not have affected the dumping margin. Furthermore, due to the military activities in the area, the verification of the relevant data was impossible. The Commission considered this situation as a *force majeure*.
- (155) On the domestic market the exporting producer sold the like product directly and through a related trader.
- (156) All sales of the exporting producer to the Union were done via a related trader in Switzerland. The trader sold the product concerned to both related and unrelated importers in the Union.

3.6.1. Normal value

- (157) Normal value for the exporting producer was established in line with the general methodology set out in section 3.1.1. above. The normal value for one of the production sites was based exclusively on domestic prices in the ordinary course of trade. The normal value for the other production site was based partially on domestic prices in the ordinary course of trade (for 38 % of the product types representing 12 % of the total volume of exports to the Union from that site) and partially was constructed. Whenever the total volume of domestic sales of a product type to independent customers during the investigation period represented less than 5 % of the total volume of export sales of the identical or comparable product type to the Union the normal value for that type was constructed by using that type's SG&A and profit rather than the weighted average SG&A and profit. However, if the weighted average price of a product type was below the unit cost of production the normal value was constructed in line with the methodology set out in recital (55) above.
- (158) The exporting producer claimed an adjustment to the costs of production of one of the production sites based in the conflict zone, namely Ilyich Iron and Steel Works of Mariupol ('Ilyich'), on the account of abnormal production costs caused directly and indirectly by the military operations in the area. The exporting producer proposed to establish the level of the adjustment by comparing the evolution of unit cost in Ilyich to the evolution of unit cost in the production site not affected by the conflict, namely Integrated Iron and Steel Works Zaporizhstal ('Zaporizhstal'). In order to establish what the exporting producer referred to as 'unit cost', for each production site the exporting producer took the costs of all goods sold and divided it by the volume of hot rolled steel products produced in the given calendar year. The exporting producer followed this pattern from 2013 (the pre-conflict period) until 2015 and on this basis proposed to adjust the costs of Ilyich downwards by a certain percentage.
- (159) Following careful consideration, the Commission considered the adjustment quantification method proposed as inappropriate. First, what was referred to as 'unit cost' was not cost of a unit of hot rolled flat steel as it included the cost of all goods sold, which included other goods. These other goods formed significant part of the

production in Zaporizhstal and even greater part of the production in Ilyich. The adjustment quantification method completely disregarded the other products' output and cost developments. The output and costs of other products did not remain constant throughout the period the exporting producer proposed to use in the method. Indeed, the exporting producer admitted in its submission that Ilyich experienced a substantial increase in production of some of the other products between 2012 and 2016. The adjustment quantification method attributed those increasing costs to the decreasing output of hot rolled flat steel thereby inflating, possibly significantly, the increase in, what they called, unit cost. Second, even if the costs the exporting producer proposed to use were the actual cost of production of hot rolled flat steel products, they proposed to compare the production quantity with the cost of sales, which disregarded the stock variation. The exporting producer should have either compared the production quantity with the cost of production or quantity sold with the cost of sales. Third, the adjustment quantification method compared the trends up until calendar year 2015 and proposes to apply the outcome of this calculation — i.e. the reduction — to the investigation period data (1 July 2015 to 30 June 2016). This is incorrect as the method should have followed the trends up until the investigation period.

- (160) In its comments on the Information Document, the exporting producer did not address the shortcomings of the adjustment quantification method discussed above. Instead, it compared the cost of manufacturing per product type between the two sites during the investigation period, arguing that the outcome of this exercise is similar to what the adjustment quantification method yield. However, the exporting producer ignored the fact that the very reason for coming up with the adjustment quantification method was that the cost of the two sites cannot be simply compared in a given year as they were different before the conflict to begin with. Indeed, according to the data used for the quantification method the 'unit cost' in 2013 in Ilyich was much higher than the 'unit cost' in Zaporizhstal. This difference expressed as a ratio is greater than the difference in the cost of manufacturing per product type between the two sites during the investigation period, which the exporting producer wanted to use to support the method.
- (161) In its comments on the final disclosure, the exporting producer argued that the Commission had not engaged in a constructive dialogue with the exporting producer by requesting or specifying the additional information it may have deemed necessary for a proper assessment of the claim. According to the exporting producer, the only time the Commission came forward specifying which information and methodology was necessary in order to assess the claim was in the final disclosure of 17 July 2017.
- (162) The Commission noted that this claim is factually incorrect. Detailed explanation of the shortcomings of the proposed adjustment method was communicated to the exporting producer on 4 April 2017 in Annex 4 to the Information Document. The reason for including this detailed description was to give the exporting producer the opportunity and sufficient time to address these shortcomings. As mentioned in recital (160) above, the exporting producer did not do so.
- (163) In its comments on the final disclosure the exporting producer argued that goods other than hot rolled steel products referred to in recital (159) above did not form- a significant part of the production in Zaporizhstal and in Ilyich. To support this claim, the exporting producer referred to the data submitted to the Commission on 16 February 2017, concerning production quantities in Ilyich.
- (164) On this point, the Commission noted that the data referred to by the exporting producer was submitted, after the verification visit already took place and thus could not be verified. Furthermore, the data concerns production quantity in tones, and does not concern their costs or value. The quantity produced does not reflect the costs of production, especially considering that the other products include more added-value and thus added-cost products such as cold-rolled and galvanised steel. As to the data used by the Commission for its assertions, with its reply to the antidumping questionnaire, the exporting producer submitted the data on the turnover generated by the entire mill, the turnover generated by the relevant division of the mill and the turnover generated by the product concerned. This turnover data was verified by the Commission during the visit and was used as proxy for costs, showing that non-hot rolled steel products formed a significant part of the production in Ilyich.
- (165) In further comments on the final disclosure, the exporting producer disagreed with the Commission's comment in recital (159) above regarding the increase in production of non-hot rolled steel products unduly inflating the 'unit costs' used in the method. The exporting producer claimed that the overall increase of the total cost of goods sold by Ilyich defies the Commission's logic that an increase of output of other products could inflate the 'unit cost' calculated for the hot rolled steel products.
- (166) The Commission disagreed with this comment. As mentioned above, the exporting producer established the 'unit cost' by dividing the entire costs of goods sold (including that of non-hot rolled steel products) by the quantity of hot rolled steel goods produced by the plant during the relevant periods. As acknowledged by the exporting

producer, during the period taken into consideration by the method, the quantity of some of the non-hot rolled steel products increased significantly. The resulting increased costs of production of these products were attributed by the method proposed by the exporting producer to hot rolled steel products thereby inflating the 'unit costs' (i.e. adding to the increase of the 'unit costs' throughout the relevant period) on the basis of which the exporting producer proposed to adjust the costs in Ilyich. This remains true independent of whether the overall cost of goods sold by the mill increased, decreased or remained constant.

- (167) With regard to the Commission's comment in recital (159) that the method should have followed the trends up until the investigation period, the exporting producer claimed in its comments on the final disclosure that it was unable to provide the data for the investigation period to be used in the method as the audited report for 2016 was unavailable until recently.
- (168) On this point, the Commission pointed out that the exporting producer was able to submit substantial amounts of investigation period data for the purpose of completing the anti-dumping questionnaire. It is therefore unclear why the exporting producer was unable to produce investigation period data for the purpose of substantiating the method proposed. This is more so considering that, as mentioned in recital (162) above, the exporting producer had the opportunity and the time to do so.
- (169) Finally, in its comments on the final disclosure, the exporting producer insisted that the difference in cost of production per product type during the investigation period between the two production sites, discussed in recital (160) above, supports the adjustment method as the difference is similar as the one developed by the method.
- (170) The Commission disagreed with this comment. In its comments, the exporting producer did not address the fact that, according to the data used for the quantification method, the 'unit cost' in 2013 (i.e. under the normal pre-conflict conditions) in Ilyich was much higher than the 'unit cost' in Zaporizhstal. This difference expressed as a ratio is greater than the difference in the cost of manufacturing per product type between the two sites during the investigation period. This means that, either the gap between the unit costs of Ilyich and Zaporizhstal shrunk between 2013 and the investigation period (i.e. the unit cost of Ilyich has decreased relatively to the unit costs of Zaporizhstal) or the 'unit costs' used in the method are completely unreliable. As explained in recital (159) above, at least the latter is true as the 'unit costs' under the method are distorted by inclusion of cost of sales of other products, which evolved differently in both sites during the relevant period. It follows that the difference in cost of production per product type during the investigation period does not support the accuracy of the method proposed by the exporting producer.
- (171) For the reasons outlined above, this claim was rejected.
- (172) Zaporizhstal acknowledged in their financial statements significant losses due to the foreign currency exchange differences arising from translation of transactions not denominated in Ukrainian hryvnia. The exporting producer argued that these expenses, not being incurred in the ordinary course of trade, should be established in accordance with Article 2(6)(c) of the basic Regulation, and capped at a level which represents the normal operating conditions of the company.
- (173) The Commission disagreed with this argument. These losses were duly recorded in the company's accounts and were incurred during the investigation period. The Commission therefore rejected this claim, considering those as being part of the company's SG&A expenses related to its operation and included them in the normal value calculation.
- (174) In its comments on the Information Document the exporting producer acknowledged that the financial expenses used in the calculation of the SG&A expenses of Zaporizhstal were duly recorded in the company's accounts and were incurred during the investigation period. The exporting producer then reiterated its argument that the SG&A expenses in question should have been based on Article 2(6)(c) of the basic Regulation, as some of the financial expenses were not related to the production and/or sale of the products. To support this argument the exporting producer submitted a new dataset, well after the verification visit took place and the claim was originally made. Finally, the exporting producer pointed out several provisions in the basic Regulation which govern construction of SG&A expenses and require such construction to be 'reasonable'.
- (175) The Commission disagreed with this analysis. According to Article 2(6) of the basic Regulation, SG&A expenses shall be based on actual data pertaining to production and sales. Only when such amounts cannot be determined

can Article 2(6)(c) be triggered. As acknowledged by the exporting producer, the actual SG&A expenses data is available in its accounts and includes the financial expenses at issue. The argument that some of the financial expenses do not relate to the production and/or sale of products has to be rejected. First, the data submitted by the exporting producer to support this claim cannot be verified at this stage of the investigation. The exporting producer had ample time and pre-notification to furnish this information when verifications took place but did not take advantage of this opportunity. Second, Zaporizhstal is only active in production and sales of its products. No evidence to the contrary has ever been presented by the exporting producer. The reference to the requirement that the construction of SG&A expenses is to be reasonable is misplaced as the Commission did not construct the SG&A expenses in question but established it in accordance with the requirements of Article 2(6) of the basic Regulation. This claim was therefore rejected.

- (176) In its comments on the final disclosure, the exporting producer argued that the expenses at issue did relate to the overall economic operation of the plant, but not to the operation involving the production and sales of the product concerned. The exporting producer further argued that the Commission did not address the evidence concerning its request to exclude these expenses. The exporting producer then argued that the Commission dismissed even the mere fact that any evidence was submitted in support of the claim at all, by stating that no evidence to contradict that Zaporizhstal is only active in production and sales of its products has been presented. Finally, in relation to the Commission's comment regarding the new dataset submitted to support the exclusion of some of the financial expenses, the exporting producer stated that this claim as such was made in the reply to the anti-dumping questionnaire and the relevant data was in the audited report submitted with that reply.
- (177) In reply to the above, the Commission noted that the exporting producer made two requests related to this claim. The first request, made in the reply to the anti-dumping questionnaire and then substantiated in its communication of 5 January 2017, was to adjust the financial expenses of Zaporizhstal to the historical level under normal operating conditions. The second request, made for the first time in the comments on the Information Document on 2 May 2017, after the verifications of Zaporizhstal, was to adjust the SG&A expenses by excluding the expenses allegedly not related to the production and/or sales of the product concerned.
- (178) As explained in recital (175) above, the Commission cannot adjust financial expenses of Zaporizhstal to historical level under normal operating conditions, because in accordance with Article 2(6) of the basic Regulation, SG&A expenses shall be based on actual data pertaining to production and sales. This data was available to the Commission and was used in the relevant calculation. No new arguments on this point were provided in the exporting producer's comments on the final disclosure, therefore no further explanation is necessary.
- (179) Regarding the second request, i.e. to adjust Zaporizhstal's normal value to exclude the expenses allegedly not related to the production and/or sales of the product concerned, the Commission noted that it is not clear from the comments on the Information Document that these expenses do not relate directly or indirectly to the production and/or sales of the product concerned. As mentioned above, to the Commission's knowledge, Zaporizhstal's activities are limited to the production and sale of its product. Its financial expenses therefore would normally in one way or another be related to these activities. Indeed, the items mentioned by the exporting producer in the comments on the Information Document as not relating to the production and/or sales of the product concerned involve cash flow related investments, loans to raw material producing subsidiaries, or liabilities stemming from employee benefits. These expenses appear to be at least indirectly linked to the production and/or sales of the product concerned.
- (180) Further verification of this issue was impossible as this request was not made until 2 May 2017, well after the relevant verification visit was concluded (that is, 24 November 2016). In the Communication of 5 January 2017, also submitted after the relevant verification visit, the exporting producer mentioned that some of the financial expenses related to loans were taken up for a general purpose and were not related to the production and sales of the product concerned. No further details on this point were provided at that time as the exporting producer did not request exclusion of these loans but maintained its claim to adjust financial expenses of Zaporizhstal to the historical level under normal operating conditions.
- (181) On this point, in its comments on the final disclosure the exporting producer argued that the Commission was provided during the verification visit at Zaporizhstal with a 'complete and comprehensive version of auditor reports which clearly raise the issue of additional financial expenses of the mill not related to the production and sales of the product concerned'. The exporting producer then argued that the Commission could have used this opportunity to verify and to request, if necessary, any further clarifications regarding the evidence submitted by Zaporizhstal.

(182) The Commission first noted that, as pointed out by the exporting producer, the complete annual reports of Zaporizhstal were not provided until the verification visit, despite being requested in the anti-dumping questionnaire. The Commission then noted that, as communicated to the exporting producer in the pre-verification letter of 27 October 2016, the purpose of the visit was to verify the information in the replies to the questionnaires by agreeing details recorded therein to source documents, cost and financial accounting records and audited financial statements. The issue of some of the financial expenses of Zaporizhstal allegedly being unrelated to the production and sales of the product concerned was not raised until 2 May 2017 and was only touched upon in the communication of 5 January 2017. Both of these occurred after the verification visits at the premises of Zaporizhstal were already concluded. Therefore, the examination of the issue and the verification of these expenses were not and could not have been on the Commission's work program for that visit. To argue that the issue of non-production or sales related financial expenses was raised simply by these expenses being recorded in the audited reports disregard the purpose of the verification visit and the Commission's role in it, as communicated to the exporting producer in the pre-verification letter prior to its commencement. This read in conjunction with the fact that the complete audited reports were provided only during the verification visit and, as mentioned above, it being far from clear that the relevant expenses are not related to production and sales of the product concerned, must lead to this part of the claim being rejected.

(183) For the reasons outlined above this claim was rejected.

3.6.2. *Export price*

(184) The export price was established using the general methodology set out in section 3.1.2. above and in particular Article 2(8) of the basic Regulation. For sales via the related importers, the export price was constructed on the basis of Article 2(9) of the basic Regulation.

(185) The exporting producer claimed that the Swiss trader — Metinvest International SA ('MISA') — was acting as a mere export department of the production sites, as it did not carry out customs clearance of the goods supplied into the Union. Furthermore, the exporting producer claimed that no deduction for trader's SG&A expenses and profit (or a nominal commission) should be made since Article 2(9) of the basic Regulation is not applicable to the present case in view of the fact that the trader is not located in the Union.

(186) The Commission did not construct the export price under Article 2(9) of the basic Regulation for export sales to independent buyers via the Swiss trader. However, even if the responsibility for the customs clearance is on the buyer, this does not change the fact that the sales are performed by the related trader, which is bearing SG&A expenses and which is normally seeking to make a profit for its services. Therefore, as noted in recital (194), the Commission considered that an adjustment under Article 2(10)(i) of the basic Regulation is warranted.

(187) In its comments on the Information Document, the exporting producer claimed that MISA is not a profit driven trader but a related company entrusted with tasks normally falling within the responsibilities of an internal export sales department.

(188) On the basis of the evidence at its disposal, the Commission disagreed with this claim. MISA is a profit-driven company, which describes itself as seeking to find the right balance between profitability, customer satisfaction and risk management. MISA activities are not limited to the sales of Metinvest Group's products. MISA and the production sites have different owners. Finally, MISA signs detailed sale and purchase contracts with the production sites. These agreements contain clauses on penalties for none- or underperformance of the respective obligations, as well as third party dispute resolution, more commonly found in contacts between independent traders rather than production and sales department of one company. On the basis of this evidence the Commission concludes that the relationship between MISA and the two production sites is more that of an agent than an integrated sales department. As explained in recital (194), the relevant adjustment is warranted whenever MISA participates in a transaction.

(189) In its comments on the final disclosure, the exporting producer inferred from the application of Article 2(8) of the basic Regulation to the sales via MISA that the Commission accepted that MISA acts as an export sales department of the group. The exporting producer then again disagreed with the application of Article 2(10)(i) of the basic Regulation, arguing that MISA does not act as an agent or a trader. To underline this point, the exporting producer argued that MISA sells only an insignificant and a niche share of products not manufactured by the group. The exporting producer then argued that the fact that MISA is seeking to find the right balance

between profitability, customer satisfaction and risk management, or that it signs detailed sale and purchase contracts with the production sites, or that it has its own director and staff, different from the mills in Ukraine, would be requirements stemming from compliance with necessary legal requirements in Ukraine and Switzerland.

- (190) As explained above, the Commission did not accept that MISA acted as an export sales department of the group. MISA acted as a related trader and therefore the Commission applied Article 2(8) in conjunction with Article 2(10)(i) of the basic Regulation. Furthermore, MISA not only sells an insignificant or a niche share of products not manufactured by the group, although this alone is of significant importance for this determination. MISA also sells substantial amounts of third-party products to the group. As to the evidence described in recital (188) above, the exporting producer merely argued that these elements are required by law and do not negate MISA's position as an export department. No further details as to what laws require which element were provided. Furthermore, the exporting producer did not explain why elements such as being profit-driven (which was previously disputed by the exporting producer in its comments on the Information Document) or having agreements with clauses on penalties for non- or underperformance of the respective obligations, as well as third party dispute resolution would not negate MISA's position as an export department. Therefore, no further comments on this point are required.
- (191) For the reasons outlined above this claim was rejected.

3.6.3. Comparison

- (192) The Commission compared the normal value and the export price of the sole exporting producer on an ex-works basis.
- (193) Where justified by the need to ensure a fair comparison, the Commission adjusted the normal value and/or the export price for differences affecting price comparability, in accordance with Article 2(10) of the basic Regulation. Adjustments were made for import charges (in the range between 0,1 % and 0,7 %), transport, insurance handling, loading and ancillary expenses (in the range between 1 % and 8 %), packing (in the range between 0 % and 0,1 %), credit costs (in the range between 0 % and 0,7 %), after-sales costs (in the range between 0,1 % and 0,4 %), bank charges (in the range between 0 % and 0,3 %) and commissions (in the range between 0 % and 0,2 %).
- (194) Furthermore, as all sales to the Union were done via the related trader in Switzerland, a relevant adjustment on the basis of Article 2(10)(i) of the basic Regulation was made.
- (195) The exporting producer claimed a level of trade adjustment under Article 2(10)(d)(i) of the basic Regulation, arguing that the sales channels of the like product in the domestic market were significantly different from those of sales of the product concerned to the Union, and thus price comparability was affected. They also argued that consistent and distinct differences existed in functions and prices for the different levels of trade in the domestic market and in the export sales to the Union.
- (196) The exporting producer did not demonstrate consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country. Indeed, the data provided by the exporting producer did not support such finding. The Commission therefore rejected this claim.
- (197) In its comments on the Information Document, the exporting producer strongly opposed this justification as arbitrary and unsubstantiated. Yet it did not provide any evidence that there were consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country. Instead, it focused only on the first part of this requirement arguing that there are consistent and distinct differences in functions and prices in the sales at different levels of trade in different markets, omitting the requirement that this should be demonstrated in the domestic market. Indeed, the Commission verified the prices of the seller for the different levels of trade in the domestic market and was unable to find consistent and distinct differences.
- (198) The exporting producer argued that if the Commission believed that Article 2(10)(d)(i) of the basic Regulation does not apply, the Commission should have resorted to Article 2(10)(d)(ii) of the basic Regulation. In doing so, aside of a vague reference to *prima facie* evidence, the exporting producer did not give a single argument why this provision would be applicable. The relevant levels of trade did exist in the domestic market and it has not been clearly demonstrated that certain functions relate to levels of trade other than the one which is to be used in the comparison. This provision is therefore inapplicable to the case at hand.

- (199) In its comment on the final disclosure, the exporting producer argued that the Commission contradicted itself in its reasoning by pointing out that, whilst various levels of trade on the domestic market exist, the exporting producer did not demonstrate consistent and distinct differences in functions and prices of the seller for these levels.
- (200) The Commission did not see a contradiction in this statement.
- (201) Furthermore, the exporting producer argued that in its communication of 5 January 2017 it did provide the Commission with its analysis and comparison of the various levels of trade in the domestic market, identifying and comparing the levels of trade on the domestic market and demonstrating a consistent difference in prices between these levels.
- (202) The Commission replied by pointing out that in the relevant communication the company compared different domestic sales channels — not levels of trade — of one of its production sites. In this already flawed comparison the exporting producer further argued that the channel most comparable to the Union sales channel is the direct one, i.e. the one without the involvement of its domestic trader. No evidence as to why this would be the case was provided, especially considering that all its sales to the Union were done via a related trader in Switzerland, i.e. MISA. The Commission therefore maintained that the exporting producer did not demonstrate that there were consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country.
- (203) In its comments on the final disclosure, the exporting producer also claimed that the Commission did not address the fact that it submitted a revised export sales listing of its related company MISA. In that list, the exporting producer had addressed the Commission's note with regard to identification of the levels of trade for a large number of transactions, which was inaccurate in the original reply to the anti-dumping questionnaire. The exporting producer claimed that it cannot be said that this information was submitted too late in the investigation, since the Commission should have verified it, if necessary, during its verification visit of the company's related entities in the Union.
- (204) The Commission disagreed with this statement. The additional information on sales listing of MISA was provided after the verification of MISA. To ensure that precisely such a situation is avoided, prior to its verification at the premises of MISA, in its communication of 17 January 2017, the Commission had reminded the company that, if a claim or any of its aspects require verification, it must be submitted at a reasonable time prior to the verification visit so that the case team can prepare the relevant part of the visit. Finally, even if the Commission was able to verify this data at the premises of MISA, this would not change the fact that, as mentioned above, the exporting producer did not demonstrate that there were consistent and distinct differences in function and price of the seller for the different levels of trade in the domestic market of the exporting country.
- (205) In its comments on the final disclosure, the exporting producer also reiterated its claim that, if the Commission considered that the evidence submitted by the company in support of its Article 2(10)(d)(i) of the basic Regulation claim failed to demonstrate the consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market, the very same evidence could have been used by the Commission for the application of a special adjustment under Article 2(10)(d)(ii), i.e. in cases of the 'absence of the relevant levels on the domestic market'. However, as mentioned above, the Commission found that the relevant levels of trade did exist on the domestic market. The exporting producer did not demonstrate that there were consistent and distinct differences in functions and prices of the seller for these levels, but this does not change the fact that these levels were present on the domestic market. The conditions for the application of Article 2(10)(d)(ii) of the basic Regulations were therefore not met.
- (206) For the reasons outlined above this claim was rejected.
- (207) The exporting producer also claimed that, for the sake of fair comparison, the normal value should be adjusted on the account of costs of transport of the like product between the production site and the related domestic trader.

- (208) According to Article 2(10)(e) of the basic Regulation an adjustment shall be made for differences in the directly related costs incurred for conveying the product concerned and/or the like product from the premises of the exporting producer to an independent buyer, where such costs are included in the prices charged. This provision does not cover the costs of transport between two related parties, which do not appear to be reflected in the price charged to the independent buyer. Therefore, the Commission rejected this claim.

3.6.4. Dumping margin

- (209) After the Information Document, the exporting producer submitted a new dataset for the sales of the related importers. This dataset was subsequently verified by the Commission. These new figures affected the dumping calculation originally established in the Information Document.
- (210) For the exporting producer, the Commission compared the weighted average normal value of each type of the like product with the weighted average export price of the corresponding type of the product concerned, in accordance with Article 2(11) and (12) of the basic Regulation.
- (211) The level of cooperation from Ukraine was very high as the exports of the cooperating exporting producer constituted more than 95 % of the total exports to the Union during the investigation period. On this basis, the Commission established the country wide dumping margin at the same level as for the sole exporting producer.
- (212) The dumping margins, expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

Company	Dumping margin
Metinvest Group	19,4 %
All other companies	19,4 %

4. INJURY

4.1. Definition of the Union industry and Union production

- (213) Within the Union, 17 companies provided production and sales data in the standing exercise and indicated that they produced the like product during the investigation period. Based on the available information from the complaint, these 17 companies represent around 90 % of the production of the like product in the Union.
- (214) Apart from these 17 companies, there were five other companies which produced the like product during the investigation period.
- (215) One interested party claimed that the inclusion of the data of the Italian producer Ilva would distort the injury picture of the entire Union steel industry given the particular situation of this company ⁽¹⁾ and, therefore, this Italian producer should be excluded. However, under Article 4(1) of the basic Regulation, the term 'Union industry' refers to the Union producers as a whole of the like products or the major proportion thereof. As the Commission had no reason to restrict its analysis to a major proportion, it was bound to analyse the entire industry, including Ilva. Therefore, this claim was rejected.
- (216) The total Union production during the investigation period was established at around 72.9 million tonnes. The Commission established this figure on the basis of information from the complainant and from all known producers in the Union. As indicated in recital (7), six Union producers were selected in the sample representing more than 45 % of the total Union production of the like product, which was found to be a representative sample.

⁽¹⁾ The European Commission has opened an in-depth inquiry to assess whether Italian state support for steel producer Ilva was in line with EU State aid rules on 20 January 2016 and extended this inquiry on 15 May 2016. This investigation has not yet been finalised as of 3 July 2017.

- (217) The business model of the Union producers and their degree of vertical integration varies. Nevertheless, the Union industry can overall be characterised as an industry with a high degree of vertical integration, as further explained in recital (219) below.

4.2. Union consumption

- (218) As mentioned in recital (45) above, the product concerned falls within a number of CN codes including certain ex codes. In order not to underestimate Union consumption, and in view of the apparent marginal impact of such codes on total consumption, import volumes of CN ex codes have been fully accounted for the purpose of calculating Union consumption.
- (219) As the Union industry is mostly vertically integrated and the product concerned is regarded as a primary material for the production of various value added downstream products, starting with cold-rolled products, captive and free market consumptions were analysed separately.
- (220) The distinction between captive and free market is relevant for the injury analysis. In addition, transfer prices are set on the captive market within the groups according to various price policies. By contrast, production destined for the free Union market is in direct competition with imports of the product concerned, and prices are free market prices.
- (221) To provide a picture of the Union industry that is as complete as possible, the Commission obtained data for the entire activity of the like product and determined whether the production was destined for captive use or for the free market. The Commission found that around 58 % of the total Union producers' production was destined for captive use during the investigation period.
- (222) After the disclosure of the Information Document, the Serbian exporting producer noted that the free market consumption of the product concerned declined between 2015 and the investigation period by over 1.2 million tonnes and that this implies a huge decrease in Union consumption during the second half of 2015. It therefore requested that the Commission further investigated whether the sales data provided by the Union industry on the free market were truly accurate.
- (223) The Commission analysed the sales and consumption data provided by the Union industry and confirmed that the data provided for the free market consumption by the Union industry were accurate and reliable.

4.2.1. Captive consumption on the Union market

- (224) The Commission established the Union captive consumption on the basis of the captive use and captive sales on the Union market of all known producers in the Union. On this basis, the Union captive consumption developed as follows:

Table 1

Captive consumption on the Union market (tonnes)

	2013	2014	2015	IP
Captive consumption	42 418 062	42 887 175	42 271 071	42 454 866
<i>Index (2013 = 100)</i>	100	101	100	100

Source: Eurofer questionnaire reply

- (225) During the period considered the Union captive consumption on the Union market remained stable.

4.2.2. Free market consumption on the Union market

- (226) The Commission established the Union free market consumption on the basis of (a) the sales on the Union market of all known producers in the Union and (b) the imports into the Union from all third countries as reported by Eurostat, thereby also considering the data submitted by the cooperating exporting producers in the countries concerned. On this basis, the Union free market consumption developed as follows:

Table 2

Free market consumption (tonnes)

	2013	2014	2015	IP
Free market consumption	32 292 192	33 139 474	35 156 318	33 930 726
<i>Index (2013 = 100)</i>	100	103	109	105

Source: Eurofer questionnaire reply

- (227) During the period considered, the Union free market consumption increased by around 5 %. The increase is mainly due to the economic recovery of the downstream industry.

4.3. Cumulative assessment of the effects of imports from the countries concerned and import volumes and import prices from the countries concerned

4.3.1. Cumulative assessment of the effects of imports from the countries concerned

- (228) The Commission examined whether imports of the product concerned originating in the countries concerned should be assessed cumulatively, in accordance with Article 3(4) of the basic Regulation.
- (229) That provision stipulates that the imports from more than one country shall be cumulatively assessed only if it is determined that:
- (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in Article 9(3) and that the volume of imports from each country is not negligible; and
 - (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the like Union product.
- (230) The margins of dumping established in relation to the imports from the countries concerned are listed above under section 3 'Dumping'. All these margins are above the '*de minimis*' threshold laid down in Article 9(3) of the basic Regulation.
- (231) The volumes of imports from Brazil, Iran, Russia and Ukraine were assessed to be not negligible within the meaning of Article 3(4) of the basic Regulation. Brazil, Iran, Russia and Ukraine held, in the investigation period, a market share of 1,79 %, 3,32 %, 4,29 % and 3,17 % respectively, as mentioned in the table 3 below.
- (232) On the other hand, import volumes from Serbia were found to be negligible within the meaning of Article 3(4) of the basic Regulation. Indeed, the volume of imports from Serbia decreased from 427 558 tonnes in 2015 to about 354 000 tonnes in the IP, translating it into a market share of only 1,04 %. It is the Commission's practice to consider 'negligible' a market share below the 1 % threshold established by the basic Regulation at initiation stage. However, the Commission found in this case that 1,04 % is still negligible because 0,04 % should be

regarded as immaterial, in particular when, in relative terms, Serbian import volumes are considerably lower than the volumes from each of the four other countries. Indeed, Serbia's import volumes were almost half the volumes from Brazil, the second lowest country in terms of import volumes.

Table 3

Import volume (tonnes) and market share

	2013	2014	2015	IP
BRAZIL				
Volume of imports from Brazil	41 895	108 973	580 525	608 541
Market share Brazil	0,13 %	0,33 %	1,65 %	1,79 %
IRAN				
Volume of imports from Iran	125 202	527 161	1 015 088	1 127 659
Market share Iran	0,39 %	1,59 %	2,89 %	3,32 %
RUSSIA				
Volume of imports from Russia	1 334 322	1 376 412	1 714 880	1 455 436
Market share Russia	4,13 %	4,15 %	4,88 %	4,29 %
SERBIA				
Volume of imports from Serbia	155 055	211 835	427 558	354 145
Market share Serbia	0,48 %	0,64 %	1,22 %	1,04 %
UKRAINE				
Volume of imports from Ukraine	905 397	939 545	1 084 477	1 075 244
Market share Ukraine	2,80 %	2,84 %	3,08 %	3,17 %
COUNTRIES CONCERNED				
Volume of imports from the countries concerned	2 561 872	3 163 926	4 822 529	4 621 026
Market share countries concerned	7,93 %	9,55 %	13,72 %	13,62 %
Index (2013 = 100)	100	120	173	172

Source: Eurostat. Market shares were established by comparing import volumes with the Union free market consumption as reported in table 2.

- (233) Following the final disclosure and in the hearing of 27 July 2017, the complainant argued that the Serbian exports should be cumulatively assessed with the imports from the four other countries as Serbian exports exceeded the 1 % de minimis threshold. In its view, the 1 % threshold does not allow for any exception, however small its additional percentage would be.
- (234) The Commission rejected this argument. The decision as to whether or not imports should be assessed cumulatively must be based on all the criteria set out in Article 3(3) of the basic Regulation. Article 3(4) of the basic Regulation does not accord any particular weight to any of these individual criteria. While it is true that imports from a country cannot be cumulated if their volume is negligible, the converse does not mean that they ipso facto do have to be cumulated. Moreover, the basic Regulation does not explicitly fix any negligibility thresholds. While Article 5(7) of the basic Regulation may serve as guidance concerning negligible import volumes, Article 3(4) does not incorporate by reference these thresholds. Rather, the wording gives sufficient flexibility to the Commission to carry out a case-by-case analysis taking into account that the 'extra' volumes of 0,04 % were immaterial.

(235) Furthermore, the Commission found that Serbian export prices were different from the exporting prices of the four other countries concerned for the following reasons:

- even if the Serbian average sales prices also decreased during the period considered, their average sales price during the investigation period (365 EUR/tonne) is the highest during the investigation period, and significantly higher than the average sales prices for Brazil, Iran, Russia and Ukraine, ranging between 319 EUR/tonne and 346 EUR/tonne, as mentioned in the table 4 below; and
- the Serbian average sales prices have been significantly higher than the average sales prices of the four other countries concerned.

Table 4

Import prices (EUR/tonne)

	2013	2014	2015	IP
BRAZIL				
Average price of Brazilian dumped imports	461	433	386	346
<i>Index (2013 = 100)</i>	100	94	84	75
IRAN				
Average price of Iran's dumped imports	454	415	369	316
<i>Index (2013 = 100)</i>	100	91	81	70
RUSSIA				
Average price of Russian dumped imports	448	431	387	324
<i>Index (2013 = 100)</i>	100	96	86	72
SERBIA				
Average price of Serbian dumped imports	468	442	400	365
<i>Index (2013 = 100)</i>	100	94	86	78
UKRAINE				
Average price of Ukrainian dumped imports	429	415	370	319
<i>Index (2013 = 100)</i>	100	97	86	74
COUNTRIES CONCERNED				
Average price of the dumped imports from the countries concerned	443	424	380	327
<i>Index (2013 = 100)</i>	100	96	86	74

Source: Eurostat

(236) In this respect, the price setting, combined with the negligible volume, suggest that the Serbian exporting producer is rather a price follower than a price setter for the product concerned. This is also exemplified by the fact that its price decrease between 2015 and the investigation period is lower also in relative terms, compared to the price decrease of the four other countries concerned.

- (237) Following the final disclosure, during the hearing of 27 July 2017 (see recital -(33)), the complainant requested the Commission services to provide data on undercutting and underselling for the Serbian exporting producer in order to be able to review the statements of the Commission, as set out in recitals (235) and (236), that the Serbian exporting producer is rather a price follower than a price setter. Moreover, in the complainant's view there is no evidence that Serbia is a price follower.
- (238) The Commission noted that it had disclosed above the average price of imports from the countries concerned. These data show that the Serbian import prices had been the highest in 2013 (468 euro per tonne) and remained the highest in the following years up to the price in the IP (365 euro per tonne). Moreover, the index in the table 4 above showed that the relative decline of Serbian prices went from 100 to 78 with the year 2013 indexed as 100, whereas the other four countries showed a decline to 75 (Brazil), 70 (Iran), 72 (Russia) and Ukraine (74). The complainant was therefore able to review the Commission's finding that the Serbian exporting producer was rather a price follower than a price setter both with respect to the import price and its relative decline between 2013 and the IP. The Commission did not use undercutting or underselling data for this assessment because undercutting and underselling calculations only give a snapshot during the investigation period and so do not allow for a price comparison of the trend over a number of years. As the complainant did not provide further reasons for the need to the final disclosure of undercutting and underselling data beyond review of the statements set out in recitals (235) and (236) above, the Commission, consequently, rejected that request.
- (239) Given that the complainant did not contest the figures as laid out in Table 4, the Commission thus confirmed its finding that the Serbian exporter only followed a price trend set by other importers rather than pursuing an aggressive pricing strategy as a price leader.
- (240) Therefore, the Commission concluded that the imports from Serbia should not be cumulatively assessed with the imports from the four other countries. As a consequence of the finding that imports from Serbia were *de minimis*, protective measures are unnecessary with regard to the imports of HRF originating in Serbia. Thus, in accordance with Article 9(2) of the basic Regulation, the proceeding should be terminated with regard to the imports from Serbia.
- (241) The Commission also assessed the conditions of competition between the dumped imports from the four other countries concerned and the conditions of competition between the dumped imports and the like product and found that they were similar. Indeed, the imported products competed with each other and with the like product produced in the Union. The products are interchangeable and were marketed in the Union through comparable sales channels, being sold to similar categories of end customers.
- (242) Following the initiation of the investigation, several parties submitted comments regarding the cumulative assessment of the effects of the imports from the countries concerned. The Mission of Ukraine to the European Union, the Ministry of Industry and Trade of Russia and one Russian exporting producer, and two exporting producers from Brazil contested the appropriateness of a cumulative assessment of their countries' imports with the other investigated countries' and claimed that their countries' imports should not be cumulated therewith. The Mission of Ukraine to the European Union argued that Ukrainian import volumes were stable during the period 2011-2016, in contrast to the other countries and that there is a significant difference between the geographical structure of imports from Ukraine on the one hand and from Brazil, Iran, Serbia and Russia on the other hand. The Ministry of Industry and Trade of Russia was of the opinion that an exhaustive evaluation of the conditions of competition needed to be made. The Russian exporting producer argued that its imports over the period considered actually decreased, that part of its imports were captive intra-group supplies, not entering as such the Union free market and that the product types sold were different. Moreover, one Brazilian exporting producer argued that it did not follow a similar price trend and that these imports were distributed through different sales channels compared to the imports from the four other countries concerned. Another Brazilian exporting producer argued that Brazilian imports were negligible and that the imports from Brazil did not follow the same trends as those from the four other countries concerned in terms of volume, market share and price.
- (243) The Commission rejected these arguments. Imports from Russia and Ukraine to the Union have increased in absolute terms during the period considered. Moreover, even if the imports had decreased over the period considered, this fact is not a criterion for determining whether the volume of imports is negligible within the meaning of Article 3(4) of the basic Regulation.

- (244) The conditions of competition between the dumped imports from Brazil, Iran, Russia and Ukraine and the like product were assessed to be similar for the reasons below.
- (a) First, all cooperating exporting producers of Brazil, Iran, Russia and Ukraine used similar sales channels, by either selling directly or via a related trader/importer, located either inside or outside the Union. Similar sales channels were also used in the Union by the Union steel producers. Therefore, the imported products from the four other countries concerned competed with each other and with the product concerned produced in the Union.
 - (b) Second, the Commission considered the totality of imports irrespective whether these included intra-group supplies. In the absence of such imports, companies would have most likely sourced the like product, being a commodity, from other sources available in the Union free market, including the like product produced by the Union industry.
 - (c) Moreover, as set out in the table in recital (264), similar decreasing price trends were identified for Brazil, Iran, Russia and Ukraine.
 - (d) The product types of the exporting producers were also manufactured and sold by the Union producers. Therefore, their product types were not different from the ones sold by the Union producers.
 - (e) Concerning the Russian volumes, as set out in the table in recital (262), the Russian import volumes both increased in terms of absolute volumes and market share.
- (245) On the basis of the above, the Commission concluded that the conditions for conducting a cumulative assessment of the effects of the imports from Brazil, Iran, Russia and Ukraine were met. Consequently, these imports were examined cumulatively for the purposes of the injury determination.
- (246) Following the disclosure of the Information Document, the Commission received several submissions regarding the cumulative assessment of the countries concerned, which are addressed in the recitals below.
- (247) The complainant argued that imports from Serbia caused injury to the Union producers similarly to imports from the other four countries. In this respect, the complainant referred to the fact that imports from Serbia doubled in absolute volume and in market share in the period between 2013 and the investigation period, that their prices also dropped in this period and that imports from Serbia undercut the Union producers by appreciable amounts during the investigation period. Moreover, the complainant also claimed that imports from Serbia have a market share of 1,04 %, which is just above the 1 % threshold of Article 5(7) of the basic Regulation. In addition, the complainant referred to a potential risk of circumvention since the termination with regard to Serbia would allow the Chinese parent company of the sole Serbian exporting producer to sell to the Union via its Serbian subsidiary.
- (248) The Commission rejected the allegation that imports from Serbia caused injury to the Union producers similarly to imports from the other countries for the reasons set out below.
- First, Serbian import volumes were found to be de minimis. As a consequence, they are negligible and cannot be found to cause injury to the EU industry. The fact that Serbian average sale prices during the investigation period were significantly higher than the average sales prices of the four other countries concerned is yet another indication that this low volume of imports cannot cause injury to the EU industry.
 - Second, concerning the market share above 1 %, that is 1,04 %, in any event, the threshold established by Article 3(4) of the basic Regulation is 'negligible'. The choice of the word 'negligible' implies that the Commission enjoys a certain level of discretion in its analysis of imports volumes when assessing cumulation. In this particular case, as explained in recital (234), the difference of a 0,04 % was found to be, in absolute and relative terms, immaterial.
 - Finally, concerning the potential risk of circumvention, the Commission noted that the actual production volumes and production capacity of the sole Serbian exporting producer were communicated to the Commission services. Therefore, the Commission will give special attention to this potential risk of circumvention by monitoring closely whether there is any indication of a change in pattern of trade, suggesting potential circumvention originating in Serbia. Moreover, but less important, the Serbian exporting producer stated that its primary strategy is to respond to domestic demand and regional demands of the Balkan countries.

- (249) In addition, two sampled Brazilian exporting producers claimed that the cumulative assessment of imports from Brazil with those from Iran, Russia and Ukraine was unwarranted for the reasons as set out in the two following recitals.
- (250) One argued that more than one-third of imports from Brazil did not enter into competition with products from Iran, Russia and Ukraine, thereby proving that the sales channels of imports from Brazil were different from those of Iran, Russia and Ukraine. Furthermore, this exporting producer argued that, similarly to Serbia, Brazilian prices were significantly higher than the average prices of Iran, Russia and Ukraine and that the Brazilian exporting producers were also rather price followers than price setters. Finally, it argued that none of the Brazilian producers undercut the prices of the Union industry.
- (251) The other Brazilian exporting producer argued that such a cumulative assessment was inappropriate due to negligible Brazilian import volumes (as was the case for Serbia) and the difference in conditions of competition. In this respect, concerning the negligible volumes, the Brazilian exporting producer argued that the market share of Brazil only exceeded the 1 % threshold as from 2015 and only amounted to 1,79 % during the investigation period. In addition, its import volumes were too small to contribute to any injury and, thus, similarly immaterial. Concerning the different conditions of competition, it referred to the fact that nearly 60 % of the imports of the product concerned from Brazil during the investigation period were sales or transfers to related European companies, which do not enter in direct competition with, and therefore face different conditions of competition than, products destined for the free market. Moreover, it disputed the Commission statement in the Information Document that imports from Brazil and the like Union product are interchangeable. It argued in this context that Brazilian exporting producers mainly export commercial types of HRF, which have different physical, chemical and technical characteristics as well as different end uses than the products sold by the Union industry, which are mainly high quality types of HRF. In addition, it contested that Brazilian exporting producers use similar sales channels to exporting producers from the other countries concerned. It argued that those producers usually sell directly to independent customers in the Union free market, contrary to the majority of the imports from Brazil. Finally, it made comments on prices similar to the ones presented by the other Brazilian exporting producer.
- (252) The Commission rejected the claims of the two sampled Brazilian exporting producers as set out below.
- (253) First, the Commission considered for the purpose of defining consumption the totality of Brazilian imports, irrespective of the fact these included intra-group supplies. This is because, in the absence of such imports, companies would have most likely sourced HRF from other sources available in the Union free market, including the like product produced by the Union industry.
- (254) Second, the sales channels from Brazil are, for part of its sales, not different to those of Iran, Russia and Ukraine. All cooperating producers of Brazil, Iran, Russia and Ukraine use similar sales channels, by either selling directly or via a related trader/importer, located either inside or outside the Union. Moreover, concerning the argument that 60 % of the imports of the product concerned from Brazil during the investigation period were sales or transfers to related European companies, which do not enter in direct competition with, and therefore face different conditions of competition than, products destined for the free market, the following can be noted. Part of the imports of the product concerned from Russian exporting producers were also sales to related European companies of which part was further processed by these related European companies. Consequently, these exporting producers face the same conditions of competition.
- (255) Third, as set out in the table 4, the Commission acknowledged that the Brazilian prices are higher than the average prices of Iran, Russia and Ukraine. Nevertheless, the table 4 also showed that the Brazilian prices were consistently lower than the Serbian import prices during the period considered, i.e. the years 2013, 2014, 2015 and the investigation period.
- (256) Fourth, concerning the argument that Brazilian exporting producers are also rather price followers than price setters, the Serbian exporting producer price was assessed in combination with its negligible volumes. Thus, the same conclusion cannot be reached with regards to Brazil.
- (257) Fifth, concerning the volumes, as set out in table 3, Brazilian imports amounted to 608 541 tonnes during the investigation period, compared to 354 145 tonnes of Serbian imports. Accordingly, Brazilian HRF import volumes were more than 70 % higher than Serbia's, and represented a market share of 1,79 %, compared to 1,04 % of Serbia. As a result, these imports were not considered negligible.

- (258) Finally, concerning the allegation of a different product mix of the Brazilian exporting producers, their products were clearly in direct competition with Union products and products from other exporting producers. Contrary to the exporting producer claim, the investigation showed that all types of the product concerned, including the types sold by Brazilian exporting producers, were also manufactured and sold by the Union producers. In this respect, the Commission noted that more than 99,9 % of all product types sold by the three Brazilian exporting producers were also sold by the sampled Union producers during the investigation period. Furthermore, a cumulative assessment is performed on a country-wide basis with regard to the full scope of the product concerned rather than taking only into consideration certain types of the product concerned.
- (259) Following the final disclosure, the Brazilian exporting producer CSN reiterated that the sales channels and import prices from Brazil are substantially different from those of imports from Iran, Russia and Ukraine. Regarding the sales channels, it mentioned that its subsidiary Lusosider is neither a trader nor a mere importer but a user of HRF. It argued that in particular the situation of NLMK Europe was not the same as the situation of Lusosider. It also mentioned that Lusosider did not have easy access to HRF sold on the Union market. Concerning import prices, it mentioned that the price trend of imports from Brazil follow the same upward trend as prices of imports from Serbia.
- (260) The Commission rejected these claims as unfounded: Regarding the sales channels, there were other Russian subsidiaries located in Latvia and in Poland with a Russian parent company other than NLMK which partially used and processed to some extent the HRF during the IP which they procured from their Russian parent company. Moreover, despite the allegation that Lusosider had not easy access to HRF sold on the Union market, the Commission had been informed during a hearing that Lusosider was supplied from other sources during the investigation period, such as Turkey, Taiwan and Russia. Moreover, the Commission has no evidence on file that Union producers did not want to supply Lusosider nor did Lusosider provide such evidence. In addition, concerning prices, the Commission recalled that the Brazilian prices were consistently lower than the Serbian import prices during the period considered, i.e. in the years 2013, 2014, 2015 and the investigation period (see recital (235)). Therefore, the Commission did not accept the request of the Brazilian exporting producer that the imports from Brazil should not be cumulatively assessed with the imports from the three other countries.
- (261) The Commission therefore concluded that all criteria set out in Article 3(4) are met for the four other countries and therefore imports from Brazil, Iran, Russia and Ukraine were examined cumulatively for the purposes of the injury determination.

4.3.2. Volume and market share of the imports from Brazil, Iran, Russia and Ukraine

- (262) Imports into the Union from Brazil, Iran, Russia and Ukraine developed as follows:

Table 5

Import volume (tonnes) and market share

	2013	2014	2015	IP
BRAZIL				
Volume of imports from Brazil	41 895	108 973	580 525	608 541
<i>Index (2013 = 100)</i>	100	260	1 386	1 453
Market share Brazil	0,13 %	0,33 %	1,65 %	1,79 %
<i>Index (2013 = 100)</i>	100	253	1 273	1 382
IRAN				
Volume of imports from Iran	125 202	527 161	1 015 088	1 127 659
<i>Index (2013 = 100)</i>	100	421	811	901

	2013	2014	2015	IP
Market share Iran	0,39 %	1,59 %	2,89 %	3,32 %
<i>Index (2013 = 100)</i>	100	410	745	857
RUSSIA				
Volume of imports from Russia	1 334 322	1 376 412	1 714 880	1 455 436
<i>Index (2013 = 100)</i>	100	103	129	109
Market share Russia	4,13 %	4,15 %	4,88 %	4,29 %
<i>Index (2013 = 100)</i>	100	101	118	104
UKRAINE				
Volume of imports from Ukraine	905 397	939 545	1 084 477	1 075 244
<i>Index (2013 = 100)</i>	100	104	120	119
Market share Ukraine	2,80 %	2,84 %	3,08 %	3,17 %
<i>Index (2013 = 100)</i>	100	101	110	113
COUNTRIES CONCERNED				
<i>Volume of imports from the countries concerned</i>	2 406 816	2 952 091	4 394 970	4 266 880
<i>Index (2013 = 100)</i>	100	123	183	177
Market share countries concerned	7,45 %	8,91 %	12,50 %	12,57 %
<i>Index (2013 = 100)</i>	100	120	168	169
<i>Source: Eurostat. Market shares were established by comparing import volumes with the Union free market consumption as reported in the table 2.</i>				

- (263) The above table shows that, in absolute figures, imports from the countries concerned increased significantly during the period considered. In parallel, the total market share of their imports into the Union went up by almost 5 percentage points (from 7,45 % in 2013 to 12,57 %, or an increase by 69 %) during the period considered.

4.3.3. Prices of the imports from the countries concerned and price undercutting

- (264) The Commission established the prices of imports on the basis of Eurostat data. The weighted average price of imports into the Union from Brazil, Iran, Russia and Ukraine developed as follows:

Table 6

Import prices (EUR/tonne)

	2013	2014	2015	IP
BRAZIL				
Average price of Brazilian dumped imports	461	433	386	346
<i>Index (2013 = 100)</i>	100	94	84	75

	2013	2014	2015	IP
IRAN				
Average price of Iran's dumped imports	454	415	369	316
<i>Index (2013 = 100)</i>	100	91	81	70
RUSSIA				
Average price of Russian dumped imports	448	431	387	324
<i>Index (2013 = 100)</i>	100	96	86	72
UKRAINE				
Average price of Ukrainian dumped imports	429	415	370	319
<i>Index (2013 = 100)</i>	100	97	86	74
COUNTRIES CONCERNED				
<i>Average price of the dumped imports from the countries concerned</i>	442	423	378	323
<i>Index (2013 = 100)</i>	100	96	86	73
<i>Source: Eurostat</i>				

- (265) The average prices of the imports from the countries concerned decreased from 442 EUR/tonne in 2013 to 323 EUR/tonne during the investigation period. During the period considered, the decrease of the average unit price of the dumped imports was 27 %.
- (266) The Commission assessed the price undercutting during the investigation period by comparing:
- the weighted average sales prices per product type of the six Union producers charged to unrelated customers on the free Union market, adjusted to an ex-works level; and
 - the corresponding weighted average prices at CIF Union frontier level per product type of the imports from the cooperating producers of the country concerned to the first independent customer on the Union market, with appropriate adjustments for post-importation costs.
- (267) The price comparison was made on a type-by-type basis for transactions at the same level of trade, duly adjusted where necessary, and after deduction of rebates and discounts. The result of the comparison was expressed as a percentage of the Union producers' turnover during the investigation period. The main adjustments related to delivery costs (varying between 3,4 % and 8,9 % per sampled Union producer), credit costs (varying between 0,1 % and 0,4 %), and discounts (varying between 0,1 % and 2 %).
- (268) As mentioned in recital (16), only one unrelated importer submitted a questionnaire reply. On the basis of the evidence collected during the verification at this unrelated importer, a post-importation cost established at 7 EUR/tonne was added.

- (269) On the basis of the above, the dumped imports from the majority of the sampled exporting producers concerned were found to undercut the Union industry prices in a range between 8,45 % and 17,74 % as can be seen in the table below. No undercutting was found for all the Brazilian companies.

Table 7

Undercutting margins

Country	Company	Undercutting margins
Brazil	ArcelorMittal Brasil S.A and Aperam Inox América do Sul S.A.	– 3,30 %
	Companhia Siderúrgica Nacional	– 6,95 %
	Usinas Siderúrgicas de Minas Gerais S.A.	– 0,12 %
Iran	Mobarakeh Steel Company	8,45 %
Russia	Novolipetsk Steel	8,87 %
	Public Joint Stock Company Magnitogorsk Iron Steel Works (PJSC MMK)	14,0 %
	PAO Severstal	17,74 %
Ukraine	Metinvest Group	8,45 %

- (270) After the disclosure of the Information Document, the complainant and the Iranian exporting producer noted that the information provided in the Information Document and in one of its annexes was inconsistent. While the document stated that no undercutting was found for the Iranian company, a specific annex showed an undercutting margin of 8,45 % for the Iranian company.
- (271) In response to these comments, the Commission confirms that the narrative of the Information Document incorrectly made a reference to the Iranian company and that the undercutting margin provided in the annex was correct.
- (272) Following the final disclosure, the Brazilian exporting producer Usiminas claimed that Articles 3(2) and 3(3) of the basic Regulation require the Commission to conduct a proper analysis of the price effect of dumped imports and to give consideration to whether there had been significant price undercutting. Such an analysis should not be limited to a simple mathematical comparison but also consist of a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration.
- (273) The Commission rejected this claim: It first provided the weighted average unit sales prices of the Union producers on the free market in the Union in the table under recital (295). Thereafter, as set out in recital (297), the Commission stated that the Union producers had to follow the downward price spiral and reduced their sales price significantly, in particular during 2015 and the investigation period. As the product concerned is a commodity, Union producers had to follow the decreasing price spiral. Similar comments by the Commission can be found in recital (387). Moreover, it also refers to its analysis of the other factors, which combined or separately could not break the causal link between dumped imports. (see recital (390)). The Commission's analysis was, consequently, not limited to a simple mathematical comparison. Last but not least, neither did the Brazilian exporting producer provide any argument nor is the Commission aware of why such additional analysis would make the undercutting analysis more meaningful given the commodity type nature of the product concerned.

4.4. Economic situation of the Union industry

4.4.1. General remarks

- (274) In accordance with Article 3(5) of the basic Regulation, the examination of the impact of the dumped imports on the Union industry included an evaluation of all economic indicators having a bearing on the state of the Union industry during the period considered.
- (275) The macroeconomic indicators (production, production capacity, capacity utilisation, sales volume, stocks, growth, market share, employment, productivity and magnitude of dumping margins) were assessed at the level of the whole Union industry. The assessment was based on the information provided by the complainant, which was then cross-checked with data provided by Union producers and available official statistics (Eurostat).
- (276) The analysis of microeconomic indicators (sale prices, profitability, cash flow, investments, return on investments, ability to raise capital, wages and cost of production) was carried out at the level of the sampled Union producers. The assessment was based on their information, duly verified.
- (277) To provide a picture of the Union industry that is as complete as possible, the Commission obtained data for the entire production of the product concerned and determined whether the production was destined for captive use or for the free market. For some injury indicators relating to the Union industry, the Commission analysed separately data related to the free and the captive market and made a comparative analysis. These factors are: sales, market share, unit prices, unit cost, profitability, and cash flow. However, other economic indicators could meaningfully be examined only by referring to the whole activity, including the captive use of the Union industry. These factors are: production, capacity, capacity utilisation, investments, return on investments, employment, productivity, stocks and labour costs. For these factors, the Commission can only conduct a meaningful assessment by referring to the whole activity of the Union industry. This analysis is in line with case-law of the Union courts and the WTO. ⁽¹⁾

4.4.2. Macroeconomic indicators

4.4.2.1. Production, production capacity and capacity utilisation

- (278) The total Union production, production capacity and capacity utilisation developed over the period considered as follows:

Table 8

Production, production capacity and capacity utilisation

	2013	2014	2015	IP
Production volume (tonnes)	74 588 182	75 509 517	74 718 189	72 920 472
<i>Index (2013 = 100)</i>	100	101	100	98
Production capacity (tonnes)	100 667 836	100 040 917	98 093 841	98 162 252
<i>Index (2013 = 100)</i>	100	99	97	98
Capacity utilisation	74,1 %	75,5 %	76,2 %	74,3 %

Source: Eurofer questionnaire reply

⁽¹⁾ ECJ, Case C-315/90 Gimelec v Commission EU:C:1991:447, paragraphs 16 to 29; Report of the WTO Appellate Body 24.7.2001, WT/DS184/AB/R, para 181 to 215.

- (279) During the period considered, the Union industry's production volume slightly decreased about 1.7 million tonnes (– 2 %).
- (280) The reported capacity figures refer to technical capacity, which implies that adjustments, considered as standards by the industry, for set-up time, maintenance, bottle necks and other normal stoppages have been taken into consideration. The production capacity decreased during the period considered due to the reduction of some production capacity mainly in Belgium and Italy.
- (281) The capacity utilisation rate remained relatively stable during the period considered, ranging between 74,1 % and 76,2 %.

4.4.2.2. Sales volume and market share

- (282) The Union industry's sales volume and market share in the free market developed over the period considered as follows:

Table 9

Sales volume and market share (free market)

	2013	2014	2015	IP
Sales volume (tonnes)	27 468 243	27 910 748	27 327 906	26 027 000
<i>Index (2013 = 100)</i>	100	102	99	95
Market share	85,1 %	84,2 %	77,7 %	76,7 %
<i>Index (2013 = 100)</i>	100	99	91	90

Source: Eurofer questionnaire reply and Eurostat

- (283) The Union industry sales volume in the Union free market decreased 5 % during the period considered from 27.5 million tonnes to 26 million tonnes.
- (284) During the period considered, the Union industry's market share in terms of Union consumption went down more than 8 percentage points, from 85,1 % to 76,7 %. The decrease in sales volume in the Union free market and the loss of Union industry's market share coincided in time with an increase of consumption in the free Union market, which is an indicator of the deterioration of the competitive position of the Union steel producers.
- (285) As far as the captive market in the Union is concerned, the captive volume and market share developed over the period considered as follows:

Table 10

Captive volume on the Union market and market share

	2013	2014	2015	IP
Captive volume on the Union market (tonnes)	42 418 062	42 887 175	42 271 071	42 454 866
<i>Index (2013 = 100)</i>	100	101	100	100
Total production of Union industry (tonnes)	74 588 182	75 509 517	74 718 189	72 920 471
% of captive volume compared to total production	56,9 %	56,8 %	56,6 %	58,2 %

Source: Eurofer questionnaire reply and Eurostat

- (286) The Union industry captive volume (composed of captive transfers and captive sales in the Union market) in the Union market in absolute figures remained relatively stable during the period considered.
- (287) The share of the captive use (expressed as a percentage of total production) of the Union industry slightly increased over the period considered, from 56,9 % in 2013 to 58,2 % during the investigation period.

4.4.2.3. Employment and productivity

- (288) The employment was calculated by taking only the employees directly working for the like product in the different steel mills of the Union producers. This method provided accurate data which is relatively easy to determine.
- (289) Employment and productivity developed over the period considered as follows:

Table 11

Employment and productivity

	2013	2014	2015	IP
Number of employees (Full time employment/employee)	18 632	17 739	17 829	17 722
<i>Index (2013 = 100)</i>	100	95	96	95
Productivity (tonne/employee)	4 003	4 257	4 191	4 115
<i>Index (2013 = 100)</i>	100	106	105	103

Source: Eurofer questionnaire reply

- (290) The level of the Union industry employment decreased during the period considered. The Commission established during the investigation that such decrease was caused by the need to reduce production costs and gain efficiency in view of the increasing competition from dumped imports on the market. This resulted in a reduction of workforce by 5 % during the period considered, without taking into consideration any indirect employment. As a consequence and despite the slightly decreasing production volume (– 2 %) over the period considered, the productivity of the Union industry's workforce, measured as output per person employed per year, increased (+ 3 %). This shows that the Union industry was trying to adapt to the changing market conditions in order to remain competitive.

4.4.2.4. Inventories

- (291) Stock levels of the Union producers developed over the period considered as follows:

Table 12

Inventories

	2013	2014	2015	IP
Closing stocks (tonnes)	2 646 989	2 653 224	2 798 420	2 469 667
<i>Index (2013 = 100)</i>	100	100	106	93
Closing stocks as a percentage of production	3,55 %	3,51 %	3,75 %	3,39 %
<i>Index (2013 = 100)</i>	100	99	106	95

Source: Eurofer questionnaire reply

- (292) Most types of the like product are produced by the Union industry based on specific orders of the users. Therefore, stocks were not considered to be an important injury indicator for this industry. This is also confirmed by the analysis of the evolution of the closing stocks as a percentage of production. As can be seen above, this indicator remained relatively stable at ca. 3,4 % to 3,7 % of the production volume.

4.4.2.5. Magnitude of the dumping margin

- (293) All dumping margins from Brazil, Iran, Russia and Ukraine were significantly above the *de minimis* level. The impact of the magnitude of the actual high margins of dumping on the Union industry was not negligible, given the volume and prices of imports from Brazil, Iran, Russia and Ukraine.

4.4.2.6. Growth

- (294) The Union consumption (free market) increased around 5 % during the period considered, while the sales volume of the Union industry on the Union free market decreased around 5 %. The Union industry thus lost market share, contrary to the market share of the imports from Brazil, Iran, Russia and Ukraine which increased significantly during the period considered.

4.4.3. Microeconomic indicators

4.4.3.1. Prices and factors affecting prices

- (295) The weighted average unit sales prices of the Union producers on the free market in the Union developed over the period considered as follows:

Table 13

Sales prices in the free market in the Union

	2013	2014	2015	IP
Sales price (EUR/tonne)	498	471	427	383
<i>Index (2013 = 100)</i>	100	95	86	77
Unit cost of production (EUR/tonne)	511	469	431	413
<i>Index (2013 = 100)</i>	100	92	84	81

Source: Questionnaire reply of sampled Union producers

- (296) The table above shows the evolution of the unit sales price on the Union free market as compared to the corresponding cost of production. Sales prices have on average been lower than the unit cost of production, with the exception of 2014 when the Union market started picking up and market shares of the imports from the four other countries concerned was lower than in the investigation period.
- (297) The cost of production remained generally higher than the decreasing sales prices, with the exception of 2014. In order to limit the loss in market share, and because the product concerned is a commodity, the Union producers had to follow the downward price spiral and reduced their sales price significantly, in particular during 2015 and the investigation period. As the product concerned is a commodity, Union producers had to follow the decreasing price spiral.
- (298) Among the sampled producers, certain hot-rolled flat products of iron, non-alloy or other alloy steel for captive consumption were transferred or sold at transfer prices for further downstream processing using different pricing policies (mainly at cost for captive transfers, and at transfer prices for captive sales). Therefore, no meaningful conclusion can be drawn from captive use price evolution.

4.4.3.2. Labour costs

(299) The average labour costs of the Union producers developed over the period considered as follows:

Table 14

Average labour costs per employee

	2013	2014	2015	IP
Average labour costs per employee (EUR)	63 374	66 039	66 023	67 045
Index (2013 = 100)	100	104	104	106

Source: Questionnaire reply of sampled Union producers

(300) During the period considered, the average wage per employee went up by 4 %.

4.4.3.3. Profitability, cash flow, investments, return on investments and ability to raise capital

(301) Profitability, cash flow, investments and return on investments of the Union producers developed over the period considered as follows:

Table 15

Profitability, cash flow, investments and return on investment

	2013	2014	2015	IP
Profitability of sales in the Union on the free market (% of sales turnover)	– 2,7 %	0,4 %	– 0,8 %	– 7,8 %
Cash flow ('000 EUR)	139 285	221 982	122 723	– 79 661
Index (2013 = 100)	100	159	88	– 57
Investments ('000 EUR)	256 013	289 582	291 771	268 839
Index (2013 = 100)	100	113	114	105
Return on investment	– 3,5 %	0,5 %	– 1,0 %	– 8,5 %

Source: Questionnaire reply of sampled Union producers

(302) The Commission established the profitability of the Union producers by expressing the pre-tax net loss of the sales of the like product on the free market in the Union as a percentage of the turnover of those sales.

(303) Profitability developed negatively over the period considered: losses were incurred during all periods, with the exception of 2014. While the losses in the year 2013 were partly linked to the aftermath of the Eurozone debt crisis, the Union steel producers could partly recover during 2014 and the first half of 2015. As shown in the table under recital (295), the unit sales price decreased 23 % during the period considered, due to the heavy price pressure exerted by the dumped imports from the second half of 2015 onwards. This led to a significant loss of 7,8 % during the investigation period, which is the worst result during the period considered.

(304) The net cash flow is the ability of the Union producers to self-finance their activities. The trend in net cash flow followed a similar downward trend as the profitability, and became negative, at unsustainable levels.

- (305) Despite the losses incurred during the period considered, investments (including the replacement of certain production assets) remained above 240 million EUR in all years of the period considered. However, investments were at a relatively low level during the whole period since the ability to raise capital has been affected by the losses incurred during the period considered (apart from the small profit achieved in 2014).
- (306) The return on investments is the profit (or loss) in percentage of the net book value of investments. Due to the incurred losses, the return on investments was negative during the period considered, with the exception of 2014.

4.4.3.4. Comments concerning the microeconomic indicators

- (307) After the disclosure of the Information Document, the Russian exporting producers, MMK Group and Severstal Group, and the Russian Ministry of Economic Development submitted that the Commission did not properly address the factor captive market in its analysis of the microeconomic indicators. The Russian exporting producers noted that the Commission analysed microeconomic indicators for the free market only, which is a smaller segment of the market, i.e. only 41,8 %-43,1 % of the Union production of the product concerned. They claimed that an examination of the microeconomic indicators only in relation to the free market of the Union would be likely to show a more negative picture than one relating to the whole EU market of the like product. In this respect, they referred to the findings of the WTO Appellate Body Report in *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ⁽¹⁾ which in their view requires that a balanced, objective examination of microeconomic indicators should include both the free and captive market.
- (308) The Commission rejected the allegation that it has not carried out a balanced, objective examination of microeconomic indicators including both the free and captive market.
- (309) First, it explained in recital (277) its methodology, stating how and when it distinguished between data related to the free and captive market.
- (310) Second, the assertion that the Commission did not act in line with that report of the WTO Appellate Body is not correct. The Commission did not ignore the captive market for the analysis. Indeed, it provided figures of the captive market and considered it in its analysis when appropriate (see, in this regard, recitals (224) to (225), and recitals (285) to (287)).
- (311) Third, in this particular case, the majority of the captive market consisted of captive transfers (almost 87 % during the investigation period) as shown in the table below:

Table 16

Breakdown between captive transfers and captive sales

	2013	2014	2015	IP
Captive transfers (tonnes)	35 884 971	36 155 050	35 865 270	36 787 755
Captive sales (tonnes)	6 533 091	6 732 125	6 405 801	5 667 111
Captive volume on the Union market (tonnes)	42 418 062	42 887 175	42 271 071	42 454 866

- (312) Such internal transfers do not enter the free market, because the product is used by an integrated producer for further processing, transformation or assembly within an integrated process. These internal transfers are characterised by the fact that no commercial invoices are issued, and that the integrated producer/user is not a separate legal entity, contrary to captive sales. As a result, sales prices for these captive transfers do not exist.

⁽¹⁾ WT/DS184/AB/R, 24 July 2001, page 69, para 204.

- (313) Moreover, it is very difficult to establish profitability or return on investment for such captive transfers since the product types (when captively transferred) are further processed internally and into various downstream steel products, without any issuance of sales invoices (which is essential to determine the income and one of the crucial elements to be able to determine a profit).
- (314) Nevertheless, as set out in recital (41), the different product types of HRF are the primary material for the production of various value-added downstream steel products, starting with cold-rolled ⁽¹⁾ flat and coated steel products. In this respect, the provisional regulation on the cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation provided that *'the situation of the Union industry in the free market deteriorated significantly during the period considered as losses started to accumulate from 2012 onwards. Indeed, sales volumes on the Union free market decreased by 14 %, sales unit prices dropped by 19 % while cost of production only decreased by 16 %. Moreover, the Union industry lost market share to imports from the countries concerned and had to reduce investments in the light of the continuously negative return on investment.'* ⁽²⁾ This conclusion in this recital was confirmed at definitive stage ⁽³⁾ and is still relevant. The investigation period of the cold-rolled flat steel products' case ⁽⁴⁾ was prior to the investigation period of the current case. Nevertheless, even with the different investigation period, the above indicators show, similar to the free market, a negative picture for the cold-rolled flat steel products, i.e. for the first downstream market for which captive transfers and sales of HRF are used.
- (315) As a result, based on the arguments above, the Commission rejected the claims of the Russian exporting producers and the Russian Ministry of Economic Development and confirms that it acted with due diligence and ensured that both markets were properly examined.

4.4.4. Conclusion on material injury

- (316) Despite the concrete actions by the Union industry to improve efficiency by cutting costs (such as the reduction of weekly labour hours) and keeping a tight grip on costs of production during the period considered, the economic situation of the Union industry deteriorated significantly: losses went from – 2,7 % in 2013 to – 7,8 % during the investigation period. As a result, losses were accumulated during the period considered, with the exception of the year 2014.
- (317) Moreover, despite a 5 % increase in the Union consumption in the free market, the sales volumes of the Union industry decreased 5 %, sales unit prices dropped by more than 20 %, and production decreased by 2 %. Furthermore, employment was reduced by 5 %. As a consequence, also the other injury indicators developed negatively.
- (318) The aftermath of the Eurozone debt crisis in 2013 impacted negatively the profitability in 2013, followed by a moderate recovery in 2014. Thereafter, in the particular circumstances of this case, the Union producers sold the product concerned mainly from the second half of 2015 below costs in order to keep their market share. All exporting producers from the four countries concerned sold at dumped prices and their prices in most cases undercut the prices of the Union steel producers, thus exerting significant pressure on sales prices of the Union industry.
- (319) Due to the losses incurred during the period considered as a result of the factors described above, the other indicators such as cash flow, return on investment followed the same downward trends as the profitability indicator.
- (320) Interested parties were informed with the disclosure of the Information Document that the Commission concluded that the Union industry suffered material injury within the meaning of Article 3(5) of the basic Regulation, and were given the opportunity to provide comments.

⁽¹⁾ Cold rolling process is defined by passing a sheet or strip that has previously been hot rolled and pickled — through cold rolls, i.e. below the softening temperature of the metal.

⁽²⁾ Commission Implementing Regulation (EU) 2016/181 of 10 February 2016 imposing a provisional anti-dumping duty on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation (OJ L 37, 12.2.2016, p. 25, recital (153)).

⁽³⁾ Commission Implementing Regulation (EU) 2016/1328 of 29 July 2016 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation (OJ L 210, 4.8.2016, p. 15, recital (117)).

⁽⁴⁾ It covered the period from 1 April 2014 to 31 March 2015, which is different from the investigation period covered in this case (see recital (19)).

- (321) The Russian exporting producers (MMK Group and Severstal Group) and the Russian Ministry of Economic Development claimed that it was impossible for the Commission to find material injury in the present proceeding since the Chinese proceedings ⁽¹⁾ covered exactly the same product concerned and *de facto* exactly the same periods for the assessment of injury trends and causal link (until June 2016 and even September 2016). For this reason, they alleged, the strong connection between the two proceedings led to the necessity to align the injury and causality findings in both proceedings.
- (322) The Brazilian exporting producer Usiminas also questioned whether the situation of the Union industry could have deteriorated from a situation in which there was a threat of injury into a situation of material injury in only six months, taking into consideration that the investigation periods for the Chinese proceeding and the present proceeding both covered the second half of 2015. For these same reasons, the Russian Ministry of Economic Development also requested the Commission to reconsider the determination of the material injury to the Union industry in the current proceeding.
- (323) Moreover, Usiminas alleged that several indicators in fact showed a stable or only a slightly negative trend and therefore that the injury allegedly suffered by the Union industry did not qualify as material. In this respect, this exporting producer referred to the slight decrease of the Union production, the sales volume and employment. Furthermore, this exporting producer claimed that the decrease in market share, although more significant, was still minor in view of the fact that the Union industry retained a dominant market share of 76,7 % during the investigation period.
- (324) The Commission acknowledged that the current investigation covers exactly the same product concerned and like product as the China investigations.
- (325) However, the current investigation and the China investigations do not cover the same periods relevant for the assessment of trends for injury and causal link. First of all, the investigation of dumping and injury in the present investigation covered the period from 1 July 2015 to 30 June 2016, whereas the examination of trends relevant for the assessment of injury covered the period from 1 January 2013 to 30 June 2016. For the China investigations, the investigation of dumping, subsidy and injury covered the period from 1 January 2015 to 31 December 2015, whereas the examination of trends relevant for the assessment of injury covered the period from 1 January 2012 to the end of 2015. Although it is true that there is an overlap of six months concerning the investigation period between the two investigations (the period from 1 July 2015 to 31 December 2015), the determination of dumping and injury was made on the basis of an investigation period and a period considered which were different in the current investigation and the China investigations and which were already defined in line with the relevant provisions of the basic Regulation and announced in the Notice of Initiation. This was clearly explained in recital (115) of Commission Implementing Regulation (EU) 2017/649 ⁽²⁾ (the 'definitive Regulation concerning China'), which states: *'The Commission did not find it possible in this case to cumulate the dumped imports by merging the two investigations. The concept of imports being 'simultaneously subject to anti-dumping investigations,' under Article 3(4) of the basic Regulation requires either imports that are under the same investigation or imports that are under two different investigations running simultaneously and that have the same or largely overlapping investigation periods. In the present case, both investigations have different investigation periods, with a six-month overlap of the IP only.'*
- (326) In the present case, the Commission had received sufficient evidence for initiating a procedure based on the allegation of actual injury, in particular due to the very low pricing, during the investigation period. The China case concerns, on the contrary, a threat of injury covering an investigation period partially preceding the investigation period in the present case, which is not only based on the pricing and volume development of Chinese imports, but also on the future expected behaviour of Chinese exporting producers in view in particular of the existing spare capacities.
- (327) The case law requires the Commission to carry out an attribution analysis of the different factors. In the present case, imports from the four countries have caused actual injury to the Union industry in the investigation period of that case.

⁽¹⁾ Commission Implementing Regulation (EU) 2017/649 of 5 April 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 92, 6.4.2017, p. 68).

⁽²⁾ Commission Implementing Regulation (EU) 2017/649 of 5 April 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 92, 6.4.2017, p. 68).

- (328) Independent of that actual injury, Chinese imports constituted an additional threat of injury to the Union industry. Hence, given the difference in the two investigations periods and the findings made in the present investigation, the threat of injury from China cannot break the causal link in the case at hand.
- (329) The Commission also observed that the method used for calculating the injury margin, which is based on the underselling observed from companies from the four countries, includes, by its very design, any attribution of injury possibly caused by China to the imports from the four countries.
- (330) Concerning the doubts of the Brazilian exporting producer whether the situation of the Union industry could have deteriorated from a situation in which there was a threat of injury into a situation where there was material injury in only six months, the Commission compared the investigation period in the China cases to the investigation period in the current case and found that indeed there was a deterioration of the Union industry situation in this 6-month period. In this regard, the Commission refers for instance to the further decrease in production volumes, sales volumes, employment, and sales prices of the Union producers and the worsened negative financial situation (profitability) as shown in the table below.

Table 17

Comparison of some main macro and micro indicators between the ‘China case’ and the 5 countries case for their respective investigation periods

	Recitals	2015 (investigation period in the China case)	IP
Production volumes	(278)	74 718 189	72 920 472
Capacity utilisation	(278)	76,2 %	74,3 %
Sales volume on the free market	(282)	27 327 906	26 027 000
Market share of the Union producers on the free market	(282)	77,7 %	76,7 %
Employment	(289)	17 829	17 722
Sales prices	(295)	427	383
Losses incurred by the sampled Union producers	(301)	– 0,8 %	– 7,8 %

- (331) Concerning the allegation that several indicators in fact showed a stable or only a slightly negative trend and therefore that the injury allegedly suffered by the Union industry did not qualify as material, the Commission referred to the further deterioration of the main injury indicators as set out in recitals (316) to (319). The Commission found that such deterioration was sufficient to qualify the situation of the Union industry as one of material injury.
- (332) Following the final disclosure, the Russian exporting producers (MMK Group and Severstal Group) contested the Commission's finding on material injury on the following grounds:

— The Union industry achieved a profit of 8,6 % during the period January – March 2017 (see recital (425);

- On 6 April 2017, the regulation imposing anti-dumping duties in the investigation into hot-rolled flat steel products from China ⁽¹⁾ definitively established the absence of material injury to the Union industry for the product concerned until 31 December 2015. Moreover, there was no material injury until 1 January 2016, and the profitability of the Union industry was again already 2 % in the period 1 July -31 December 2016 (see also recital (425));
- A similar comment was submitted by the Brazilian exporting producer Usiminas ⁽²⁾ who argued that it 'wishes to indicate that the comparison ⁽³⁾ does not explain whether the situation of the Union industry could have deteriorated from a situation in which there was a threat of injury into a situation where there was material injury in **only six months**.'
- The moderate deterioration of economic indicators from 2015 to the IP (see the table under recital (330)) cannot be assessed as material.

(333) The Commission rejected these arguments for the following reasons:

- As mentioned in recital (426), in accordance with Article 6(1) of the basic Regulation, the conclusion on injury was reached on the basis of verified IP data. The collection and verification of post IP data, on the other hand, was done in the framework of the Union interest analysis. The table in recital (301) showed the high losses from the year 2013 onwards (exception made for the year 2014).

Even taking into account post-IP data, the Union industry is still in an injurious situation: the profits achieved during the period July – December 2016 and January – March 2017 cannot compensate for the consecutive periods of high-end losses. Furthermore, the injury analysis is based on a number of factors, of which profitability is only one of many;

- Concerning the regulation imposing anti-dumping duties on cold-rolled flat steel products from China, the Commission referred to its arguments in recital (325) and in particular to the fact that the current investigation and the China investigations do not cover the same periods relevant for the assessment of trends for injury and causal link;
- Concerning the deterioration of the economic indicators, the Commission reiterated that all main indicators deteriorated, characterised by a further decrease in production volumes, sales volumes, employment, and sales prices of the Union producers and the worsened negative financial situation (profitability). This in itself can be considered as an indicator of material injury.

(334) On the basis of the above, the Commission concluded that the Union industry suffered material injury within the meaning of Article 3(5) of the basic Regulation.

5. CAUSATION

(335) In accordance with Article 3(6) of the basic Regulation, the Commission examined whether the injury to the Union industry was caused by the dumped imports from Brazil, Iran, Russia and Ukraine. In accordance with Article 3(7) of the basic Regulation, the Commission also examined whether other known factors could at the same time have injured the Union industry. The Commission ensured that any possible injury caused by factors other than the dumped imports from Brazil, Iran, Russia and Ukraine was not attributed to the dumped imports.

(336) The factors considered by the Commission were: the economic crisis, Union producers not being sufficiently competitive, imports from third countries, the impact of the situation of one Italian steel producer on the injury picture, the export sales performance of the Union producers, the 'overcapacity' of the European steel industry, and the correlation between HRF prices in the Union market, on the one hand, and raw material and HRF prices worldwide, on the other hand.

⁽¹⁾ Commission Implementing Regulation (EU) 2017/649 of 5 April 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 92, 6.4.2017, p. 68).

⁽²⁾ Submission by the Brazilian exporting producer Usiminas, 7 August 2017, page 2.

⁽³⁾ The Brazilian exporting producers refers to Table 15 of this Regulation. The same table had been shown in the General Disclosure Document.

5.1. Effects of the dumped imports from Brazil, Iran, Russia and Ukraine

- (337) Sales prices of the exporting producers decreased on average from 442 EUR/tonne in 2013 to 323 EUR/tonne during the investigation period (– 27 %). By continuously lowering their unit sales price during the period considered, exporting producers from Brazil, Iran, Russia and Ukraine were able to increase their market share from 7,45 % in 2013 to 12,57 % in the investigation period, as shown in the table in recital (262). There was also a substantial increase in the volume of imports from the countries concerned in 2015 and the investigation period when compared to the previous years.
- (338) The Commission found that the increasing volumes and the sharp decrease in the prices of imports from the countries concerned during the period considered caused injury to the Union industry. This is because, faced with the aggressive pricing strategy of the exporting producer of the countries concerned, Union producers had no choice but to also decrease prices and to sell at a loss in order to maintain a certain level of sales volume and market share. This had, consequently, a negative impact on the industry's profitability, which reached the unsustainable level of – 7,8 % during the investigation period.
- (339) In view of the coincidence in time between, on the one hand, the level of dumped imports at continuously decreasing prices, and, on the other hand, the Union industry's loss of sales volume and price depression resulting in a loss-making situation, the Commission concluded that the dumped imports caused material to the Union industry.

5.2. Effects of other factors

5.2.1. *The economic crisis*

- (340) The Commission found that the aftermath of the Eurozone debt crisis affected negatively the performance of the Union steel industry in 2013. However, as mentioned in recital (303), the Commission also concluded that the Union industry started recovering during 2014 and the first half of 2015.
- (341) In particular, the market had started recovering from the effects of the crisis with a relatively stable, even increasing demand from 2014 onwards. As a result, from 2014, the Union industry could have benefited more from the recovery of the market. However, low-priced imports gradually increased and captured market shares to the detriment of the Union industry. The continuous pressure of imports started to be fully felt from the second half of 2015, the beginning of the investigation period.
- (342) Thus, taking into consideration the recovery of the Union market, as evidenced by the increase of the Union free market consumption over the period considered (see table under recital (226), the Commission concluded that the Eurozone debt crisis has had a negative impact during mainly in the year 2013 of the period considered and before the investigation period. However, it did not contribute to the material injury found during the investigation period.

5.2.2. *Imports from third countries*

5.2.2.1. China

- (343) The volume of imports and market share (in volume of total imports) from China developed over the period considered as follows:

Table 18

Volumes, unit prices and market shares from China

	2013	2014	2015	IP
China				
Volume of imports from China	336 028	592 104	1 519 304	1 578 848
Index (2013 = 100)	100	176	452	470

	2013	2014	2015	IP
Unit import prices from China	505	463	404	339
<i>Index (2013 = 100)</i>	100	92	80	67
Market share	1,04 %	1,79 %	4,32 %	4,65 %
Share in total Union import volume	6,97 %	11,32 %	19,41 %	19,98 %

Source: Eurostat

(344) As set out in the table above, imports from China rose by 370 % during the period considered, whereas the imports from third countries other than Brazil, Iran, Russia and Ukraine (including China) increased only by 51 %. Furthermore, comparing absolute import figures, it was observed that:

— China was together with Russia and Ukraine among the three largest exporters to the Union market during the period 2013-2015;

— China was the largest exporter to the Union period during the investigation period.

(345) Furthermore, Chinese prices went from 505 EUR/tonne in 2013 to 339 EUR/tonne during the investigation period.

(346) The case law requires the Commission to carry out an attribution analysis of the different factors. In the present investigation, imports from Brazil, Iran, Russia, and Ukraine have caused actual injury to the Union industry in the investigation period of this case. Independent of the present investigation, in the context of the investigation on the same product imported from China, the Commission concluded that there was a causal link between the Chinese dumped imports and threat of material injury of the Union industry (in particular during the second half of 2015). ⁽¹⁾

(347) Although the 'China' investigation and the present investigation do not cover the same periods relevant for the assessment of trends of injury and causal link, there is first an overlap of six months concerning the investigation period between the two investigations (the period from 1 July 2015 to 31 December 2015). Second, as mentioned in recital (59) of the definitive 'China' Regulation ⁽²⁾, the volume of Chinese imports further increased (by 8,5 %) in the first half of 2016 (773 275 tonnes), compared to the first half of 2015 (712 390 tonnes). Moreover, as set out in the table in recital (343), the import volumes from China during the investigation period were not negligible. Third, as mentioned in recital (93) of the definitive 'China' case, the '*Chinese exporting producers had an aggressive price setting in the Union market, in particular in the second half of 2015 and the first half of 2016. If no measures are taken, and taking into account the massive existing Chinese excess capacity in steel, including the product concerned, Chinese exporting producers could maintain an aggressive price strategy, lowering their sales prices to minimal levels.*'

(348) For all these reasons, and in particular due to the not negligible Chinese import volumes and the aggressive price setting by the Chinese exporting producers, it is possible that Chinese imports contributed also to the material injury found in this investigation.

(349) On the other hand, it cannot be assumed that the Chinese imports were the only cause of the Union's industry worsening situation. If, hypothetically, the effect of the Chinese imports were to be eliminated, the imports from the four countries would still be an independent cause in their own right. In particular, the level of imports during the investigation period from the four countries concerned (4.2 million tonnes during the investigation period) is much more significant and almost three times higher than the level of Chinese imports during the investigation period (1.6 million tonnes during the investigation period).

⁽¹⁾ Commission Implementing Regulation (EU) 2016/1778 of 5 October 2016 imposing a provisional anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 272, 7.10.2016, p. 62), recital (197).

⁽²⁾ Commission Implementing Regulation (EU) 2017/649 of 5 April 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 92, 6.4.2017, p. 76), recital (59).

- (350) Moreover, the Chinese exporting producers were considered to be price setters on the Union market, but this Chinese price setting for HRF alone was not decisive. Rather the imports from the four countries with their significant volume and market share also depressed prices in the Union market. Without such alignment to the aggressive price policy from the four countries, the injury would not have occurred.
- (351) Therefore, the Commission concluded that it is likely that the imports from China have contributed to the material injury suffered by the Union industry. However, it did not break the causal link between the injury caused to the Union industry and the dumped imports of the four other countries because of their significant volumes and comparatively low prices.
- (352) Moreover, any effects from the Chinese exports are not attributed to the four countries, as the injury elimination level only takes into account the effects of the dumped imports from the four countries (see recital (554)).

5.2.2.2. Other countries

- (353) The volume of imports and market share (in volume of total imports) from third countries developed over the period considered as follows:

Table 19

Volumes, unit prices and market shares from third countries (excluding China)

	2013	2014	2015	IP
Turkey				
Volume of imports from Turkey	1 001 157	473 194	667 119	824 099
<i>Index (2013 = 100)</i>	100	47	67	82
Unit import prices from Turkey	462	452	397	344
<i>Index (2013 = 100)</i>	100	98	86	74
Market share	3,10 %	– 1,43 %	1,90 %	2,43 %
Share in total Union import volume	20,76 %	9,00 %	8,45 %	10,4 %
Total (all other countries other than Brazil, Iran, Russia, Ukraine and China)				
Volume of imports from all other countries	2 081 103	1 684 531	1 914 137	2 057 998
<i>Index (2013 = 100)</i>	100	81	92	99
Unit import prices from all other countries	478	461	423	365
<i>Index (2013 = 100)</i>	100	97	89	76
Market share	6,44 %	5,08 %	5,44 %	6,07 %
Share in total Union import volume	43,16 %	32,22 %	24,24 %	26,04 %

Source: Eurostat

- (354) One Brazilian exporting producer claimed that the fact that Turkey was not subject to this investigation was discriminatory. This exporting producer alleged that the volume of Turkish imports was higher than the Brazilian during the period considered and that Turkish import prices were also lower than the import prices from Brazil. For these reasons, this interested party submitted that the Turkish imports were a major cause of the injury that the Union industry might have suffered and that the complainant was wrong in dismissing the impact of the Turkish imports.
- (355) With regard to the discrimination claim, the Commission noted that the complainant provided *prima facie* evidence in the complaint that Turkish exporting producers were not dumping the product concerned into the Union market. On the other hand, similar calculations for Brazil and the other countries concerned suggested that imports from those countries were indeed dumped, fact which was confirmed by this investigation.
- (356) In relation to the potential injury caused by imports from Turkey, the Commission found that the volume of imports from Turkey decreased during the period considered. Thus, even if imports from Turkey contributed to injury caused to the Union industry, they could not have been the cause of the increasing negative trends found in the injury analysis. Moreover, the Turkish import prices (344 euro/tonne, see the table in recital (353)) are on average higher than the average import prices from the countries concerned, as set out in the table in recital (264) and were not dumped on the basis of the *prima facie* evidence provided in the complaint (see recital (355)). For these reasons, the Commission concluded that the Turkish imports did not break the causal link between the dumped imports of the four countries and the material injury they caused to the Union industry.
- (357) With respect to the import volumes from other third countries, the Commission compared them with the imports from the four countries concerned. It noted that the imports from Brazil, Iran, Russia and Ukraine constituted the vast majority of all imports (4 266 881 tonnes) into the Union during the investigation period, and that their volume increased by 77 % during the period considered. Their market share was 12,58 % during the investigation period. In contrast, the aggregate volume of all the other countries only stood at 3 636 846 tonnes and their market share was 10,72 % during the same period. As set out in the table in recital (353), the aggregate volume of all the other countries apart from China only stood at 2 057 998 tonnes and their market share was 6,07 %.
- (358) Moreover, the average import prices from the other third countries (365 EUR/tonne for all other third countries, see table 14 above) were higher than the average import prices of Brazil, Iran, Russia and Ukraine (323 EUR/tonne during the investigation period, see recital (265)). Therefore, the Commission concluded that the import volumes from other third countries did not break the causal link between the dumped imports from Brazil, Iran, Russia and Ukraine and the injury of the Union industry.
- (359) The case law requires the Commission to carry out an attribution analysis of the different factors. In the present investigation, imports from Brazil, Iran, Russia, and Ukraine have caused actual injury to the Union industry in the investigation period. Independent of the present investigation, given the present findings concerning volumes and prices as set out in recitals (357) and (358), the imports of all other countries apart from China did not break the causal link in the case at hand, and had only a marginal impact, if at all, on the injury picture.

5.2.3. Export sales performance of the Union industry

- (360) The volume of exports of the sampled Union producers developed over the period considered as follows:

Table 20

Export volumes by the sampled Union producers

	2013	2014	2015	IP
Export volume to unrelated customers	2 379 035	2 777 446	2 409 721	2 075 670

	2013	2014	2015	IP
Index (2013 = 100)	100	117	101	87
Average price (EUR/tonne)	463	459	391	357
Index (2013 = 100)	100	99	84	77

Source: Questionnaire reply of sampled Union producers

- (361) The volume of export sales by the sampled Union producers decreased by 13 % during the period considered. As far as prices are concerned, they dropped significantly, by 23 % over the period considered.
- (362) Export sales of the sampled Union producers accounted for about 25 % of their total sales in the free market during the investigation period. Also, the decrease in export prices followed percentage-wise the same trend as the sales prices of the Union producers in the Union market.
- (363) The Commission concluded that the export sales performance of the Union producers contributed to the injury of the Union industry. However, it found that this factor did not break the causal link between the dumped imports and the material injury to the Union industry either for the same reasons set out in recitals (350) and (351), i.e. because of the significant volumes and comparatively low prices of the imports from the four countries, and because their impact was only marginal.

5.2.4. Specific situation of one Italian Union producer

- (364) One interested party claimed that the inclusion of the Italian producer Ilva in the injury data distorted the injury picture. It claimed that the actual production and the sales of the Italian producer decreased significantly during the period considered for reasons unrelated to imports of the countries concerned.
- (365) First, as set out in recital (215), the definition and analysis of the Union industry are based on the entire Union industry, including that Italian producer. Thus, it would not be appropriate to exclude this producer from the definition of the Union industry. In this context, the fact that this Italian producer reduced its actual production (by less than 700 000 tonnes) during the period considered cannot fully explain the reduction in the overall production levels of the Union industry (– 1.7 million tonnes). Some Union producers were able to increase their actual production during the period considered, but some others (such as Ilva) were not. The same reasoning applies to the sales data.
- (366) In addition, Ilva is a non-sampled Union producer and as such did not influence the trends observed for the microeconomic indicators. In this respect, the Commission noted that all sampled Union producers incurred losses during the investigation period. This corroborated the finding that the Union industry as a whole is injured.
- (367) Moreover, the impact of the specific situation of the one Italian producer on the overall picture of the Union industry was also limited. Despite the fact that this Italian producer reduced its production and sales volumes, other Union producers were able to produce and sell relatively more and filled the gap created by this Italian producer. Nevertheless, these Union producers had no other choice but to follow the price level set by the dumped imports in order to avoid losing further market share.
- (368) Furthermore, the fact that certain Union producers perform relatively better in the Union market than others may be the result of a variety of factors but does not affect the conclusion that the Union industry as a whole suffered injury caused by dumped imports.
- (369) The Commission therefore concluded that the impact of the one Italian producer was limited and did not contribute to the injury caused to the Union industry.

5.2.5. *The overcapacity of the European steel industry and worldwide overcapacity of the steel industry*

- (370) Some interested parties claimed that it was not the imports from the countries concerned but rather the overcapacity of the Union producers that caused injury to the EU industry. To corroborate their claim, these interested parties referred to the Commission's Steel Action Plan.
- (371) The Commission rejected this argument. Although there is a worldwide steel overcapacity problem ⁽¹⁾, including in the Union market, the Commission identified that three factories ⁽²⁾ of the Union industry considerably reduced their actual production volumes during the period considered. Globally, the production volume of the Union producers was reduced by 2 %, as set out in the table in recital (278).
- (372) As shown in the table at recital (301), the profitability worsened significantly and record losses were incurred during the investigation period. Consequently, this shows that there is no direct correlation between the relatively stable production and capacity figures on the one hand and the worsening losses on the other hand, taking into consideration the willingness of the Union industry to adapt to the changing market conditions in order to remain competitive.
- (373) Therefore, the Commission concluded that the overcapacity of the European steel industry did not break the causal link.
- (374) With respect to the additional argument that the injury of the Union industry was caused by worldwide overcapacity on HRF, the table below shows the theoretical crude steel spare capacities and the actual production levels in Brazil, Iran, Russia and Ukraine.

Table 21

Crude steel capacities' and actual production levels of the like product by Brazil, Iran, Ukraine and Russia (in thousands of tonnes)

Country	Crude steel capacity estimated for the year 2015 ⁽¹⁾	Crude steel production in 2015 ⁽²⁾	Theoretical excess capacity in 2015 ⁽¹⁾ ⁽²⁾	HRF actual production in 2014	HRF actual production in 2015
Brazil	49 220	33 256	15 964	14 229	13 388
Iran	28 850	16 146	12 704	8 276	7 872
Russia	90 000	70 898	19 102	26 898	27 509
Ukraine	42 500	22 968	19 532	7 867	6 314

⁽¹⁾ *Source for capacity data:* OECD (OECD, DSTI/SU/SC(2016)6/Final, 5 September 2016, Directorate for Science, Technology and Innovation, Updated steelmaking capacity figures and a proposed framework for enhancing capacity monitoring activity, Annexe, p. 7 and following).

⁽²⁾ *Source for production data:* World Steel Association, Steel Statistical Yearbook 2015 (World Steel Association, Steel Statistical Yearbook 2016 table 1 on pages 1 and 2 and table 13 on page 35, <http://www.worldsteel.org/statistics/statistics-archive/yearbook-archive.html>).

- (375) Those overcapacities triggered dumping practices from all the countries concerned.

⁽¹⁾ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of Regions and the European Investment Bank, Steel: Preserving sustainable jobs and growth in Europe, COM (2016) 155 final, Brussels, 16.3.2016. This document provides the following on the worldwide steel overcapacity:

— Page 2: ... 'the economic slowdown in China and other emerging economies had a negative impact on global steel demand since 2014';

— Page 6: ... 'In addition to measures aiming to mitigate the effects of global overcapacities, the Commission is tackling the underlying causes of the problem with our main partners. A global problem requires a global solution.'

⁽²⁾ Ilva, ThyssenKrupp and Tata Steel UK

- (376) The Commission thus concluded that worldwide overcapacities do not break the causal link in the specific circumstances of this case. In fact, in this case, overcapacity is one of the reasons for the dumping practices of the countries concerned.

5.2.6. Union producers not sufficiently competitive

- (377) Some interested parties alleged that the Union producers were not sufficiently competitive due to comparatively higher energy (mainly electricity) costs. Another interested party alleged that the Union industry was characterised by lack of investments and innovation.
- (378) Concerning energy costs, although important, energy is not the major cost component for producing the product concerned. The Commission found on the basis of a recent specialised study that European electricity prices decreased by 12 % during the period 2010 – 2015. As a result, the Union became the region with the fourth lowest electricity price level in the world.⁽¹⁾ Thus, it cannot be argued that Union producers have a comparative disadvantage in this regard. Third, these arguments on electricity costs cannot be reconciled with the fact that the Union industry was still able to achieve profits of about 0,4 % in 2013 as well as during the period 2007 – 2011, when this alleged comparative disadvantage in cost terms would also have existed.
- (379) Concerning the allegation of a lack of investments and innovation, the Commission found during the investigation that there were still investments ongoing above 240 million EUR during the period considered (see recital (305)). As for the allegation that the Union industry was not innovative, this interested party did not provided any evidence in support of its assertion.
- (380) Therefore, the Commission rejected the claim that the Union industry was not sufficiently competitive and concluded that these factors did not cause injury to the Union industry.

5.2.7. Low HRF prices on the Union market due to low raw material prices and/or low HRF prices worldwide

- (381) One Brazilian exporting producer argued that the low prices of raw materials in the manufacturing of steel, in particular of iron ore, have led to a decline of HRF market prices in the Union market. The Ukrainian exporting producer argued that the alleged price effect in the Union domestic market was not caused by the imports from the countries concerned, but rather due to a declining overall trend in prices of HRF throughout the world.
- (382) The Commission analysed both the HRF prices and the developments in raw material prices for HRF for the period considered.
- (383) The Commission confirmed during the investigation that the prices for raw materials fell between 2012 and the investigation period. For instance, the price for iron ore decreased from about 141 USD per MT to 52 USD per MT, a decrease of more than 60 %.
- (384) However, when analysing the cost of production of the largest sampled Union producer, the Commission found that the impact of these decreasing raw material prices is much lower than the price evolution observed. For example, the input from the most important raw materials accounted for about 70 % of its total cost of production in 2013, but was still at about 60 % of its total cost of production during the investigation period. This showed that there was no direct correlation between the fall in raw material prices and a decrease of cost of production for HRF.
- (385) Furthermore, the cost of production of the Union industry decreased altogether by 19 % (see recital (295)), which was not only the result of a lower cost of raw material but also due to efficiency gains achieved by the Union producers as set out in recital (290). In addition, the average import prices decreased by a higher percentage over the same period, i.e. by 27 % (see recital (265)).

⁽¹⁾ Extract from the latest EC bottom-up study on energy prices and costs performed by a consortium of consultants, including Ecofys and CEPS, July 2016.

- (386) Under fair market conditions, the Union industry could have maintained its sales price levels so as to reap the benefits of a reduction in costs and reach profitability again. However, Union producers had to follow the trend of prices in the Union market and also reduce its prices. During the investigation period, Union producers were forced to sell below costs in order to avoid further shrinking their market share. Therefore, the Commission rejected the claim that the worldwide decrease in the prices of HRF and the decrease in the raw material prices contributed to the injury suffered by the Union industry.

5.3. Conclusion on causation

- (387) A causal link was established between the dumped imports from Brazil, Iran, Russia and Ukraine on the one hand and the injury suffered by the Union industry on the other hand. There was a coincidence in time between the sharp increase in the volume of the dumped imports at continuous decreasing sales prices from Brazil, Iran, Russia and Ukraine and the worsening of the Union's performance, in particular from the second half of 2015. The Union industry had no other choice but to follow the price level set by the dumped imports in order to avoid losing further market share. This resulted in a loss-making situation. As a result, the Union industry was unable to benefit from the recovering Union consumption and forced to sell its products on the Union market below its costs.
- (388) The Commission has found that other factors that may have had an impact on the situation of the Union industry were: imports from third countries, the export sales performance of the Union producers, and the overcapacity of the European steel industry and worldwide overcapacity of the steel industry.
- (389) In summary, the Commission considered that none of the arguments put forward by the interested parties concerning the other factors after the disclosure of the Information Document were able to alter the findings which established a causal link between the dumped imports and the material injury suffered by the Union industry during the IP.
- (390) Moreover, the Commission concluded that these factors combined or separately could not break the causal link between dumped imports and the material injury found to the Union industry and that the dumped imports from the countries concerned remained the main cause of injury for the following reasons. As set out in recital (357), the imports from Brazil, Iran, Russia and Ukraine constituted the vast majority of all imports (4 266 881 tonnes) into the Union during the investigation period, and their volume increased by 77 % during the period considered. In addition, as set out in recital (362) the export sales of the sampled Union producers only accounts for a minor part (25 %) of the total sales in the free market, whereas the overcapacities in the four countries concerned is exactly one of the reasons for the dumping practices in the Union market.
- (391) Some of the known factors other than the dumped imports — the economic crisis, the situation of one particular Italian producer, the Union producers being not sufficiently competitive, and the low HRF prices on the Union market due to low raw material prices and/or low HRF prices worldwide — were found not to have caused injury to the Union industry during the investigation period.
- (392) Parties were informed of these findings through the Information Document. Interested parties provided comments, which are addressed in the following recitals. These comments were taken into account by the Commission when reaching its final determination.
- (393) The Russian exporting producers MMK Group and Severstal Group claimed the alleged causal link between the imports from the countries concerned and any deterioration of the situation of the Union industry between 1 July 2015 and 30 June 2016 would be manifestly broken by the findings in the definitive Regulation concerning China. In this respect, they referred to the substantial and rapid growth of the Chinese import volumes since 2015 to the end of the investigation period in the current proceeding and to the further downward trend of Chinese import prices (– 33 %), as set out in recital (161) of the Commission Implementing Regulation (EU) 2016/1778 ⁽¹⁾ ('the provisional Regulation concerning China'). These Russian exporting producers specifically referred to recitals (178) to (182), (184) and (188) of the provisional Regulation concerning China as evidence that it was the Chinese imports that were responsible for the worsened situation in the period July 2015 – June 2016 and not the imports from the countries concerned. Moreover, similar to the comments of the Russian exporting producers, the Russian Ministry of Economic Development claimed that the

⁽¹⁾ Commission Implementing Regulation (EU) 2017/649 of 5 April 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 92, 6.4.2017, p. 68).

Chinese imports were a decisive factor that negatively affected the Union industry state, not the imports from the countries concerned. Following the final disclosure, the same claim was reiterated by these exporting producers and by the Russian Ministry of Industry and Trade.

- (394) The Commission rejected these arguments. The recitals to which the Russian exporting producers referred relate to the period 2012 – 2015, and not to the period considered in the current proceeding. The same is true with regard to the downward trend of the Chinese import prices. In this respect, the Commission refers to the explanations contained in recital (325) and restates that there is no contradiction between the present case and the case concerning China. Indeed, the Commission concluded that the imports from China might have contributed to the material injury suffered by the Union industry, as set out in recital (349), but that they did not break the causal link between the dumped imports from the countries concerned and the material injury found during the investigation period.
- (395) The Russian Ministry of Economic Development also claimed that, contrary to the Union producers, the share of raw material costs for Russian manufacturers in the total production cost accounted for more than 60 % in 2015. Therefore, the decrease in raw material prices led to a greater reduction in HRF prices of the Russian exporting producers than for the Union producers. It therefore expected that the Commission should evaluate this element properly for the purposes of this proceeding. In addition, the Russian ministry claimed that the export prices of the Union industry were much lower than its average unit cost of production, and that the lack of profitability in the export performance of the Union industry could also be a factor which caused injury to the Union industry. Therefore, the Russian ministry requested the Commission to reconsider the determination of causation in the current proceeding. Following the final disclosure, the same claim concerning the export performance of the Union industry was reiterated by the Russian Ministry of Industry and Trade.
- (396) Concerning the arguments of the Russian ministry on the raw material prices, the Commission referred to recitals (381) and following, where it found that there is no direct correlation between the fall in raw material prices and a decrease in cost of production for HRF, as far as the Union producers are concerned. In fact, if the decrease in raw material prices led to a greater reduction in HRF prices of the Russian exporting producers than for the Union producers, this should have been reflected both in the domestic and export price of the Russian producer. However, the Commission found that the Russian exporting producer was dumping its products in the EU market.
- (397) With regard to the lack of profitability in the export performance of the Union industry, the Commission referred to recital (360) and following. It did not only acknowledge that the sales prices of exported volumes dropped significantly but also that the export volumes of the sampled Union producers did not account for more than 25 % of their total sales on the free market during the investigation period (see recital (362)). Therefore, the Commission concluded that the export sales performance marginally contributed to the injury of the Union industry but that this factor did not break the causal link between the dumped imports and the material injury to the Union industry.
- (398) Furthermore, the Brazilian exporting producer CSN submitted that the accuracy of the causality assessment was adversely affected by (i) the inclusion of imports made by the ArcelorMittal Group in the injury assessment; and by (ii) the contradiction between the findings of the present case regarding the effects of the imports from China and the conclusions of the Commission in the parallel anti-dumping investigation concerning the imports of HRF from China. Regarding the inclusion of imports made by the ArcelorMittal Group, CSN stated that these imports constituted a conscious and ill-intentioned intra-group decision. The Brazilian exporting producer Usiminas provided similar comments, stating that most imports from Brazil were captive sales/transfers, in particular from ArcelorMittal Brazil to ArcelorMittal in Europe. Concerning the effects of China, CSN disagreed with the conclusions in recital (349), providing that the Chinese imports did not break the causal link between the injury suffered by the Union industry and the imports from the four countries concerned. In this respect, this Brazilian exporter referred to the increase of the Chinese imports — at further decreasing prices — which increased at a much faster pace than the imports from the four countries concerned.
- (399) The Commission rejected these claims. Concerning the inclusion of imports made by the ArcelorMittal Group from its related company in Brazil to related companies in the Union, the Commission noted that once it is

concluded that the criteria for a cumulative assessment of the effect of the dumped imports under Article 3(4) of the basic Regulation have been met, the causality analysis is to be performed in relation to the four countries concerned taken together. As explained under chapter 4.3.1, the conditions for cumulative assessment have been met for Brazil, Russia, Iran and Ukraine. Hence, in the case at hand, the question of self-inflicted injury is whether imports from Brazil to the Union industry were such as to break the causal link between injury and the dumped imports taken cumulatively. In this regard, the Commission noted that the imports made by the Arcelor-Mittal Group during the IP represented only 5,8 % of total imports of the four countries concerned. On this basis, it concluded that such low volumes were not able to break the causal link between dumping and the injury found. Their impact on injury was marginal.

- (400) Concerning the claim on the Chinese imports, the Commission referred to recital (394). Even if it is true that the Chinese imports increased at a faster pace than the imports from the four countries concerned, the level of imports during the investigation period from the countries concerned (4.2 million tonnes during the investigation period) is almost three times higher than the level of Chinese imports during the investigation period (1.6 million tonnes during the investigation period). Therefore, as already mentioned before, the Commission concluded that the imports from China might have contributed to the material injury suffered by the Union industry, as set out in recital (349), but that they did not break the causal link between the dumped imports from the countries concerned and the material injury found during the investigation period.
- (401) The Brazilian exporting producer Usiminas claimed that the Commission failed to establish that there was a causal link between injury and the imports of HRF from Brazil. Usiminas claimed that there should be no doubt that Brazilian imports, on account of their low volumes and comparatively higher prices, were simply not capable of having the stated injurious effects on the Union industry. Usiminas also claimed that, even if imports from Brazil, Iran, Russia and Ukraine were cumulated, their volumes could not be considered 'significant' in accordance with Article 3(3) of the basic Regulation. In particular, the combined market share of Brazil, Iran, Russia and Ukraine was at most 12,58 % during the investigation period, which was too low to be the cause of injury when considering the Union industry maintained a market share of more than 75 % during the period under consideration. In addition, Usiminas submitted that, on the basis of the data provided in the Information Document, the Union's decrease in profitability and the increase in volumes of the combined imports from Brazil, Iran, Russia and Ukraine did not coincide in time. In this regard, Usiminas claimed, for example, that the most significant losses in profitability occurred between 2015 and the investigation period, when the combined market share of the imports from the countries concerned increased by a mere 0,08 %. Finally, it requested the Commission to explain how it was possible that the situation of import from Brazil, Iran, Russia and Ukraine changed so drastically in such a short period of time that imports that did not present a threat of injury became a cause of actual material injury to the Union industry.
- (402) First, as explained in recital (261), the Commission concluded that the conditions for conducting a cumulative assessment of the effects of imports from Brazil, Iran, Russia and Ukraine were met in accordance with Article 3(4) of the basic Regulation. All margins of dumping established in relation to the imports of these countries, as listed under section 3 Dumping, were above the '*de minimis*' threshold and, therefore, not negligible.
- (403) Second, the Commission rejected the claim that the volumes from the countries concerned cannot be considered 'significant' within the meaning of Article 3(3) of the basic Regulation. The combined market share of Brazil, Iran, Russia and Ukraine was 7,45 % during 2013 and reached 12,58 % during the investigation period. Also in absolute volumes, the imports from these countries increased significantly during the period considered from 2.4 million tonnes during 2013 to 4.3 million tonnes during the investigation period. On the other hand, the market share of the Union industry went down from 85,1 % to 76,7 % during the same period, indicating a deterioration of the competitive position of the Union steel producers.
- (404) Third, it is true that the combined market share of the imports from Brazil, Iran, Russia and Ukraine only increased by 0,08 % during 2015 and the investigation period. However, during the same period, prices of imports from Brazil, Iran, Russia and Ukraine also fell significantly by 10, 14, 16 and 14 % respectively, which is another element that must be taken into consideration when determining whether dumped imports from the countries concerned were the cause of material injury to the Union industry.

- (405) Finally, with regard to the claim that the import volumes from the countries concerned did not present a threat of injury, recital (188) of the provisional Regulation concerning China provides in this context that *'it is likely that the imports from Brazil, Iran, Russia, Serbia and Ukraine have contributed to the threat of material injury'* ⁽¹⁾. This statement was confirmed in recital (116) of the definitive Regulation concerning China. ⁽²⁾
- (406) In addition, the causation analysis as mentioned in recitals (337) to (339) clearly explains and substantiates why the imports from Brazil, Iran, Russia and Ukraine became a cause of material injury to the Union industry. In view of the coincidence in time between, and considering the level of dumped imports at continuously decreasing prices, as well as the Union industry's loss of sales volume and price depression resulting in a loss-making situation, the Commission concluded that the dumped imports caused material injury to the Union industry.
- (407) In addition, Usiminas alleged that any injury that the Union industry suffered during the investigation period was at least partly due to the fact that the effects of the economic recession continued to be felt throughout the period considered. It also alleged that the imports from China as well as from Turkey, in addition to the high energy costs in the Union were a much more likely cause of the alleged injury than imports from Brazil.
- (408) The Commission rejected these claims as follows. Concerning the argument that the economic recession was at least partially the cause of injury, the Commission concluded during the investigation that although the Eurozone debt crisis had a negative impact during the year 2013, it did not cause the material injury found during the investigation period (see recital (342)).
- (409) Concerning the argument that other factors (the imports from China and from Turkey, and high energy costs) were a much more likely cause of the injury that the Union industry allegedly suffered than the imports from Brazil, the following can be stated.
- (a) Imports from China: as set out in recitals (343) to (349), the Commission concluded that it is possible that Chinese imports, taking into consideration its volumes and prices, contributed to the material injury found in this investigation, but that it did not break the causal link between the injury caused to the Union industry and the dumped imports of the four other countries;
 - (b) Imports from Turkey: as set out in recital (356), imports from Turkey decreased during the period considered. Thus, even if imports from Turkey contributed to injury caused to the Union industry, they cannot have been the cause of the increasing negative trends found in the injury analysis.
 - (c) High energy costs: the Commission refers in this context to recital (378). It cannot be argued that the Union producers have a comparative disadvantage concerning these costs. The Union became the region — due to falling electricity prices during the period 2010 – 2015, with the fourth lowest electricity price in the world.
- (410) The Commission considered that none of the arguments put forward by the interested parties after the disclosure of the Information Document were able to alter the findings which established a causal link between the dumped imports and the material injury suffered by the Union industry during the investigation period.
- (411) Following the final disclosure, the Brazilian company CSN claimed that the impact of the ArcelorMittal Group on injury should be separated and distinguished from the imports from Brazil. As a consequence, the investigation vis-à-vis Brazil should be terminated as the market share of dumped imports would decrease below the *de minimis* threshold in the absence of imports by the ArcelorMittal Group, characterised as a self-inflicted injury.
- (412) The Commission rejected this claim. Even if the Commission were to isolate the imports of the ArcelorMittal Group, the remaining Brazilian imports would clearly be not negligible. Moreover, as set out in recital (399), once it is concluded that the criteria for a cumulative assessment of the effect of the dumped imports under Article 3(4) of the basic Regulation have been met, the causality analysis is to be performed in relation to the four countries concerned taken together.

⁽¹⁾ Commission Implementing Regulation (EU) 2016/1778 of 6 October 2016 imposing a provisional anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other steel originating in the People's Republic of China (OJ L 272, 7.10.2016).

⁽²⁾ Commission Implementing Regulation (EU) 2017/649 of 5 April 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 92, 6.4.2017, p. 68).

- (413) Therefore, on the basis of the above, the Commission concluded that the material injury to the Union industry was caused by the dumped imports from Brazil, Iran, Russia and Ukraine. Other known factors which at the same time had an impact on the situation of the Union industry, considered individually or collectively, did not break the causal link.

6. UNION INTEREST

6.1. Preliminary remarks

- (414) In accordance with Article 21 of the basic Regulation, the Commission examined whether it could clearly conclude that it was not in the Union interest to adopt measures in this case. It gave special consideration to the need to eliminate the trade-distorting effects of injurious dumping and to restore effective competition. The determination of the Union interest was based on an appreciation of all the various interests involved, including those of the Union industry, importers, and users.
- (415) Parties were informed of the Commission's findings on Union interest through the Information Document. Interested parties provided comments, which are addressed in the following recitals. Moreover, as explained in recitals (28) and following, the Commission also collected additional information on post-IP developments. It visited a number of users, associations and Union producers following the disclosure of the Information Document, as set out in recital (29). The comments of parties and the additionally collected information on post-IP developments were taken into account by the Commission when reaching its final determination on Union Interest and are discussed in the following recitals.
- (416) Following the disclosure of the Information Document, the complainant claimed that it had strong reservations concerning the Commission's assessment of post-IP data for the purposes of the Union interest's determination. The complainant claimed that the post-IP period could not be a basis to undermine the obvious conclusions that must be drawn from the IP data. In addition, it claimed that, if the Commission decided to assess post-IP data, it should also look at the period after March 2017, as *'the Q2 2017 data is the best evidence of what would happen if no duties are imposed ⁽¹⁾'*.
- (417) Moreover, following the disclosure of the Information Document, the Commission received comments relating to the need to take into consideration important post-IP developments from the members of the Consortium, from exporting producers, and from the Mission of Brazil to the European Union. Most comments received related to price developments, in particular that prices of the product concerned and the like product increased significantly after the investigation period.
- (418) Concerning the arguments of the complainant, it is a basic principle that, pursuant to Article 6(1) of the Basic Regulation, information relating to a period subsequent to the investigation period is normally not to be taken into account. Nevertheless, the Commission noted that, in the context of determining whether there is a Union interest as contemplated in Article 21(1) of the basic Regulation, information relating to a period subsequent to the investigation period may be taken into account. ⁽²⁾ The assessment of the post-IP data covered the period after the investigation period as far as possible. Some follow-up questions were sent to interested parties for the period after March 2017 and the replies were also taken into account.
- (419) The post-IP developments referred to, in particular a steep increase of prices of the product concerned and the like product and a shortage on the market of certain product types, are relevant for the assessment of the Union interest in imposing appropriate measures, in particular given the specific circumstances of this case. Therefore, the Commission's decision to, exceptionally, investigate these post-IP developments in the period between July 2016 and March 2017 (and beyond March 2017) in the context of its assessment of Union interest was warranted and appropriate.

⁽¹⁾ Submission by Eurofer of 2 May 2017, p. 12. This statement refers to the fact that the Commission decided at provisional stage to continue the investigation without the imposition of measures.

⁽²⁾ Judgment of 25 October 2011, *Transnational Company 'Kazchrome' and ENRC Marketing v Council*, Case T-192/08. EU:T:2011:619, paragraph 221.

6.2. Interest of the Union industry

- (420) The Union industry is located in several Member States (UK, France, Germany, Czech Republic, Slovak Republic, Italy, Luxembourg, Belgium, Poland, the Netherlands, Austria, Finland, Sweden, Portugal, Hungary and Spain), and employs around 18 000 employees, directly working for the like product in the different steel mills of the Union producers (see recital (289)).
- (421) Seventeen EU producers cooperated during the investigation. One Italian producer opposed the initiation of the investigation.
- (422) As shown in recital (387), the whole Union industry experienced a deterioration of its situation, in particular from the second half of 2015, and was negatively affected by the dumped imports. In particular, injury indicators related to the financial performance of the sampled Union producers, such as profitability, were seriously affected.
- (423) Moreover, it is expected that the imposition of definitive anti-dumping duties would restore fair trade conditions on the Union market, enabling the Union industry to recover. This would result in an improvement of the Union industry's profitability towards levels considered necessary for this capital intensive industry. The Union industry has suffered material injury caused by the dumped imports from Brazil, Iran, Russia and Ukraine.
- (424) Following the disclosure of the Information Document, the Commission sent additional post-IP questionnaires to the six sampled Union producers. Post-IP questionnaire replies were received from all six Union producers and the complainant was informed that the Commission services would come to verify relevant data on spot.
- (425) The collected post-IP data at the six sampled Union producers showed that the profitability of each individual Union producer varied. On average, during the IP, sampled Union producers incurred losses amounting to – 7,8 %. During the post-IP periods of July – December 2016 and January – March 2017, profitability was 2 % and 8,6 %, respectively. These percentages are the weighted average pre-tax profitability figures of all sampled Union producers, as shown in their respective income statements, expressed as a percentage in relation to their sales in the Union to unrelated customers.
- (426) The Commission reiterates that, in accordance with Article 6(1) of the basic Regulation, the conclusion on injury was reached on the basis of verified IP data. The collection and verification of post-IP data, on the other hand, was done in the framework of the Union interest analysis only. The table in recital (301) showed the high losses and the negative cash flows from the year 2013 onwards.
- (427) On the basis of the additional information received, the Commission found that the overall assessment of the development of profits and costs during the post-IP periods can neither mitigate the negative trends found for the other injury indicators nor compensate for the four consecutive periods of high losses.
- (428) The Commission therefore concluded that the imposition of definitive anti-dumping duties would be in the interest of the Union industry.

6.3. Interest of importers

- (429) As stated in recital (8), all seven importers which came forward were members of the Consortium and were against the imposition of measures in this particular investigation.
- (430) For the sampled unrelated importer, activities related to the product concerned represented between 5 and 10 % of the overall turnover during the investigation period. It opposed a potential imposition of anti-dumping measures considering that it could lead to a further decrease in or cessation of imports of the product concerned.

- (431) The Commission noted that, as set out in recitals (453) and (458), HRF imports from countries other than Brazil, Iran, Russia and Ukraine compensated to some extent during the first months of 2017 for the volumes which were imported from the countries concerned before the initiation of this investigation. Therefore, the Commission concluded that the imposition of measures would not have a considerable negative price effect on importers, but that they would need to switch sources, which would entail additional costs for these importers.

6.4. Interest of users

6.4.1. Introduction

- (432) Hot-rolled flat steel products are used as an industrial input purchased by end users for a variety of applications, including in construction (production of steel tubes), shipbuilding, gas containers, pressure vessels and energy pipelines.
- (433) Users are competing with the vertically integrated related companies of the Union industry on the downstream markets of the product concerned. The product concerned/like product is a cost item for and is processed by the various users.
- (434) The Consortium made several submissions in various stages of the investigation. In addition, three hearings were held on their request.
- (435) The Italian based company Marcegaglia Carbon Steel Spa, (hereinafter, 'Marcegaglia') which processes the product concerned/like product and produces, inter alia, tubes, pipes and other downstream steel products and is a member of the Consortium provided a questionnaire reply as a member of the Consortium. The product concerned/like product is, as for the other users, a cost item for this user. Marcegaglia on its own consumes between 2.9 – 4.4 million tonnes of the product concerned/like product on an annual basis. It imports between 1.6 – 2.4 million tonnes of the product both from the countries concerned and other third countries. It fully cooperated during the investigation; it submitted a questionnaire reply, was subsequently visited on spot, and provided all information requested by the Commission during the investigation.
- (436) Moreover, users other than the members of the Consortium, in particular Baltic and Polish users, submitted comments just after the initiation of the case as stated in recital (17). They expressed their opposition to the initiation of this investigation. Furthermore, the Employers' Confederation of Latvia and the Association of Mechanical Engineering and Metalworking Industries of Latvia also submitted comments opposing the initiation. Though further cooperation was sought from these interested parties during the course of this investigation, even after the disclosure of the Information Document, no additional comments were received.
- (437) Following the disclosure of the Information Document, the complainant claimed that the Union interest analysis was distorted by the fact that it only focused on non-integrated users that rely on exports, and that benefited (and continue to benefit) from the supply of dumped input material. At the same time, it alleged that the Commission failed to take into account the interests of other user companies — users related to Union producers, and other users which for different reasons are not in a position to rely on imports. It claimed in this respect that the non-imposition of measures had detrimental effects on the users related to the Union producers which have to compete with users relying on dumped imports.
- (438) As mentioned in recitals (28) and (29), after the disclosure of the Information Document, the Commission continued to seek and verify all information it deemed necessary for its definitive findings. For this purpose, it sent additional post-IP questionnaires to 74 users (including members of the Consortium, users related to Union producers, and other users which for different reasons are not in a position to rely on imports) and 12 users' associations.

(439) The Commission received post-IP questionnaire replies from 25 users/service centers:

- 11 members of the Consortium ⁽¹⁾, i.e. representing 33 % of all members of the Consortium, filled in a post-IP questionnaire reply. They are against the imposition of measures.
- Three users related to exporting producers filled in the questionnaire reply. They are against the imposition of measures.
- Nine users related to Union producers filled in a post-IP questionnaire. They are in favour of the imposition of measures.
- Two users not related to Union producers filled in a post-IP questionnaire. They are in favour of the imposition of measures.

Out of the 25 post-IP questionnaire replies, 14 were fully completed by users.

(440) Furthermore, two out of the 12 users' associations provided additional information.

(441) In this respect, the complainant alleged that the Commission should have concluded that there is no impact on users given the low level of cooperation for the following reasons: Only very few users reacted to the initial questionnaire, the level of response by users to a large number of post-IP questionnaires was low, including a low reply rate by the members of the Consortium, and finally the views of the majority of users, which provided financial data and which supported duties, were largely ignored.

(442) The Commission first reiterated that it had carried out the Union interest investigation in full compliance with Article 21 of the basic Regulation:

At the time of the disclosure of the Information Document (see recital (22), 4 April 2017), the Commission had acknowledged that there was a low level of cooperation from users to the initial questionnaire. It invited parties to make their views known on the facts and considerations which had been collected until then at the provisional stage. It also noted at the time that the documentary evidence obtained from one source had been inconsistent with that obtained from other sources, including the conflicting statements between the Union industry and the consortium concerning the profitability margins and the possibility to pass on price increases. In this respect, the Commission determined what additional procedures were necessary to collect competent evidence. That was in line with Article 21(1)(second sentence) and 21(2) of the basic Regulation, according to which a determination pursuant to this Article need only be made where all parties have been given the opportunity to make their views known. Moreover, Article 21(5) of the basic Regulation provides that the Commission must examine the information which is properly submitted after provisional stage.

(443) The Commission was also not convinced by the complainant's argument that the level of responses by users to the post-IP questionnaires had been too low to draw significant conclusions therefrom. It had received 14 fully completed post-IP questionnaire replies by users (see the table under recital (498)). Those replies included one important user (Marcegaglia), as explained in recital (435), which on its own consumed between 8,5 % and 13 % of the total Union HRF production. Moreover, the post-IP reply of ESTA represents at least more than 100 steel tube makers within the Union ⁽²⁾. Its information on the slightly negative profitability of the entire tube sector confirmed the evidence obtained from the users that fully cooperated by completing the post-IP questionnaires. The Commission hence believed that the 25 replies (14 of them having been full post-IP questionnaire replies from users) could be considered representative to draw conclusions on the whole market of steel tube makers in full compliance with Article 21(5) of the basic Regulation:

⁽¹⁾ Although all members of the Consortium were requested to fill in the post-IP questionnaires, the lawyer representing the Consortium mentioned that some did not have the organizational structure to provide the requested post-IP information, whereas others were busy with the closing of the financial year, on top of public holidays and the tight deadline granted to fill in the questionnaire.

⁽²⁾ ESTA itself replied on 10 May 2017 to the Commission services that 'it represents more than 100 Steel Tube producers in 17 EU countries and covers more than 90 % of the EU production. The diversity of these producers ... can be big international groups or SMEs with only one production facility in one country, who might also be subsidiaries of major steel producers or family owned companies...'

- (444) Finally, the Commission rejected the complainant's claim that it had ignored the views of users which had been in favour of measures. Their point of view was clearly mentioned in recital (439) and in the table contained in recital (498). However, the Commission also understood that the majority of them were part of the vertically integrated HRF Union steel producers. They only came forward after a concerted action, exemplified by the submission of standard formulations in favour of measures without any specific information about their particular situation. As they were basically echoing the general views of the Union industry, the Commission assessed that they had not brought any new element to the table which would change the assessment of the relevant interests at issue.
- (445) The following sub-sections hence contain the assessment of all the information received during this investigation and the Commission's findings, which were reached after taking into account all the comments received from interested parties.

6.4.2. Claims by users

- (446) The Consortium argued that the imposition of measures on imports from the countries concerned, in addition to the measures on imports from China, would lead to a situation where users would no longer have access to reliable supplies in the Union market, in particular of high quality coils used for re-rolling. Users, members of the Consortium also stated during the hearings that the Union industry does not always supply certain, more specialised product types (such as the ones used in the automotive sector). They also claimed that it takes the Union producers a long time to deliver products and that, unlike the Union producers, traders in the Union also store different product types and schedule small deliveries at the convenience of users.
- (447) The Consortium pointed out that 88 % of the total Union production is accounted for by only 16 companies belonging to eight large groups, and that the largest part of the production is used in the captive market. Thus, as a result of their relatively high market share, Union producers could exercise a strong pressure both in the market of the product concerned and in the downstream market. Individual members of the Consortium also confirmed these statements during the hearings.
- (448) The Consortium also claimed that the *'the adoption of anti-dumping duties against the Countries Concerned would render the EU unrelated processing industry extremely vulnerable in respect of competitors established in third countries which could sell into the EU markets products obtained from HRF not subject to anti-dumping measures.'* It also argued that Union steel producers performed better in the second half of 2016 (post-IP period) due to the significant increase of prices in the Union market.
- (449) The Association of Mechanical Engineering and Metalworking Industries of Latvia argued on 18 July 2016 that *'... Any measures against imports of this product and necessity to find other suppliers will significantly increase the cost of production and reduce the competitiveness of Latvia value added products in all markets in short to medium term'*. Similar comments, i.e. that any imposition of measures would lead to an increase of costs for users, were made jointly by the Consortium as well as individually by several of its members.

6.4.3. Analysis of the claims of the users

6.4.3.1. Shortages in supply

- (450) Concerning the arguments that the imposition of measures would lead to a shortage of supply of the product concerned, the Commission first noted that the objective of anti-dumping duties is not to close off the Union market from any imports, but to restore fair trade by removing the effect of injurious dumping. Imports from Brazil, Iran, Russia and Ukraine should therefore not come to an end, but to continue, albeit at fair prices.
- (451) At the same time, it cannot be excluded in practice that measures against Brazil, Iran, Russia and Ukraine could have a prohibitive effect on these countries.
- (452) In this regard, the Commission established that the users are not exclusively dependent on imports from Brazil, Iran, Russia and Ukraine, but also purchased the product concerned from Union producers as well as from producers in other third countries such as Turkey, South-Korea and India.

- (453) As a result, users could potentially turn to imports from other third countries. In this context, the Commission noted a relative increase of imports from other third countries in 2016 such as Turkey, India and South-Korea. In absolute terms, these countries exported roughly 2.25 million tonnes in 2016.
- (454) Furthermore, the Commission found during the investigation that the Union industry has spare capacity available, as set out in the table of recital (278). Moreover, the complainant stated that a significant part (about 7 million tonnes) of the existing spare capacity could be made operational in the short term, if the conditions in the market would allow. The complainant specifically referred to the potential re-opening of three production sites in the UK, Spain and Germany. The Commission hereby confirmed that these production sites do exist and can be potentially re-opened.
- (455) Following the disclosure of the Information Document, the Commission received comments from several interested parties on its findings regarding the potential shortage of supply.
- (456) Two Russian exporting producers (MMK Group/Severstal Group) claimed that the measures would have a prohibitive/import-restrictive effect and would, as such, endanger the supply of the HRF not only to their subsidiaries, but to all independent users across the Union.
- (457) On the other hand, the complainant submitted that HRF imports from the five countries concerned, which were about 421 000 tonnes per month during 2016, could be more than compensated by imports from Turkey, India, South Korea and Egypt, which amounted to 450 000 tonnes per month in the first three months of 2017. Conversely, the Consortium claimed that there was no reassurance for users that imports from these countries would be a valid and stable alternative source of supply, given, for instance, the strong domestic steel demand in Turkey and in India. Moreover, the Consortium claimed that, after the imposition of provisional anti-dumping duties against China in October 2016, imports of HRF from China decreased by 98 %, when comparing the period October 2016 – January 2017 to October 2015 – January 2016.
- (458) As mentioned in recital (452), the Commission found that users are not exclusively dependent on imports from Brazil, Iran, Russia and Ukraine, but also purchased HRF from Union producers as well as from producers in other third countries during the investigation period. In this respect, on the basis of available Eurostat data, HRF imports from countries other than Brazil, Iran, Russia and Ukraine compensated during the first months of 2017 for the volumes which were imported from the countries concerned before the initiation of this investigation. The main other imports from third countries in the first months of 2017 came from countries such as Egypt, India, South-Korea and Turkey. Nevertheless, the volumes of imports from other countries than Brazil, Iran, Russia and Ukraine do not compensate fully the decreased volumes of imports from Brazil, Iran, Russia, Ukraine and China.

Table 22

Comparison of volumes of imports

Countries	Total imports during the IP	Monthly average during the IP	Total imports during the first 3 months of 2017	Monthly average during the first 3 months of 2017	Difference in average monthly imports
Four countries: (Brazil, Iran, Russia, and Ukraine)	4 266 881 (see recital (262))	355 573	386 485	128 828	– 226 745
China	1 578 848 (see recital (343))	131 571	5 364	1 788	– 129 783

Countries	Total imports during the IP	Monthly average during the IP	Total imports during the first 3 months of 2017	Monthly average during the first 3 months of 2017	Difference in average monthly imports
Other third countries (Egypt, India, South-Korea, Turkey ...)	2 057 998 (see recital (353))	171 499	1 463 824	487 941	+ 316 442
Total imports	7 903 727	658 643	1 855 673	618 557	– 40 086

Source: Eurostat

(459) The above table shows that the total average volume of imports went down with about 40 000 tonnes per month (480 000 tonnes per year) when comparing volumes during the IP with volumes during the first quarter of 2017. As a result, for these periods, the import volumes of other third countries compensated to a large extent, but not fully the decrease in volumes from the four countries concerned and from China.

(460) The following table shows the actual production in some major other third countries (Egypt, India, South-Korea, and Turkey).

Table 23

Actual production of the like product by third countries (in thousands of tonnes)

Country	Crude steel capacity for the year 2014 ⁽¹⁾	Crude steel production in 2014 ⁽²⁾	Crude steel production in 2015 ⁽²⁾	Theoretical excess capacity in 2014	HRF actual production in 2014	HRF actual production in 2015
Egypt	11 200	6 485	5 506	4 715	849	689
India	108 000	87 292	89 026	20 708	40 956	48 100 ⁽³⁾
South Korea	85 900	71 543	69 670	14 357	48 587	47 489
Turkey	49 400	34 035	31 517	17 883	NA ⁽⁴⁾	NA ⁽⁴⁾

⁽¹⁾ Source for capacity data: OECD (OECD, DSTI/SU/SC(2016)6/Final, 5 September 2016, Directorate for Science, Technology and Innovation, Updated steelmaking capacity figures and a proposed framework for enhancing capacity monitoring activity, Annexe, p. 7 and following).

⁽²⁾ Source for production data: World Steel Association, Steel Statistical Yearbook 2016 (World Steel Association, Steel Statistical Yearbook 2016 table 1 on pages 1 and 2 and table 13 on page 35, <http://www.worldsteel.org/statistics/statistics-archive/yearbook-archive.html>).

⁽³⁾ Estimate

⁽⁴⁾ No data available

(461) The above last available 2014/2015 figures for the like product show that these third countries have the capacity to produce and have still some excess capacity available for the production of crude steel. However, the domestic steel demand in India ⁽¹⁾ is strong and likely to grow in Turkey ⁽²⁾. The increases in steel demand in South Korea ⁽³⁾ have been supported by the boom in construction output over the last couple of years, although very recent indicators suggest that the pace of construction in South Korea may now be slowing down. Moreover, steel production in Egypt ⁽⁴⁾ is on the downturn, partially as a result of a shortage in natural gas distribution and a decision by the Egyptian authorities to remove the natural gas subsidies for the steel industry.

⁽¹⁾ USA, International Trade Administration, Global Steel Trade Monitor, February 2017, Steel Exports Report India, <http://www.trade.gov/steel/countries/pdfs/2017/q1/exports-india.pdf>

⁽²⁾ OECD, DSTI/SC(2017)1/Final, OECD Steel Committee, 24 March 2017, Steel Market Developments — Q2 2017, analysis on page 6 and page 9, <http://www.oecd.org/industry/ind/steel-market-developments-2017Q2.pdf>

⁽³⁾ OECD, DSTI/SC(2017)1/Final, OECD Steel Committee, 24 March 2017, Steel Market Developments — Q2 2017, analysis on page 7, <http://www.oecd.org/industry/ind/steel-market-developments-2017Q2.pdf>

⁽⁴⁾ OECD, DSTI/SC(2017)1/Final, OECD Steel Committee, 24 March 2017, Steel Market Developments — Q2 2017, analysis on page 10, <http://www.oecd.org/industry/ind/steel-market-developments-2017Q2.pdf> See further OECD, DSTI/SU/SC(2016)6/Final, 5 September 2016, Directorate for Science, Technology and Innovation for the decision to remove natural gas subsidy, page 19

- (462) The Commission also noted that the Union industry claimed that spare capacity could be made operational as soon as fair competition was re-established in the market. According to some estimates made by the concerned Union producers, the re-opening of the three production sites in the UK, Spain and Germany would take from 2 weeks up to 6 months. This additional production could be supplemented by imports from other third countries.
- (463) Therefore, the Commission rejected the claim that the imposition of measures would lead to a shortage of supply of the product concerned/like product in the Union market. However, the Commission also concluded that the imposition of anti-dumping duties is most likely to lead to a higher dependence of the users on the Union industry (see section 6.4.3.2.).

6.4.3.2. Negotiating power of the Union steel producers

- (464) As shown in the table under recital (282), the Union industry's market share in terms of Union consumption represented 76,7 % during the IP. Consequently, total imports into the Union represented 23,3 % of the Union consumption during the IP. More than 70 % of all these imports to the Union during the IP were from the countries concerned (Brazil, Iran, Russia and Ukraine), as well as from China, whose imports have been subject to anti-dumping duties since 7 October 2016 ⁽¹⁾.
- (465) Accordingly, if anti-dumping duties were imposed against the imports from Brazil, Iran, Russia and Ukraine, more than 70 % of total imports (including China, which is already under measures) during the IP would be under measures, despite the fact that other third countries than Brazil, Iran, Russia and Ukraine started importing into the Union subsequent to the investigation period, as set out in recital (457). Nevertheless, the fact that 70 % of all imports during the IP would be under measures, would significantly strengthen the Union steel producers' position in the Union HRF market.
- (466) The Commission found that the Union industry does not only include individual producers, but also consists of groups of related producers in the various countries of the Union, which already supply users with a large volume of the like product (as mentioned above in recital (464), the total Union industry's market share on the Union free market amounts to 76,7 %). The largest group of Union steel producers accounts for more than a third of all Union HRF production, whereas the three largest groups of producers together account for more than two thirds of all Union HRF production. The Commission also found that about 60 % of the total Union producers' production was destined for captive use.
- (467) Following the disclosure of the Information Document, the complainant challenged the Commission's statements concerning the increased negotiating power of the Union steel producers, claiming that they did not reflect basic principles of economics. It alleged that there was and would be strong competition among a significant number of large Union steel groups, and that prices would continue to be at a competitive level. Moreover, in this context, to support its arguments, the complainant submitted an economic model on which basis it stated that *'the number of Union and third-country suppliers is found to be sufficient to defuse concerns that the structure of the market could give rise to any significant degree of pricing power, especially in the presence of continued availability of residual non-dumped supply from suppliers facing moderate injury margins, confirming the results from the quantitative modelling of quantity and price impacts.'* ⁽²⁾ This economic model was also presented during a hearing on 8 June 2017.
- (468) Two Russian exporting producers (MMK Group/Severstal Group), though, referred to the oligopolistic structure of the Union market, structure which, combined with anti-dumping measures, could create the potential for the establishment of supra-competitive prices by the few remaining supplier groups.
- (469) Concerning the arguments of the complainant, the Commission noted:

— The above-mentioned economic model did not differentiate between imports from third countries and Chinese imports. This is a weakness in the model, since the statistical data show that Chinese imports stopped entering the Union market from the fourth quarter of 2016 onwards;

⁽¹⁾ Commission Implementing Regulation (EU) 2016/1778 of 6 October 2016 imposing a provisional anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other steel originating in the People's Republic of China (OJ L 272, 7.10.2016).

⁽²⁾ Submission by Eurofer, Economic analysis of the impact of anti-dumping measures in AD 635 on selected imports of hot-rolled flat steel (HRF) on EU downstream products, undated, sent to the Commission services on 31 May 2017, p. 1.

- The economic model of Eurofer contains no information regarding the capacities available in other third countries (other than the ones subject to this investigation and China) ⁽¹⁾. Technically, that means that the supply elasticity of 10 is not verified for a sufficiently large range of the supply function;
- The dumping and injury margins in the economic model were assumed to be ranging between 11,4 % and 22,8 %, whereas the highest calculated margins in this investigation are higher, up to 33 % (see recital (583));
- The investigation revealed that at certain instances users were not supplied in due time by Union producers. Therefore, the domestic supply elasticity of 10, which was used in the economic model is questionable, and possibly overstated;
- Even if the main conclusion of the economic analysis was correct, and that *ad-valorem* duties would only have a limited impact on prices and a more accentuated impact on volumes, it is still a fact that the post-IP profitability during the period January-March of the Union producers went from a loss of 7,8 % to a profit of 8,6 % (January – March 2017), whereas the profitability of steel tube makers of HRF was a mere 0,4 % for the same period.

(470) Following the final disclosure, the complainant alleged that the findings of the Commission on the negotiating power fail to respect basic economic principles.

- First, there is no mention of the Herfindahl-Hirschman Index (HHI) index, which is the standard tool to measure market concentration and market power. Moreover, it alleged that eight major players and plenty of spare capacity are indicators of a competitive market.
- Second, the Commission was not entitled to rely on claims made by Severstal and MMK about oligopolies and supra-competitive prices when such claims are contradicted by the data and not supported by evidence. These unsupported claims were only cited to support preconceived ideas.

(471) The Commission rebutted these comments as unfounded.

- First, concerning the market concentration and negotiating power of the Union steel industry, the Commission referred to the further potential consolidation on the Union market: ThyssenKrupp has announced to divest its steel business in Europe, and a merger with Tata Steel or another competitor is among the publicly mentioned options. Moreover, the previous competitor Ilva with its huge production capacity has been acquired by mainly ArcelorMittal, adding further negotiating power to the buyers. In this respect, despite the production reductions at Ilva during the period considered, as set out in recital (365), the Commission was informed that the acquirers committed themselves to start producing 6.5 million tonnes of steel in 2018 and 9.5 million tonnes of flat products. The Commission thus had undisputed factual grounds to expect a further increase of the negotiating power of the largest Union producer on the Union market.
- Second, the Commission rejected firmly the allegation that it has discarded the economic model. It clearly had pointed to this economic model in recital (467) and commented upon this model in recital (469). Moreover, in relation to the submission of MMK Group/Severstal Group, the Commission pointed out that it is under an obligation to take into account all the evidence on file. This does not necessarily mean that it endorses the assessment made in these submissions.

(472) Moreover, the complainant also alleged that the Commission had wrongly dismissed the independent economic model based on alleged deficiencies in the analysis.

- First, the Commission's critique that the economic model had not differentiated between imports from third countries and Chinese imports, nor contained detailed data on third-country capacities had not been correct because a second revised report of 15 June had corrected these omissions.
- Second, the fact that the dumping and injury margins calculated by the Commission were slightly higher compared to what was used in the economic model was a grossly unfair argument to reject the economic model as the complainant had not received those data when it commissioned the study.

⁽¹⁾ The Commission presented some figures in this Regulation. See recital (460).

- Third, the Commission ignored the fact that the improved profitability of Union producers flows mainly from increased sales and thus higher capacity utilisation, which drives down the unit costs, not from increased prices.
- Fourth, the Commission did not provide any evidence that the domestic supply elasticity of 10 is questionable.

(473) The Commission accepted the first two procedural points.

- First, it had indeed received two versions of the report, namely one for the hearing of 8 June 2017 and a second one by email on 15 June 2017. The email of 15 June 2017 from the complainant did not make it clear that there was a difference between the two versions, so the Commission had indeed commented on the first version only in the general disclosure document. However, it verified that the data that it criticised as lacking had been included in the second version, and thus dropped its criticism of the report on this account.
- Second, the Commission acknowledged that the complainant was not aware of the dumping and injury margins at the time of the establishment of the economic model that it ordered. In this respect, the Commission accepted that this fact could not be held against the study. However, at the same time, this does not change the fact that the figures as set out in recital (469) are more precise than the ones used in the study.

(474) In contrast, the Commission rejected the other two substantive points levied against its criticism of the study.

- An improved profitability of the Union industry subsequent to the investigation period can be the result of an increased price, or of a lower cost, or the combined effect of both elements. As set out in recital (494), prices went up by more than 30 % after the investigation period. At the same time, raw material costs increased as well, but not to the same degree and with higher volatility. Moreover, the Commission compared the capacity utilisation rate of the Union industry during the IP (74 %) with the capacity utilisation rate in the first quarter of 2017 (76 %). This difference of 2 percentage points is unlikely to have resulted in a major lowering of the unit costs as the main factor for improved profitability. On the basis of this calculation, it can thus be safely assumed that price increases played an important role in the increased profitability of the Union industry.
- Concerning the domestic supply elasticity of 10, the Commission clarified that it had collected evidence on the file concerning some users which had faced difficulties in HRF supplies. These facts were duly verified during the investigation, as set out in more detail in recital (506) and confirmed the Commission's questioning of the domestic supply elasticity.
- Moreover, the Commission tested the assumption of the complainant's economic model that *ad valorem* duties should have no effect on the Union prices against the experience with the recent Regulation where *ad valorem* duties ranging between 18,1 % and 35,9 % had been imposed on HRF imports from China. It noted that — after the imposition of measures against HRF originating from the PRC — the Union prices rose to a relatively higher degree than world market prices. Specifically, the spread between CIF Union import prices and ex-works prices (simple average over regions and qualities) had been about 26 euro after imposition of measures in October 2016, whereas it had been about 9 euro in an equally long period preceding the imposition. The Regulation imposing anti-dumping duties on hot-rolled flat steel products from China had thus indeed produced a discernible price effect on the Union market, which the study could not explain.
- Against that background, the Commission also considered that, in the situation that emerged since the end of 2016, an additional *ad valorem* tariff on imports from the four countries would have had an amplifying effect on the increased world market prices and conferred upon EU producers a price effect in excess of the observed dumping and injury.
- On this basis, the Commission concluded that, if anti-dumping duties were imposed against the imports from Brazil, Iran, Russia, and Ukraine, it is likely that the Union steel producers would be in a better negotiation position vis-à-vis users.

6.4.3.3. Users becoming less competitive vis-à-vis competitors in third countries

- (475) The Commission analysed the claim that the imposition of anti-dumping duties would render the Union unrelated processing industry (such as the pipes and tubes industry) extremely vulnerable in respect of competitors established in third countries which could sell to the Union market products obtained from HRF which were acquired without any measures.
- (476) The Commission noted that this allegation was not accompanied by supporting evidence. In addition, there are anti-dumping measures in force in the Union on some types of imported pipes and tubes originating in China, Russia and Belarus ⁽¹⁾.
- (477) Therefore, and in the absence of any other comments, the Commission rejected this allegation.

6.4.3.4. The increase of the costs for users

6.4.3.4.1. Introduction

- (478) After the initiation of the investigation, the complainant alleged that, exception made for the steel tube industry, any increase in costs of users was likely not to have a material impact on the vast majority of user segments such as the construction sector, the automotive sector, etc. Concerning the steel tube industry, the complainant alleged that only the tube makers that are likely to be significantly affected would be those that needed to rely on dumped imports of the product concerned.
- (479) On the other hand, the Consortium claimed that the impact on costs of users was not as limited to the steel tube industry as alleged by the complainant. In this respect, the Consortium claimed that the product concerned represents about 85 – 95 % of the cost of the commodity tubes and around 75 – 80 % of the costs of other types of welded tubes, such as energy or mechanical precision tubes. In addition, the Consortium submitted ⁽²⁾ that users other than tube makers would be impacted twice as high as calculated by Eurofer, due to the alleged increase of post-IP prices of the product concerned. Moreover, as mentioned in recital (449), the Association of Mechanical Engineering and Metalworking Industries of Latvia and the Consortium also argued that the imposition of anti-dumping duties would lead to an increase in the cost of production of its members.
- (480) As stated in recital (514), the most important consumption/uses of the product concerned relate to the following segments: the steel tube industry (32 %), construction (20 %), automotive (15 %) and mechanical engineering (15 %).
- (481) Following the disclosure of the Information Document, the European Steel Tube Association (hereafter 'ESTA'), which represents more than 100 steel tube producers in 17 Member States, covering more than 90 % of the Union production, provided, upon the Commission's request for additional information, one note clarifying some key points. As an association, representing various users, ESTA did not take a position on the precise likely impact of duties on the situation of the steel tube makers. Nevertheless, it confirmed that HRF is the main driver of the pricing of the welded tubes (by opposition to seamless tubes that are made from steel billets) ⁽³⁾.
- (482) The Commission assessed all information collected and on this basis assessed each segment separately.

6.4.3.4.2. Impact of the imposition of measures on the costs of the steel tube makers

6.4.3.4.2.1. Introduction

- (483) The statistics submitted by the complainant ⁽⁴⁾ showed that the steel tube industry is the most important sector using the product concerned. According to these statistics, about 32 % of all HRF consumption is used in the steel tube industry.

⁽¹⁾ The European Steel Tube Association (ESTA) commented that these types are certainly welded pipes and tubes (so-called 'gas pipes') but only represent not more than 10 % of the total Union production of welded tubes. (email from ESTA to the Commission services, 1 June 2017).

⁽²⁾ Submission by the Consortium, Comments in reply to Eurofer's submission of 7 February 2017 submitted on behalf of CIHFR, undated, document received by email on 2 March 2017, p. 4.

⁽³⁾ ESTA, AD 635 — ESTA Comments, 10 May 2017.

⁽⁴⁾ Submission by Eurofer, Submission analysing the impact of provisional duties on users, 7 February 2017, p. 2.

- (484) The company participating in the Consortium, Marcegaglia, which provided a full questionnaire response, processes HRF and produces, inter alia, tubes, pipes and other downstream steel products. On its own, this company was responsible for importing about 1.6 – 2.4 million tonnes of HRF (about 20-30 % of total imports of HRF) during the investigation period. Moreover, it also purchased 1.3 – 2.0 million tonnes of the like product from the Union steel producers during the investigation period. The Commission resorted to this large user to infer conclusions on the impact of measures on users from the steel tube segment generally.
- (485) With this objective, during the on-spot verification, the Commission asked the representatives of Marcegaglia to make simulations to assess the possible impact of any imposition of anti-dumping measures, based on its profitability figures (income statement) for the investigation period. These simulations were made by the company representatives under the assumption that exactly the same volumes were procured from the same suppliers (Union producers, exporting producers of the countries concerned and exporting producers of other third countries) as during the investigation period. These simulations neither take into account the HRF price increases subsequent to the IP nor whether part of these cost increases could be passed on to the customers of these users.
- (486) The results were as follows:
- One simulation showed that an 18 % anti-dumping duty against China and a 10 % anti-dumping duty against the countries concerned would lead to a break-even situation for this Italian user.
 - Another simulation showed that an 18 % anti-dumping duty against China and a 20 % anti-dumping duty against the countries concerned would lead to a loss.
- (487) Following the disclosure of the Information Document, the complainant ⁽¹⁾ claimed that these simulations were flawed because they presumed that the cost to Marcegaglia would increase by the amount of the duties, whereas Marcegaglia had a number of other sourcing options. Moreover, the complainant contested the finding that the users would be harmed disproportionately. Based on an economic analysis of the impact of anti-dumping measures, the complainant argued that the imposition of measures would only lead to a limited price increase of the product concerned and would rather have a quantitative effect ⁽²⁾.
- (488) The simulations on spot had not taken into account that imports originating in China completely stopped from the fourth quarter of 2016, as set out in recital (469) and also had not taken into account that some other countries started importing, as mentioned in recital(458) ⁽³⁾. Therefore, the Commission updated its simulations as follows.
- Assuming that all Chinese supplies are substituted by supplies from other third countries, and assuming a 15 % anti-dumping duty against Brazil, Iran, Russia, and Ukraine, the Italian user would be able to achieve a small profit between 0 and 1 %.
 - Assuming that all Chinese supplies are substituted by supplies from other third countries, and assuming a 10 % anti-dumping duty against Brazil, Iran, Russia, and Ukraine, the Italian user would be able to achieve a small profit between 1 and 2 %.
 - Assuming that all supplies from China, Brazil, Iran, Russia, and Ukraine are substituted by supplies from other third countries (no duties payable at all), the Italian user would be able to achieve a profit between 2 and 4 %.
- These were conservative simulations as they did not factor in possible HRF price increases post-IP which turned out to be above 30 % compared to the IP, as set out in recital(494).
- (489) Concerning the claims of Eurofer based on its economic analysis, they are rejected for the reasons set out in recital (469).

⁽¹⁾ Submission by Eurofer, Eurofer's comments on the Commission's information document of 4 April 2017, p. 9. The complainant also mentioned that these simulations were never disclosed in the non-confidential file.

⁽²⁾ Submission by Eurofer, Economic analysis of the impact of anti-dumping measures in AD 635 on selected imports of hot-rolled flat steel (HRF) on EU downstream products, undated, sent to the Commission services on 31 May 2017, p. 1.

⁽³⁾ These facts were not available at the time that these simulations were carried out.

- (490) The Commission concluded in recital (501) that the profitability of the users in the steel tube businesses was modest during the investigation period and after the investigation period (up to 31 March 2017). Therefore, it confirmed that there was a considerable risk that *ad-valorem* duties between 5,3 % and 33 % (on top of the higher prices) would drive the steel tube makers into losses, taking into consideration the rising prices after the investigation period. *A fortiori*, the SMEs from the Consortium would even risk more drastic consequences as their negotiating power *vis-à-vis* the Union producers is much smaller.

6.4.3.4.2.2. Rising prices after the investigation period for the steel tube sector

- (491) Following the disclosure of the Information Document, as set out in recital (29), 23 users completed additional (post-IP) questionnaire replies. Two additional verification visits were carried out on spot in order to verify this post-IP data.
- (492) Furthermore, following the disclosure of the Information Document, the Serbian exporting producer claimed that prices of the product concerned had increased since the end of the investigation period, from 417,5 euro/tonne to 575 euro/tonne in March 2017 in Northern Europe, or an increase of 37,7 %, and from 395 euro/tonne to 545 euro/tonne for the same period in Southern Europe. In this regard, the Consortium claimed that the EU market is currently characterized by a continuous increase in HRF prices.
- (493) Moreover, the complainant claimed that the major reason for the price increases observed after the investigation period was the rising of raw material prices, and not the impact of the ongoing investigation. Though admitting that prices were in the range of 530 and 550 euro/tonne, the complainant claimed that the Commission's decision not to impose provisional measures in the current case led to a decrease of prices in March-April 2017.
- (494) The Commission found that prices started rising in the second half of 2016, and continued to rise further during the first quarter of 2017. These price increases were noted for all types of the product concerned and the like product. The collected post-IP data showed that price in the post-IP period indeed increased.
- First, on the basis of data from the six sampled Union producers, on average, the price increases of the like product amounted to 15,3 % for the period July – December 2016 and to 35,7 % for the period January – March 2017, when comparing to the average prices in the investigation period.
 - Second, on the basis of data provided by the cooperating users, price increases of the product concerned of 18,2 % for the period July – December 2016 and to 50,4 % for the period January – March 2017, when comparing to the average prices in the investigation period.
- (495) Furthermore, the Commission found that prices started to decrease slightly during the months of April and May 2017. However, Union producers' prices remained around 500 euro/tonne during these months.
- (496) In view of the above, the Commission found significant price increases in the post-IP period (up to March 2017), for all types of the product concerned and the like product. Thereafter, the prices started to decrease slightly, but remained to a significant extent above the price levels during the IP.

6.4.3.4.2.3. The profitability of the steel tube sector

- (497) Following the disclosure of the Information Document, the following information on the profitability of the steel tube sector was submitted:
- ESTA replied that the global profitability figure for 2016 concerning welded tubes is around – 0,3 % ⁽¹⁾; and
 - the Consortium stated that users and service centres which are members of the Consortium had on average a 5 % margin of profit during the investigation period. It claimed in this regard that a mere 10 % increase in the price of the product concerned would bring a typical SME into an unsustainable loss situation of 3,6 % ⁽²⁾.

⁽¹⁾ ESTA, email from ESTA to the Commission services, 1 June 2017.

⁽²⁾ Submission by the Consortium, Comments on the Commission's information document submitted on behalf of CIHFR, 8 May 2017, p. 9 and p. 10.

(498) The collected post-IP data showed that profitability among individual users varied considerably as follows:

Table 24

Profitability of steel tube makers ⁽¹⁾

Category of steel tube makers	Number of steel tube makers	Profitability during the IP	Profitability from 1 July 2016 – 31 December 2016	Profitability from 1 January 2017 – 31 March 2017
Members of the Consortium	5 (*)	3,68 %	– 0,87 %	0,34 %
Steel tube makers related to Union producers (in favour of imposition of measures)	8 (**)	– 3,69 %	– 5,83 %	0,39 %
Steel tube makers in favour of imposition of measures (not related to the Union producers)	1 (***)	– 0,33 %	2,80 %	6,13 %
Total weighted average profitability	14	2,01 %	– 3,95 %	0,37 %

Source: post-IP questionnaire reply from different steel tube makers

(*) As mentioned in recital (439), 11 replies were received from the members of the Consortium, of which five were steel tube makers and the remaining six were service centres (these are the companies that limit their activities to specific processing operations such as cutting, slitting, and/or pickling the product).

(**) As mentioned in recital (439), nine replies were received of which eight were steel tube makers and the remaining one was a service centre.

(***) As mentioned in recital (439), two replies were received of which only one was a steel tube maker. The other one was a service centre.

(499) The above table shows that the profitability of the steel tube makers overall improved during the first 3 months of 2017 compared to the last half of 2016 and amounted overall to 0,37 %. The steel tube makers explained that because they expected during the course of 2016 that HRF prices would increase, they bought proportionally more HRF products (at relatively lower prices) than usual. These products were then used when HRF prices had already increased. However, the steel tube makers which were visited on spot expected that their results would possibly deteriorate in the second quarter of 2017.

(500) Moreover, the steel tube makers related to Union producers claimed that their low or even negative profit margins were due to the fact that they had to compete with other steel tube makers who were to some extent supplied by dumped HRF from the countries concerned.

(501) Overall, the Commission concluded that the profitability of the users in the steel tube businesses was modest during the investigation period and after the investigation period.

6.4.3.4.2.4. The possibility to pass on any price increases in the steel tube sector

(502) The Consortium claimed that the only way to remain profitable would be to pass on any price increase. However, the Consortium submitted that this was not possible, because any increase in selling prices above competitive levels would cause independent users to lose market share to integrated users and, consequently,

⁽¹⁾ These percentages are the weighted average pre-tax profitability figures of all steel tube makers, as shown in their respective income statements for the periods mentioned in the table, expressed as a percentage in relation to their sales on the Union free market.

profits. Concerning the pass on of cost increases, ESTA stated that *'as long as the EU (steel tube) producers are able to pass to the customers the cost increases, the market conditions remain fair'* ⁽¹⁾.

- (503) Concerning the question whether steel tube makers would be able to pass on cost increases, the Commission noted discrepancies in the submissions received.
- On the one hand, some users (mainly the ones related to Union producers) indicated that they have in principle not experienced any major problems to pass on the cost increase to their customers during the post-IP period. However, they underlined that such a pass on would be more difficult when certain competitors could rely on very cheap HRF imports, or when their customers were themselves not performing well.
 - On the other hand, other users (mainly the independent users) indicated serious concerns whether they would be able to pass on the HRF price. In this respect, they referred to:
 - a very competitive market characterized by low margins and by difficulties in HRF supplies, which does not allow them to pass on the cost increase to their customers; and
 - a situation of increased imports of semi-finished and/or finished products (at lower prices) from countries such as Turkey, FYROM and Belarus. This also reduced the possibility to pass on the cost increase.
- (504) Following the final disclosure, the complainant argued that the statements by the other users (mainly the independent users), in particular the statement on 'difficulties in HRF supplies' in recital (503), are speculative and flawed.
- (505) The Commission dismissed this comment as unfounded.
- (506) First, these users stated in their completed questionnaire replies that they sometimes had difficulties in receiving HRF supplies using terms as 'big delays in delivery terms', or 'limited capacity of producers reflecting in shortage of material on the market'. Second, the Commission had evidence on file that users which were visited on spot had indeed difficulties to be supplied or supplied in time. Third, the Commission further observed that tube makers who are also exporting outside the Union would have a lesser possibility to pass on their cost increases. Therefore, the Commission rejected the allegation that the statements made by the users above are speculative or flawed.
- (507) Moreover, the complainant argued that these statements by the users were in contradiction with the conclusions of the section on 'shortages of supply' where the Commission 'rejected the claim that the imposition of measures would lead to a shortage of supply of the product concerned/like product in the Union market (see recital (463))'.
- (508) In this respect, the Commission underlined that its finding in Section 6.4.3.1 on the shortage of supply consisted of sets of a prospective analysis. The Commission had first looked into the question whether the imposition of ad-valorem duties could block the imports of HRF in the Union altogether. In this regard, it was satisfied that there were sufficient alternative HRF imports from other third countries available. The Commission then added that one could also expect that Union production expands and compensates — at least in part — for the future potential lack for HRF imports from the countries concerned. The Commission thus concluded that the imposition of duties would not likely lead to a shortage of supply in the future.
- (509) This prospective analysis in Section 6.4.3.1 is different from the above-mentioned difficulties of some users to be supplied by the Union industry with HRF with sufficient quantities and on time at present. Accordingly, the Commission rejected the argument that the reference to the statement of users on their 'difficulties of supply' in recital (503) was contradicted by the Commission's analysis of the likely absence of 'shortages of supply' in the future evolution of the HRF market in recital (463).
- (510) Due to the discrepancies which were noted between the various categories of steel tube makers, the Commission therefore confirmed that there is a risk for users that they cannot pass through to the full extent HRF price increases to their customers.

⁽¹⁾ ESTA though did not reply to the question whether steel tube makers are in practice able to pass on to the customers cost increases.

6.4.3.4.2.5. Conclusion for the steel tube sector

(511) Based on the above, the Commission concluded that there was a considerable risk that duties in the form of *ad-valorem* duties would drive the steel tube sector into losses for the following reasons:

- HRF is the main cost element for welded tubes;
- HRF prices increased significantly after the investigation period;
- the profit margins in the steel tube sector are relatively small; and
- it is unclear whether independent steel tube makers have the possibility to pass on any price increase to their customers.

(512) Following the final disclosure, the complainant disputed the Commission's conclusions that *ad valorem* duties would drive the steel tube sector into losses for the following four reasons:

- First, the Commission relied mainly on the flawed Marcegaglia model, which does not take basic economic principles into account. In this respect, the complainant alleged that the main impact of duties would be on volumes, not on prices. Moreover, the Marcegaglia model ignores all evidence on the substitution elasticity for HRF. The complainant also mentioned that, because HRF is a commodity, the substitution elasticity across alternative suppliers is high, and is in any event neither infinite nor zero.
- Second, HRF prices have risen following the investigation period. As a result, the price increase in HRF affects all tube makers alike, which is an important fact when considering the ability to pass on such cost increases. If users have the ability to pass on the cost increases, the fact that prices have risen is not relevant, when judging the impact on users.
- Third, the Commission relied on the fact that the profitability of the steel tube makers was modest. However, according to the complainant, the Commission did not even attempt to look at and verify what the longer term position is or to establish a baseline for typical profitability. Moreover, the Commission could not have drawn conclusion from the profitability of users in one quarter, i.e. the first quarter of 2017.
- Fourth, the Commission's conclusion that there was a considerable risk that duties would drive the steel tube makers into losses does not follow from the findings. In particular, the claim that there was a risk that costs could not be passed on to the full extent does not justify the conclusion that *ad valorem* duties would drive the steel tube sector into losses. The Commission also mischaracterised the views of the integrated users who fear a competitive distortion, as other users who rely on dumped imports would have gained an unfair competitive advantage.

(513) The Commission rejected the majority of these arguments as follows:

- First, as already set out in recital (485), simulations were first made to assess the possible impact of any imposition of anti-dumping measures, based on Marcegaglia's profitability figures (income statement[s]) for the investigation period which were verified on spot. Thereafter, the Commission updated its simulations in recital (488). Moreover, the Commission considered the argument in the economic model that, if some suppliers were to increase their prices or if their HRF products were to be under measures, the buyer (user) would try to switch to other suppliers who did not increase their prices. However, this assumption does not take into account that there are contractual obligations between the buyer (user) and the supplier, at least limiting the substitution elasticity for HRF in the beginning. Indeed, next to the spot market, HRF users also conclude longer term contracts with their suppliers. Another possible concern at the beginning would be the fact that establishing a new business relationship needs at least some investment. However, the Commission acknowledged that the substitution elasticity would improve over time.
- Second, the complainant acknowledged that HRF prices have been rising in the fourth quarter of 2016 and the first quarter of 2017 and that such price increases affect all tube makers alike. The Commission

acknowledged that, if users have the ability to pass on the cost increases, the fact that input prices have risen is not relevant, when judging the impact on users. However, as set out in recitals (502) to (510), the Commission doubted whether all tube makers would have the ability to pass on the cost increases.

- Third, the Commission provided in the table under recital (498) financial data for the investigation period (12 months), for the period 1 July – 31 December 2016 (6 months) and for the period 1 January – 31 March 2017 (3 months). Given that anti-dumping measures can have an immediate and disruptive effect upon imposition, in particular for small and medium enterprises, which are present in the stainless steel tube sector ⁽¹⁾, the Commission was entitled to base its findings on the above-mentioned data covering 21 months without entering into a long-term viability study for the tube sector.
- Fourth, concerning the pass on, the Commission based its findings on the comments which were received in the post-IP questionnaire replies. Moreover, the possibility whether users could pass on possible cost increases was further discussed and documented during the verifications on spot. As a result, the conclusion of the Commission is based on statements (inspection of documents and inquiry), which are equally valid as evidence for an investigating authority. Second, it did not ignore the fact that the majority of the steel tube makers which filled out the questionnaire raised fears of competitive distortion. In that respect, it pointed out that a level-playing field would be restored for all users for HRF purchases below the MIP level, as *ad valorem duties* will remove dumping for imports from the four countries. For HRF purchases above the MIP level, it will be a business decision of a tube maker whether to satisfy its supply from an integrated Union producer or from imports.

6.4.3.4.3. Impact of the imposition of measures on the costs of other user segments

6.4.3.4.3.1. Introduction

- (514) The statistics provided by the complainant ⁽²⁾ showed also that, apart from the steel tube industry, other sectors such as construction (20 %), automotive (15 %), mechanical engineering (15 %) are also important consumers of the product concerned.
- (515) The Commission sought during the course of this investigation cooperation from a number of users from these other sectors in Poland and in the Baltic states. Questionnaires were sent to them but no replies were received.
- (516) No users' associations came forward after the initiation of this course, apart from the Association of Mechanical Engineering and Metalworking Industries of Latvia. However, the latter did neither substantiate its claims that anti-dumping measures would lead to a cost increase for the mechanical engineering sector nor submitted any additional comments. The Commission was thus unable to establish a clear figure on the potential impact of measures on this sector.
- (517) The Commission also took note of the conflicting viewpoints between the complainant and the Consortium about the possible impact of the imposition of measures on the costs of other user segments, such as automotive and construction, which appear to be less affected than the steel tube sector. For example, the automotive industry could be facing some additional production costs of 430 million euro. However, when broken down to the unit costs, this is less significant. According to estimates from the Consortium and the complainant the increase of costs for a medium car would stand around 24-27 EUR per car only. The situation seems to be similar in the household appliances sector.

6.4.3.4.3.2. Cooperation of users and users' associations following the disclosure of the Information Document

- (518) Following the disclosure of the Information Document, the Commission tried to estimate the impact of measure on segments other than the steel tube sector.
- (519) In this respect, the Commission sought again cooperation from a number of users in Poland and in the Baltic States (mainly in the mechanical engineering sector) by sending them additional post-IP questionnaires but no replies were received.

⁽¹⁾ Submission of European Steel Tube Association, 10 May 2017.

⁽²⁾ Submission by Eurofer, Submission analysing the impact of provisional duties on users, 7 February 2017, p. 2

- (520) Moreover, the Commission pro-actively also sought cooperation of 11 users' associations representing other sectors (construction, automotive, mechanical engineering, domestic appliances). All these associations received post-IP questionnaires and were requested to forward the questions to their members in case the associations themselves did not have the replies to the questions.
- (521) Two partial replies were received from users' associations and one partial reply was received from a company that received the post-IP questionnaire through its association.
- First, the European Committee of Domestic Equipment Manufacturers (CECED) stated that it was not in a position to provide the requested data, but stated: *'Potential EU anti-dumping measures on steel would directly or indirectly impact the manufacturing of appliances in a negative way...For this reason, we are not in favour of protectionist measures such as anti-dumping measures, which could adversely affect the competitive position of our industry, unless thoroughly justified by unequivocal evidence.'* ⁽¹⁾
- Second, Agoria, the Belgian Member of Orgalime ⁽²⁾ stated that the cost of HRF varied depending on the type of finished product: it could range between 5 % (for trailers, garbage trucks, rail roads, terminal tractors) up to 100 % (for telescopic booms for cranes). However, the reply was unclear what the impact would mean in practice for their business.
- Third, Electrolux Home Products Corporation N.V. — which received the Commission's request for additional information through the association CECED — mentioned that it is a producer of household appliances acting on the global market. This company stated that *'Steel is a major cost component for our products that are sold in a highly competitive low-margin global market place. For our European production sites, we buy the steel from European suppliers and we prefer to continue this. However, EU duties on steel imports are resulting in artificially high prices for domestic and foreign steel that are placing our business at a competitive disadvantage to other manufacturers that have factories outside the EU and export their finished products to the EU.'* ⁽³⁾
- (522) The Commission notes in connection to these replies that no meaningful data was provided regarding profitability and sales values. The Commission was thus unable to establish a clear figure on the potential impact of measures on sectors other than the steel tube sector.
- (523) However, taking into consideration the low response rate by users and users' associations in sectors other than the steel tube sector, the impact of any price increase was assessed to be less significant than for the steel tube sectors, even if the three replies (see recital (521)) pointed rather to the fact that they would be not in favour of the imposition of measures in this case.
- (524) Following the first disclosure, the complainant argued that the Commission wrongly came to the conclusion that 'the impact of any price increase was assessed to be less significant' for the following reasons: the analysis of the impact of possible measures on sectors other than the steel tube sector is characterised by the absence of any data or verified evidence suggesting a material impact on other user segments; The only evidence cited to show an impact on users are three letters. In addition, the conclusion is in blatant contradiction with the statements of the Commission that there are 'no meaningful data' available and that it is 'unable to establish a clear figure on the potential impact of measures on sectors other than the steel tube sector' (see recital (522)). Moreover, the complainant alleged that one of the associations (Agoria) stated that it supports the imposition of *ad valorem* duties.
- (525) The Commission acknowledged that the complainant argued in their submission of 7 February 2017 that 'the examples ... show that for all sectors apart from the tube sector the impact of duties is likely to be de minimis' and that there was a low degree of cooperation. Moreover, it was true that Agoria did seem to indicate that it supports the imposition of *ad valorem* duties.

⁽¹⁾ Letter dated 22 May 2017 from the Director-General of CECED to the Commission services.

⁽²⁾ Orgalime is the European Engineering Industries Association which is representing the interests of Mechanical, Electrical & Electronic, Metalworking & Metal Articles Industries.

⁽³⁾ Letter received by email on 22 May 2017, undated from the CEO and Vice President Purchasing of Electrolux Home Products Corporation N.V.

- (526) Nevertheless, the statements of the other user association and of the one company (see recital (521)) provided indications that they do not share the assessment of the complainant that the impact of duties is likely to be minimal. Moreover, the Commission did assess the increase of costs for a medium car which would stand around 24-27 EUR per car (see recital (517)) and the likely impact on household appliances, which it characterised as less significant in the range of 0.63 to 1.43 euro per equipment).
- (527) Against this background, the Commission refined its overall conclusion and concluded that the impact on other sectors than the steel tube sector would be less significant.

6.4.3.4.3.3. Conclusion on the other sectors than the steel tube sector

- (528) The Commission confirmed that the impact on these other users would be less significant than for the steel tube sector.

6.4.3.5. Interests of users related to exporting producers

- (529) All imports from the Brazilian exporting producer CSN to the Union went to its related Portuguese subsidiary, Lusosider. The latter company processes mainly these HRF imports into downstream products for sales mainly in the Iberian Peninsula.
- (530) During a hearing, CSN informed the Commission services that an important investment decision was pending and that this could affect Lusosider, which currently employs 250 people. The Russian exporting producer NLMK stated that it had developed over time its downstream operations in the Union. In this respect, it argued that 'the imposition of anti-dumping measures on HRF, by limiting the possibilities to export an important input from Russia to its EU mills, would severely impede NLMK's ability to grow its downstream production in the EU.' ⁽¹⁾
- (531) Following the disclosure of the Information Document, NLMK added that '*... NLMK wanted to draw the attention of the European Commission on the risks that the imposition of anti-dumping measures could create in particular in case of force majeure situations, by limiting the availability of materials from our parent company, should it prove necessary.*'
- (532) Following the disclosure of the Information Document, three users related to the exporting producers were asked to fill in a post-IP questionnaire. Two of them filled in a full questionnaire, whereas the remaining one submitted a partial reply. On the basis of the data, the Commission noted that the profitability of these two users went from 1,81 % during the IP to 14,10 % in the first three months of 2017. However, the profitability in the first three months of 2017 for one company was found to include profits which were rather exceptional and not of a permanent nature as a result of the increased HRF prices during the post-IP period.
- (533) Following the final disclosure, the complainant argued that the reference by the Commission to the statement of NLMK (see recital (531)) cannot hide the fact that this company did not import HRF from its Russian parent company during the period considered.
- (534) The Commission acknowledged that NLMK did not import HRF from its Russian parent company during the period considered. However, NLMK has demonstrated that its customers require a confirmation that supplies of HRF from NLMK are guaranteed in all instances, including in case of force majeure situations. In such cases, NLMK located within the Union needs a fall back on supplies from its parent company located in Russia. Otherwise, it would not be able to retain its bigger customers and to remain competitive on the Union market.
- (535) The Commission concluded that the imposition of measures is neither in the interest of the Portuguese subsidiary, Lusosider, related to the Brazilian exporting producer CSN nor to the Belgian subsidiary, NLMK, related to the Russian exporting producer NLMK.

⁽¹⁾ Submission of 25 October 2016 of Novolipetsk Steel.

6.4.4. Conclusion on the interest of users

- (536) In view of the above, the Commission concluded that the imposition of measures was against the interest of users. While the impact on the steel tube sector would be very pronounced, the impact on other downstream sectors is most likely less severe, though.
- (537) Following the first disclosure, the complainant argued that the wording ‘most likely less severe’ is a misleading and incorrect statement, given the evidence actual on file:
- First, the impact in the tube segment is concentrated in a small part of that segment, namely makers of welded tubes who are not related to Union HRF producers and choose to rely on imports;
 - Second, the short analysis of the other sectors than the steel tube sector confirmed no material impact.
- (538) The Commission rejected the allegations of the complainant as follows:
- First, as already mentioned in recital (435), Marcegaglia on its own consumes between 2.9 – 4.4 million tonnes of the product concerned/like product on an annual basis. This means that this sole company is responsible on its own for about between 8,5 % and almost 13 % of the total Union free market consumption, as set out in the table under recital (226). Moreover, the analysis of the steel tube market was not only dependent on the analysis of Marcegaglia. As set out in recital (8), a Consortium had been established *ad hoc* for the purpose of the investigation by more than 30 users and unrelated importers mainly but not exclusively located in Italy. They consist mainly of SMEs, although Marcegaglia was also member of this Consortium. In this respect, as set out in recitals (17) and (24), this Consortium submitted comments and was heard during the hearings. In addition, as set out in the table in recital (498), five members of the Consortium cooperated by providing post-IP data. Therefore, the Commission rejected the allegation of the complainant that the impact in the tube segment is concentrated in a small part of that segment.
 - Second, concerning the allegation that there is no material impact for sectors other than the steel tube sector, the Commission referred to its earlier statements in recital (524) above. There is an impact, albeit that this impact is less significant.
- (539) Nevertheless, and for the sake of coherence, the Commission acknowledged that it should have used in the conclusion the same wording ‘less significant’ like in the analytical part of recital (528). Therefore, the Commission changed its earlier conclusion, as set out in recital (536), as follows: In view of the above, the Commission concluded that the imposition of measures was against the interest of users. While the impact on the steel tube sector would be pronounced, the impact on other downstream sectors will most likely be less significant.

6.5. Conclusion on Union interest

- (540) The Commission weighted and balanced the strong interests of an important Union industry to be protected against unfair practices, on the one hand, and the likely negative effects of measures on users, on the other hand.
- (541) The imposition of measures would allow the Union industry to maintain a sustainable level of profits. Such measures would help the Union industry to become healthy and viable, taking also into consideration the accumulated losses incurred since 2013, with the exception of the modest profit achieved in the year 2014.
- (542) In contrast, the imposition of definitive measures against Brazil, Iran, Russia and Ukraine could negatively impact the users — who are to a large extent dependent on the supply of the product concerned — in a disproportionate way. This would undermine their competitiveness on the downstream market, in particular for tubes and pipes.
- (543) As noted above, in order to adequately balance these opposing interests and reach appropriate conclusions on this point, the Commission found it imperative to examine the developments after the end of the investigation period, that is, after July 2016. It also took into consideration that HRF prices in the second half of 2016 raised significantly, crossing the mark of 500 EUR/tonne in February 2017.

- (544) Following the disclosure of the Information Document, the Commission investigated further the allegations that HRF prices rose during the post-IP period. It moreover encouraged users to provide additional data on the several users sectors in order to assess more precisely the potential impact of measures on downstream sectors other than tubes and pipes. It also invited interested parties to comment on the appropriate form of measures.
- (545) After collection of the additional data, provided by different interested parties, the Commission concluded that the HRF prices rose significantly during the post-IP period and that:
- Definitive measures would allow the Union producers to return to sustainable profit levels. If no measures were imposed, it would become uncertain whether the Union industry would be able to become sufficiently viable, taking also into consideration the accumulated losses incurred since 2013, with the exception of the modest profit achieved in the year 2014.
 - As regards the interest of users, the imposition of measures in the form of an *ad-valorem* duty against Brazil, Iran, Russia and Ukraine would impact negatively the users (in particular in the steel tube sector) in a disproportionate way, impacting their prices and their employment.
- (546) The Commission recalled the findings in recital (425) regarding profitability of the Union producers as well as the significant rise of prices after the investigation period. On this basis the Commission considered it in line with the Union interest to change the form of the measures to adequately strike the balance between the interests of Union producers and users in this particular case. Therefore the Commission decided to impose *ad valorem* duties, capped by a Minimum Import Price ('MIP') which takes into account the rise in raw material prices after the investigation period for the following reasons:
- On the one hand, setting the duty at the level of the *ad valorem* duty capped by the MIP would allow the Union producers to recover from the effects of injurious dumping. Setting a cap at the level of an effective MIP would be a safety net to enable them to achieve a sustainable profitability.
 - On the other hand, setting a cap at the level of an effective MIP should also prevent any adverse effect of the price increases after the investigation period which could have a significant negative impact on the users' business.
- (547) Following the final disclosure, the complainant alleged that the Commission's findings are contrary to the requirements under Article 21(1) of the basic Regulation. If measures were in the interest of the Union industry, the Commission would be obliged to impose them unless there is evidence that measures would have a disproportionate impact on user industries. According to the complainant, there is no such evidence. Moreover, it claimed that the Commission had given priority to the interests of a small sub-group of users (i.e. certain steel tubemakers) and failed to carry out an appreciation of the various interests taken as a whole. More broadly, it alleged that the rules on Union interest provide only for the imposition or non-imposition of measures. In other words, it is a simple yes or no-test.
- (548) The Commission rejected these points as legally erroneous and explained how the Union interest test under Article 21 of the basic Regulation is usually carried out:
- If measures are in the interest of the Union Industry, the Commission is obliged to impose them unless there is evidence that measures would have a disproportionate impact on user industries, importer, consumers or other directly affected parties. In the latter case, no measures should be imposed at all. However, in the current investigation, neither scenario is at issue.
 - Rather, the evidence on hand clearly pointed to the fact that users of the most important sector using the product concerned (i.e. the steel tube sector, consuming about 32 % of all HRF consumption, see recital (483)) could be disproportionately harmed if *ad valorem* duties would be imposed, also in light of the rise of HRF prices subsequent to the investigation period.
 - In this scenario, the Commission may modulate the form of the measure to strike the appropriate balance between the competing interests. In this respect, special consideration was given to the need to protect the Union industry against unfair practices, on the one hand, while limiting the likely negative effects of measures on users (steel tube makers in the first place), on the other hand, without undermining the effectiveness of the measure.

- (549) In that respect, the Commission not only looked at the abstract interests involved, but, as it does customarily, also on the likely concrete effect on the respective businesses. Arguing against the MIP, Eurofer wrote to both the Commissioner for Trade and the President of the European Commission: 'Even if the MIP were to be above the cost of production, it would become *a cap on the profitability of our industry*, even as we begin to recover from the worst crisis in decades. ⁽¹⁾'
- (550) In the view of the Commission, this statement rather confirmed its own view that it was in the Union interest to impose *ad valorem* duties only below the level of the MIP. While the MIP would mitigate the concrete risk that some tube makers, including many SMEs, could become lossmaking, the disadvantage stemming from a MIP for the complainant seems to be mainly to stand in the way of higher profit margins in a recovery period where it is already achieving profits above the target level.
- (551) Following the final disclosure, the Consortium requested that the present investigation should be terminated based on consideration of Union interest. In this respect, it argued that the imposition of anti-dumping measures, in whatever form, would have a devastating effect on the economic viability of the independent users for the following reasons:
- The HRF Union market is characterised by an oligopolistic structure, whereby almost 90 % of the HRF is manufactured and supplied — both on the captive and the free markets — by a few vertically integrated producers.
 - In view of their vertical integration, the Union producers are at the same time producers and processors (users) of HRF. This means that independent users find themselves to be both customers and competitors of the few powerful Union producers.
- (552) The Commission rejected also this request. As set out in recital (548), special consideration was given to the need to protect the Union industry against unfair practices, on the one hand, while limiting the likely negative effects of measures on users (steel tube makers in the first place), on the other hand. In this balance of interests, the observations of the Consortium had already been duly taken into account.
- (553) For all these reasons, the Commission confirmed its decision to impose *ad valorem* duties, capped by a MIP (see recital (546)).

7. DEFINITIVE ANTI-DUMPING MEASURES

7.1. Injury elimination level (Injury margin)

7.1.1. Target price

- (554) To determine the level of the measures, the Commission first established the amount of duty necessary to eliminate the injury suffered by the Union industry. According to the case-law, the target price is the price which the Union industry could reasonably achieve under normal conditions of competition, in the absence of the dumped imports from the four countries. The target price is calculated by establishing the costs of production of the like product and adding the profit margin which the Union industry could reasonably achieve under normal conditions of competition, in the absence of the dumped imports.
- (555) As regards the determination of a target profit, the data for the period considered show only losses, with exception of the year 2014, where a small profit was realised which was not considered appropriate for determining a reasonable profit margin, achievable in the absence of dumped imports. As set out in recital (341), the Union industry could have benefited more from the recovery of the market from 2014 onwards. However, low-priced imports gradually increased and captured market shares to the detriment of the Union industry. The continuous pressure of imports started to be fully felt from the second half of 2015, the beginning of the investigation period.

⁽¹⁾ Letters dated both on 27 June 2017 from the Director-General of Eurofer to the Commissioner for Trade and to the President of the European Commission.

- (556) The complainant requested the Commission, in the complaint, to use 12,9 % of turnover as reasonable non-injurious profit margin. This was the average profit before tax on sales which was used in a previous material injury case dating back from 2000 concerning the same product concerned ⁽¹⁾.
- (557) The Commission considered that this profit margin was not appropriate and therefore could not be used because that case dates back from 2000 and the data from over 15 years ago cannot be regarded as representative anymore given the technological and financial changes the Union industry faced since then.
- (558) The Commission also requested the six sampled Union producers to provide profitability data with regard to the like product when sold on the Union free market for the years 2007 to the investigation period through their original questionnaire responses. The Commission found that none of these years (singled out or in the form of a basket) are representative for establishing a target profit for the following reasons:
- First, it observed that the profitability data for the period considered cannot be considered as an appropriate benchmark for the calculation of the target profit since the normal conditions of competition were not met due to the presence of dumped imports during 2015 onwards from China and from the four countries. Furthermore, as mentioned in recital (133) of the definitive HRF Regulation on imports from China ⁽²⁾, the years 2012, 2013 and 2014 cannot be considered to be years under normal conditions of competition, given the aftermath of the Eurozone debt crisis, and the decline of steel demand in 2012.
 - Second, the profitability varies significantly for each year prior to the year 2012. As such, neither a single year nor a basket could be regarded as representative on its own. For instance, the analysis went as far back as 2007 to ensure that at least one year before the financial and economic crisis started would be taken account. However, 2007 and 2008 were exceptionally positive, whereas the following years were impacted by the 2009 financial crisis, and hence not representative of normal conditions either.
- (559) Therefore, the Commission went to another product, heavy plate, in the same sector of industry. In this context, the Commission referred to recital (202) of Commission Implementing Regulation (EU) 2017/336 ⁽³⁾, where it confirmed its finding contained in Regulation (EU) No 2016/1777 ⁽⁴⁾ whereby a profit of 7,9 % was used. In this respect, there are at least two common features: firstly both products are produced in the same sector of industry and secondly, both products are hot-rolled, not clad, plated or coated products.
- (560) On this basis, the Commission calculated a non-injurious price of the like product for the Union industry by adding the profit margin of 7,9 % to the cost of production of the sampled Union producers during the investigation period.
- (561) Following the final disclosure, the complainant considered that the 7,9 % target profit was far too low: it alleged that the Commission should use the profits achieved in 2008 (i.e. a target profit of 14,4 %) since the Commission verified profitability data for a period of 10 years, including the year 2008, which was the year before the onset of the financial crisis. Moreover, it argued that an alternative method to determine the profit margin was to relying on the data from the previous investigation on hot-rolled flat products (in 2000, when a profit margin was achieved of 12,9 %). In addition, it argued that the Commission did not provide any reasoning for the inconsistency with the approach in the China case, where a target profit of 7 % was used.

⁽¹⁾ Commission Decision No 284/2000/ECSC of 4 February 2000 imposing a definitive countervailing duty on imports of certain flat rolled products of iron or non-alloy steel, of a width of 600 mm or more, not clad, plated or coated, in coils, not further worked than hot-rolled, originating in India and Taiwan and accepting undertakings offered by certain exporting producers and terminating the proceeding concerning imports originating in South Africa (OJ L 31, 2000, p. 44, para. 338).

⁽²⁾ Commission Implementing Regulation (EU) 2017/649 of 5 April 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 92, 6.4.2017, p. 88, recital (133)).

⁽³⁾ Commission Implementing Regulation (EU) 2017/336 of 27 February 2017, imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain heavy plate of non-alloy or other alloy steel originating in the People's Republic of China (OJ L 50, 28.2.2017, recital (202), p. 37).

⁽⁴⁾ Commission Implementing Regulation (EU) 2016/1777 of 6 October 2016 imposing a provisional anti-dumping duty on imports of certain heavy plate of non-alloy or other alloy steel originating in the People's Republic of China (OJ L 272, 7.10.2016, p. 5).

Finally, it alleged that rejecting the HRF profits in favour of a different product contradicts previous practice. In this context, it refers to the rebars case, where *'the Commission observes that profitability data related specifically to the product concerned constitutes a more accurate benchmark than the profitability data of other steel products or of the steel sector in general.'*

- (562) The Commission rejected these arguments. As explained in recital (558), the year 2008 was found to be an extremely positive year and hence not representative of normal conditions. Moreover, the target profit achieved in the year 2000 is too distant in this case to constitute a reasonable alternative. Even under the unlikely assumption that there were no technological and financial changes in the Union since the year 2000, there have been at least some changes in the size of the Union market since 2000 as a result of the growing number of Member States during the period 2000 – 2016. In addition, the target profit used in the China case was based on a prospective analysis in this 'threat of injury' case and would be even lower.
- (563) In return, the Consortium submitted that using a 7,9 % target profit was not realistic and too high for the following reasons:
- Even though both HRF and heavy plate are indeed produced in the same sector of industry and are both hot-rolled, it must be noted that the physical characteristics of the two products are different.
 - By relying on the heavy plate case, the Commission implicitly admitted that the profit margin achieved in 2011 can be reasonably used as a benchmark for the calculation of the injury elimination level. Therefore, the question arises why the Commission did not use the 2011 profit margin determined for the Union industry in the parallel investigation into imports of HRF from the PRC, i.e. 3,11 %. The choice of a profit margin relating to a product which is the very same as in the present investigation would be more appropriate.
- (564) The exporting producer CSN made a similar comment and requested the Commission to take the profit margin of 3,11 % achieved in 2011 since this was the profit at hand for the exact same product scope. In any case, CSN submitted that a reasonable profit margin should be set at a level not higher than 5 % for the Union industry in the present investigation.
- (565) Moreover, the Ukrainian exporting producer Metinvest commented that using such a 7,9 % target profit was too high, arguing that HRF and heavy plate have different physical characteristics. Their principal argument was that the heavy plates segment has a higher profit margin due to higher sales prices compared to hot-rolled flat products where the prices are generally lower, with a lower profitability as a result. A similar comment was made by the Iranian exporting producer Mobarakeh Steel Company, arguing that the 7,9 % target profit is unrealistically high in the steel industry in the current economic environment. In addition, the Brazilian exporting producer Usiminas also commented that a 7,9 % target profit was unrealistically high and unlawfully inflated.
- (566) As set out under recital (558), the profit margin achieved in HRF in 2011 could not be used as in that year, the market for HRF was still heavily affected by the 2009 economic and financial crisis and thus cannot be considered as representative. Therefore, for the reasons explained in recital (559), the Commission used the target profit from another product, namely heavy plate, in a similar sector of industry. Consequently, there is neither a departure nor a contradiction with the Commission's standard practice.
- (567) Concerning the allegation that higher sales prices of heavy plate compared to HRF will lead automatically to higher profitability, the Commission noted that there are many other variables (such as supply and demand, scarcity, and incurred costs) than the level of the sales price as such which drive the level of the profitability. In response to the argument that the Commission implicitly accepted that profits from 2011 can be accepted as a reasonable benchmark, the Commission noted the following. First, while heavy plate and HRF both belong to the same sector of industry, that is, steel, these products have different markets and the recovery from the economic and financial crisis did not follow the same pace. Indeed, during its investigation, the Commission found no evidence that the two industries recovered in parallel, nor have interested parties provided evidence to

this effect. Second, in recital (221) of Regulation (EU) No 2016/1777 ⁽¹⁾ concerning heavy plates, the Commission merely noted that the profitability reached by the Union industry increased from 2009 onwards but it did not exclude that marginal or minor effects of the economic and financial crisis were still present in 2011. In light of the increasing trend in profitability and the receding impact of the economic and financial crisis on the market for heavy plates, it therefore considered that the profitability reached in 2011 was reasonable. As concerns the current investigation, the Union industry's profitability recovery showed a different trend than what was observed in the investigation concerning heavy plates. While, in the present investigation, profitability started to recover in 2010 and increased from the levels recorded in 2009, profitability decreased again in 2011. Therefore, it cannot be concluded that the Union industry recovered or started to recover from the financial crisis by 2011 or that the profitability levels reached by 2011 were considered reasonable in a similar vein to what was observed in the heavy plates investigation.

- (568) Moreover, the Commission noted that the profit which was achieved by the Union industry during the period January – March 2017 (see recital(425)) was higher than the target profit of 7,9 %. Therefore, it considered that this target profit was not unrealistically high in the current economic environment.

7.1.2. Reliance by analogy on Article 2(9) of the basic Regulation for the calculation of the injury margin

- (569) When an exporting producer sold the product concerned via related importers, the export price was constructed on the basis of the resale price to the first independent customer, duly adjusted pursuant to Article 2(9) of the basic Regulation. This adjustment consisted of the costs incurred between importation and resale through deducting the SG&A of the related importer and a reasonable amount for profit of 2 % ⁽²⁾ to which subsequently post importation costs (column 4) were added.
- (570) Following the disclosure of the Information Document and following the final disclosure, the Russian MMK Group challenged the approach of the Commission which applied by analogy Article 2(9) of the basic Regulation. It claimed that such application was in breach of Article 2(9) of the basic Regulation itself and vitiated by a manifest error of assessment. It also claimed that such a method leads to the collection of excessive duties. In addition, the Iranian exporting producer Mobarakeh Steel Company argued that this methodology violated Article 1(1) of the basic Regulation and the case law of the Union courts and that it does not allow a fair comparison between the prices of the imported product types and those of the domestic industry. Following the final disclosure, the Russian exporting producer PAO Severstal, the Iran exporting producer Mobarakeh Steel Company and the Ukraine exporting producer Metinvest made similar comments.
- (571) First, the purpose of calculating an injury margin is to determine whether imposing a lower duty rate (than the one based on the dumping margin) to the export price of the dumped imports would be sufficient to remove the injury caused by the dumped imports. This assessment should be based on the export price at the Union frontier level which is considered to be a level comparable to the Union industry ex-works price. In the case of export sales via related importers, by analogy with the approach followed for the dumping margin calculations, the export price was constructed on the basis of the resale price to the first independent customer duly adjusted pursuant to Article 2(9) of the basic Regulation. As the export price is an indispensable element in the injury margin calculation, and as this Article is the only Article in the basic Regulation which gives guidance on the construction of the export price, the application of this Article by analogy is justified.
- (572) Second, the Commission considered that the establishment of the relevant import price for undercutting and underselling calculations should not be influenced by whether the exports are made to related or independent operators in the Union. The methodology followed by the Commission ensured that both circumstances receive equal treatment. In other words, the purpose of the injury margin calculations is not to measure to what extent the sales of the related importers are causing injury to the Union producers, but rather whether the exports from the exporting producers have such detrimental effect through undercutting and underselling the prices of Union producers. To that end, the relevant price to be taken into account is the price at which the product concerned is sold to the Union, and not the price at which the imported materials are then resold by importing producers in the Union.

⁽¹⁾ Commission Implementing Regulation (EU) 2016/1777 of 6 October 2016 imposing a provisional anti-dumping duty on imports of certain heavy plate of non-alloy or other alloy steel originating in the People's Republic of China (OJ L 272, 7.10.2016, p. 28).

⁽²⁾ The reasonable profit margin which was used is the same as the one used in an investigation concerning a closely resembling product, i.e. cold rolled flat steel.

- (573) Third, Article 2(9) was only applied to a small part of the total sales for the Ukraine exporting producer Metinvest. As mentioned in the specific disclosure for Metinvest, Article 2(9) was only used in relation to its sales via related traders within the Union. Moreover, concerning the Iran exporting producer Mobarakeh Steel Company, and contrary to what had been described in the specific disclosure, Article 2(9) had not been applied.
- (574) Therefore, the Commission considered that the approach followed was accurate and rejected these claims.

7.1.3. The level of the post-importation cost

- (575) Following the disclosure of the Information Document, two exporting producers challenged the level of the post-importation cost and claimed that the amount of 7 euro/tonne is understated. First, the Russian exporting producer NLMK claimed that the amount of the post-importation cost should be at least 40 euro/tonne. Second, the Ukrainian exporting producer Metinvest claimed that it should be at least 9.44 euro/tonne, which allegedly represents the weighted average of the post-importation costs of the four related entities of the Ukrainian exporting producer, located in the Union. Following the final disclosure, the Brazilian exporting producer Usiminas also claimed that the post-importation cost was understated and based on selective data.
- (576) The Commission rejected these claims. It determined the post-importation cost on the basis of its analysis of the verified information at the one unrelated importer who came forward. Moreover, the Brazilian exporting producer Usiminas did not provide any further substantiation for the rationale why they assessed the post-importation cost to be understated.

7.1.4. Other comments following the final disclosure

- (577) The Ukraine exporting producer Metinvest claimed an important physical characteristic adjustment following the final disclosure of the information document. It reiterated its claim following the final disclosure. It claimed in particular that most coils produced by the mills of Metinvest weigh 8 and 12 tonnes, while the industry standard within the Union is rather 24 tonnes. This fact triggered important and natural price cuts for Metinvest during its negotiations, for which it submitted evidence and for which it requested now an adjustment.
- (578) The Commission rejected this claim for the following reason: The relevant production sites of Metinvest were visited on spot during the period 17-25 November 2016 and 25-27 January 2017. At the time of these verification visits, this claim was never made nor evidenced. The claim concerning differences in physical characteristics came therefore in too late as it was only made after the disclosure of the Information Document (2 May 2017). It could also not be linked to any verified evidence. It was, thus, not verifiable. Moreover, the particular characteristics of the different product types have been reflected in the so-called PCNs used to report sales and costs at the beginning of the investigation. If Metinvest would have had problems with the establishment of the different product types (the so called PCN-construction), it should have brought this claim logically at the beginning of the investigation. In addition, it should be noted that more than 99 % of all product types which were sold by the Ukraine exporting producer in the Union were also produced and sold by the Union producers. Thus, the claim cannot be accepted.
- (579) The Iranian exporting producer Metinvest requested the Commission to exclude certain product types (the PCNs belonging to group 13) from the injury margin calculations, since these product types represent a residual group of product types, where all steel grades different from those identified by digits 01 to 12 would fall. As a result, this residual group comprises a very wide range of products.
- (580) The Commission considered that the product concerned, irrespective whether belonging to group 13 or not, are all certain flat-rolled products of iron, non-alloy steel or other alloy steel, whether or not in coils (including 'cut-to-length' and 'narrow strip' products), not further worked than hot-rolled, not clad, plated or coated. Accordingly, the product definition comprises a well-defined product. It was also found that all types of the product concerned have the same two main principal uses, as set out in recital (41).

7.1.5. *Definitive injury margins*

- (581) In the absence of any other comments regarding the injury elimination level, the definitive injury margins would be as follows:

Country	Company	Injury margin
Brazil	ArcelorMittal Brasil S.A. and Aperam Inox América do Sul S.A.	20,2 %
	Companhia Siderúrgica Nacional	15,7 %
	Usinas Siderúrgicas de Minas Gerais S.A.	17,5 %
Iran	Mobarakeh Steel Company	34,0 %
Russia	Novolipetsk Steel	26,1 %
	Public Joint Stock Company Magnitogorsk Iron Steel Works (PJSC MMK)	44,0 %
	PAO Severstal	42,4 %
Ukraine	Metinvest Group	35,5 %

7.2. **Definitive measures**

- (582) In view of the definitive conclusions reached by the Commission with regard to dumping, injury, causation and Union interest, anti-dumping measures should be imposed in order to prevent further injury to the Union industry resulting from the dumped imports.
- (583) Anti-dumping measures may take different forms. While the Commission has a large discretion when choosing the form of measures, the purpose remains to remove the effects of the injurious dumping. An *ad valorem* duty set in accordance with the lesser duty rule, ranging between 5,3 % and 33 % was established, as follows:

Country	Company	Dumping margin	Injury margin	<i>Ad valorem</i> anti-dumping duty
Brazil	ArcelorMittal Brasil S.A. and Aperam Inox América do Sul S.A.	16,3 %	20,2 %	16,3 %
	Companhia Siderúrgica Nacional	73,0 %	15,7 %	15,7 %
	Usinas Siderúrgicas de Minas Gerais S.A.	65,9 %	17,5 %	17,5 %
Iran	Mobarakeh Steel Company	17,9 %	34,0 %	17,9 %
Russia	Novolipetsk Steel	15,0 %	26,1 %	15,0 %
	Public Joint Stock Company Magnitogorsk Iron Steel Works (PJSC MMK)	33,0 %	44,0 %	33,0 %
	PAO Severstal	5,3 %	42,4 %	5,3 %
Ukraine	Metinvest Group	19,4 %	35,2 %	19,4 %

- (584) As set out above in recital (546), it is appropriate to change the form of the measure. On the basis of the specific facts of the case, the Commission considered that an *ad valorem* duty capped by a MIP which takes into account the rise in raw material prices after the investigation period would be the most appropriate form of measure in this case.

— On the one hand, setting the duty at the level of the *ad valorem* duty capped by the MIP would allow the Union producers to recover from the effects of injurious dumping. Setting a cap at the level of an effective MIP would be a safety net to enable them to achieve a sustainable profitability;

- On the other hand, setting a cap at the level of an effective MIP should also prevent any adverse effect of the price increases after the investigation period which could have a significant negative impact on the users' business. Moreover, it would prevent serious disturbances in the supply of the Union market.
- (585) Where imports are made at a CIF Union border price equal to or above the MIP established, no duty would be payable. If imports are made at a price below the MIP, the definitive duty should be equal to the difference between the applicable MIP and the net free at Union frontier price, before duty. In no event should the amount of the duty be higher than the *ad valorem* duty rates set in recital (583) and in Article 1 of this Regulation.
- (586) Accordingly, if imports are made at a price below the MIP, the lower of the differences between the applicable MIP and the net free at Union frontier price, before duty, and the *ad valorem* duty rates as detailed in the last column of the table in recital (583) would be payable.
- (587) For the purposes of the effective application of the MIP, and on the basis of the information collected during the investigation, the Commission decided to establish one MIP for all product types of the product concerned.
- (588) For the purpose of calculating such MIP, account has been taken
- first, both of the dumping margins found and of the amounts of duties necessary to eliminate the injury sustained by Union industry during the investigation period (the first step, a MIP based on the data of the investigation period only);
 - second, the increase in raw material prices after the investigation period (the second step, an adjusted MIP).
- (589) As a first step, the MIP based on the data of the investigation period is equal to the weighted average of:
- Where duties are based on the injury elimination level: The cost of production during the investigation period of the Union producers and a profit (7,9 %) as regards two Brazilian exporting producers (CSN and Usiminas) and;
 - Where duties are based on the dumping margin: The normal value, including transport (to arrive at a CIF border Union price) as regards all other exporting producers.

The methodology used by the Commission to calculate the MIP in the first step was identical to the one used in the recent GOES case ⁽¹⁾. Like in any anti-dumping investigation, the Commission collected data for the IP, which were verified, in order to establish normal values per product type and non-injurious target prices for the Union Industry, also per product type. The target prices for the Union industry consisted of the cost of production to which a reasonable profit was added. The level of the MIP is in this first step directly based on verified data for the IP. In addition, the lesser duty rule was taken into account. Where the *ad valorem* duties were based on the dumping margin, the normal values, to which transport costs were added to arrive at a CIF border Union price, were used in the calculation of the MIP. Where the *ad valorem* duties were based on the injury elimination level, the non-injurious target price for the Union industry was used. The MIPs were then calculated as a weighted average of the normal values and non-injurious target prices used. The weighing factor was established on the basis of the proportion of the volume of the imports to the Union from the companies where the *ad valorem* duty is based on the dumping margins and on the proportion of the volume of the imports from the companies where the *ad valorem* duty is based on the injury elimination level. The MIP is a weighted average of the prices (normal value and target prices) of the different product types.

- (590) As a second step, such MIP was subsequently compared to:
- the HRF sales prices during the post IP period on the Union market. Data on these prices were obtained from the users and from the Union industry during the investigation following the disclosure of the Information Document, as set out in recital (29). The investigation revealed that overall the MIP based on the data of the investigation period was below the post IP sales prices, in which case no duty would be payable. This finding of the investigation was corroborated by the statements of the Union industry and several users.

⁽¹⁾ Commission Implementing Regulation (EU) 2015/1953 of 29 October 2015 imposing a definitive anti-dumping duty on imports of certain grain-oriented flat-rolled products of silicon-electrical steel originating in the People's Republic of China, Japan, the Republic of Korea, the Russian Federation and the United States of America, OJ L 284, 30.10.2015, p. 130 and following.

- the HRF raw material (needed to produce HRF) prices after the investigation period on the Union market. In this context, the complainant argued that a MIP based on only data of the investigation period would be set at a too low level and would be ineffective and inappropriate given that prices started to rise after the investigation period from the historically low levels seen during the IP. Moreover, the complainant argued that the market has seen considerable volatility of raw material costs over the years and that raw material prices fell in the IP significantly ⁽¹⁾. The Commission reviewed the volatility of the raw material prices to produce HRF, in particular of coking coal and iron ore. It established that in particular the prices of coking coal had increased significantly after the investigation period.

(591) Against this background, the Commission calculated that the cost of manufacturing for producing HRF increased by 116 euro per tonne when comparing the cost of manufacturing during the IP with the cost of manufacturing during the period March – May 2017.

- If this total increase of 116 euro per tonne in the cost of manufacturing were to be fully attributed to the total cost increase in raw materials, this would most likely result in an overstatement of the proportion of the raw material increase in the total increase in the cost of manufacturing: it is more likely that also other costs of manufacturing (such as energy and labour costs) increased;
- On the other hand, if this total increase of 116 euro per tonne in the cost of manufacturing were to be equally attributed to all different cost components of the cost of manufacturing, this would mean that only 63 euro per tonne could be allocated to the increase of the cost of raw materials: this would most likely result in an understatement of the proportion of the raw material cost increase in the increase of the cost of manufacturing since it is generally assumed that the increase in the raw material costs, in particular of the coking coal, has been the main driver of the increase in the cost of manufacturing after the investigation period.

For all these reasons, a reliable figure identifying the increase in cost of manufacturing as a result of the increase of raw material prices ranges between 63 euro and 116 euro resulting in an additional amount of 89.50 euro per tonne.

(592) Based on this methodology, the MIP based on data of the investigation period was adjusted for the increase in raw material prices after the investigation period and was finally set at the following level

Countries concerned	Product range	MIP (EUR/tonne net product weight)
Brazil, Iran, Russia and Ukraine	All product types	EUR 472.27

(593) The complainant ⁽²⁾ submitted comments why measures, such as MIP cannot be considered a viable option in this case:

- First, MIP would not achieve the desired impact as they would be based on exceptionally low prices that prevailed during the IP.
- Second, there are fluctuations in prices of key raw material used to make HRF products.
- Third, the facts in the current investigation are considerably different compared to other recent investigations (such as the investigation into GOES from China, Japan, Korea, Russia and the USA ⁽³⁾) where the Commission imposed MIPs.
- Fourth, MIP set at IP prices would not bring any relief to the industry even in the event that market HRF prices fall again.

⁽¹⁾ Submission by Eurofer, 30 May 2017, AD635 — Hot-rolled flat ('HRF') steel products originating in Brazil, Iran, Russia, Serbia and Ukraine (the 'five countries') — Eurofer submission on the appropriate type of measures, p. 5.

⁽²⁾ Submission by Eurofer, AD 635 — Hot-rolled flat steel products originating in Brazil, Iran, Russia, Serbia and Ukraine (the 'five countries') — Eurofer submission on the appropriate type of measures

⁽³⁾ Commission Implementing Regulation (EU) 2015/1953 of 29 October 2015 imposing a definitive anti-dumping duty on imports of certain grain-oriented flat-rolled products of silicon-electrical steel originating in the People's Republic of China, Japan, the Republic of Korea, the Russian Federation and the United States of America (OJ L 284, 30.10.2015, p. 109).

- Fifth, experience from previous cases where MIPs were imposed shows that MIP are easy to circumvent or absorb.
- Sixth, MIP is not needed in this case given the abundant spare capacity in the Union.

(594) The Commission rejected these claims. The Commission noted that the complainant submission was based on a press article ⁽¹⁾ which did not reflect the actual measure chosen as appropriate by the Commission. Indeed, the Commission did not impose a MIP based on HRF prices during the investigation period as described by the complainant, but an *ad valorem* duty which is capped by the MIP which takes into account the rise in raw material prices after the investigation period. In particular, the Commission provides the following observations in response to the various statements of the complainant as set out in recital (593):

- First, setting the duty at the level of the *ad valorem* duty capped by an effective MIP should allow the Union producers to recover from the effects of injurious dumping and constitute a safety net for them
- Second, the Commission acknowledged that there are fluctuations in prices of key raw material used to make HRF products and therefore took into account the increase in prices of raw materials after the investigation period when calculating the MIP.
- Third, the Commission noted that the facts in the current investigation are not that different compared to other recent investigations (such as the investigation into GOES from China, Japan, Korea, Russia and the USA ⁽²⁾). Both cases have been characterised by significant price increases of the product concerned and the like product after the investigation period.
- Fourth, concerning the argument that the MIPs set at IP prices will not bring any relief to the industry in the event that market HRF prices fall again, the Commission reiterated that in case prices fall below the MIP the *ad-valorem* duty will be levied (up to the level of the MIP).
- Fifth, the Commission acknowledged that there is a certain risk of absorption or circumvention. Therefore in order to minimise the risk of circumvention exporting producers who wish to benefit from the MIP must present a valid commercial invoice to the customs authorities of the Member States. The invoice must conform to the requirements set out in Annex I hereof. Imports not accompanied by that invoice should be subject to the *ad valorem* anti-dumping duty applicable to the exporting producer in question in accordance with Article 1 hereof.
- Sixth, the Commission recalled that it changed the form of the measures, in line with the Union interest, to strike an adequate balance between the interests of Union producers and users in this particular case.

(595) Following the final disclosure, the following comments were made by interested parties on the methodology used for establishing the MIP and the level of the MIP.

(596) The complainant alleged that a duty based on the MIP was not appropriate for the following reasons:

- First, such a MIP would define a reference price in the market and distort market mechanisms;
- Second, raw materials account for over 50 percent of HRF and are highly volatile. The MIP is not appropriate in such a market;
- Third, a single MIP would encourage exports of higher value-added products;
- Fourth, such a tapered duty would encourage imports from levels well below the MIP and would in effect reward the exporting producers who dumped or undersold the most;
- Fifth, the MIP cannot prevent injurious dumping;
- Sixth, the impact of a MIP has an impact on the parallel case against Chinese HRF.

⁽¹⁾ Mlex press report: Price floor on hot-rolled steel seen as a middle ground for EU dumping-probe conundrum of 24 May 2017

⁽²⁾ Commission Implementing Regulation (EU) 2015/1953 of 29 October 2015 imposing a definitive anti-dumping duty on imports of certain grain-oriented flat-rolled products of silicon-electrical steel originating in the People's Republic of China, Japan, the Republic of Korea, the Russian Federation and the United States of America (OJ L 284, 30.10.2015, p. 109).

(597) The Commission rejected these arguments:

- First, it recalled, as already set out in recital (594), that it did not impose a MIP based on HRF prices during the investigation period, but an *ad valorem* duty which is capped by the MIP. This MIP also takes into account the rise in raw material prices after the investigation period. It did also not set a reference price in the market which distorts competition for the following reason: The imposition of an *ad valorem* duty capped at the MIP was not meant to fix prices at specific levels, but rather, as set out in recital (546), to remove the effect of injurious dumping and to protect users from any adverse effect of undue price increases after the investigation period. Moreover, the MIP is not a floor price, so exporting producers, if they wish so, can still sell at prices below or above the MIP. Therefore, exporting and Union producers still can compete with each other by differentiating their prices from each other, irrespective of the set MIP.
- Second, the Commission acknowledged that raw materials account for over half a cost of HRF (see recital (384)) and that there are fluctuations in prices of key raw material used to make HRF products. For this particular reason, as set out in recital (590), it took into account the increase in prices of raw materials after the investigation period when calculating the MIP.
- Third, the use of different MIPs per product type would have led to over more than 1 000 different levels that would be impossible to implement.
- Fourth, every exporting producer has to pay his own individual *ad valorem* duty when the price would be below the MIP, which does not encourage further dumping practices.
- Fifth, the MIP is set at a price level which clearly exceeded the prices of all exporting producers during the IP, which all stood below 400 euro per tonne.
- Sixth, the Commission acknowledged in recital (324) that the current investigation covers exactly the same product concerned and like product as the China investigations. However, as set out in more detail in recital (325), the current investigation and the China investigations do not cover the same periods relevant for the assessment of trends for injury and causal link. As such, although there is an overlap of six months concerning the investigation period between the two investigations (the period from 1 July 2015 to 31 December 2015), the determination of dumping and injury was made on the basis of an investigation period and a period considered which were different in the current investigation and the China investigations and which were already defined in line with the relevant provisions of the basic Regulation and announced in the Notice of Initiation. Therefore, due to the distinct character of the two investigations, the Commission did not use a double standard.

(598) The complainant also alleged that a single MIP would be contrary to the EU and WTO principle that anti-dumping duties are to be imposed on a country-specific and where possible an exporter-specific basis.

(599) Concerning the allegation that no individual duties apply to each exporting producer, reference is made to recitals (585) and (586), which describes the methodology whereby individual duties apply in case an *ad valorem* duty has to be paid. As a result, under Article 6.10 of the WTO AD Agreement, the Commission had determined an individual margin for each known exporting producer of the product under investigation.

(600) The Russian exporting producer PAO Severstal requested:

- its individual company specific MIP to be established and applied as an anti-dumping measure, based on the non-dumped export price resulting from the present investigation;
- alternatively, if the Commission were to maintain its approach on a MIP established for all exporting producers, that there should be a price differentiation for the product types of HRF, depending whether they are in coils or not in coils. It was claimed that the product types of HRF not in coils are at least 15 euro per tonne more expensive due to additional processing costs involved for slitting and cutting processes. It requested the Commission to recalculate therefore to recalculate two distinct MIPs (one for the product types in coils, and the other for the product types not in coils).

(601) The Commission rejected both requests of this Russian exporting producer:

- It maintained that the methodology it used is valid. In this respect, the Commission referred to the fact that this methodology, including the use of a basket for different exporting producers, was for instance already used in other recent investigations, such as the investigation into GOES from China, Japan, Korea, Russia and the USA ⁽¹⁾. Moreover, if an individual company specific MIP would have to be calculated, this would mean that at least eight different MIPs would need to be calculated. This would imply a multiplication of the administrative burden, in particular for the customs authorities;
- Moreover, whether the product concerned is in coils or not in coils, every exporting producer has to pay his own individual *ad valorem* duty when the price (i.e. the price paid for the product concerned whether in coils or not in coils) would be below the MIP, although the Commission acknowledged that this *ad valorem* duty would then be capped by the MIP. The MIP as such based on a mixture of product types, irrespective of whether they were full or slit for example.

(602) The Ukrainian exporting producer Metinvest welcomed the Commission's decision to cap the anti-dumping duty at a level of the MIP, as a less trade-distorting measure than *ad valorem* anti-dumping duties. However, it alleged that the MIP which was calculated by the Commission was too high for the following reason: The Commission overstated the increase in raw material prices, since it took into account for its calculations the period March – May 2017, which was characterised by significant price fluctuations, in particular as far as coking coal was concerned. According to its own methodology by this Ukrainian exporting producer, Metinvest alleged that the maximum value of the step 2 adjustment to the MIP corresponding to a change in prices of key raw materials between the investigation period and the period subsequent to the investigation period (1 July 2016 – 31 March 2017) cannot exceed 58 euro per tonne, not 89.5 euro per tonne. It therefore requested the Commission to recalculate the MIP.

(603) The Commission rejected the request of the Metinvest for the following reasons: First, taking into consideration that the raw material prices to produce HRF are characterised by their volatility and could even become more expensive than the price levels during the period March – May 2017, the Commission needed to calculate a MIP in such a way that it would at the same time remove the effect of injurious dumping and to prevent users from any adverse effect of undue price increases after the investigation period. Second, the methodology which was used by Metinvest and which led to a change in price of key raw materials (iron ore and coking coal) has the advantage of being simple, but on the other hand does not take into account other raw materials to produce HRF, such as scrap. Moreover, some use more or less scrap (or another raw material) what would be difficult to accurately quantify. In that respect, the Commission would run in the difficult task of establishing an average proportion of all raw materials needed to produce 1 tonne of HRF worldwide.

(604) The Russian exporting producer NLMK commented that the Commission failed to disclose properly the determination of the MIP for each exporting producer, in particular the used transport cost. Moreover, the scope of the 'transport' adjustment to the normal value of NLMK to determine its company-specific MIP that was later aggregated with others was not clear and could cover other costs that should not be covered.

(605) The Commission clarified that the transport costs which were added to the normal value to arrive at the CIF border price for NLMK (and for the other exporting producers) were the ones as reported by NLMK and verified during the on spot investigation. This fact is also corroborated by the fact that the calculation by NLMK to arrive at the CIF border price on the basis of its own transport costs is similar to the calculations of the Commission. As a result, the Commission did not artificially inflate the MIP established in respect of NLMK, or of other exporting producers.

(606) The Brazilian exporting producer CSN and its related company Lusosider welcomed the Commission's proposal to introduce a MIP with a view to striking the balance between the interests of the users and the interests of the Union industry. Nevertheless, they argued that the imports made by the ArcelorMittal Group from its Brazilian subsidiary should be disregarded in the step 1 calculations. Moreover, they argued that the Commission should minimise the artificial effect of exceptional raw material price increases on the calculation of the MIP either by capping such extraordinary fluctuations on the basis of historical price movement data, or by using the most

⁽¹⁾ Commission Implementing Regulation (EU) 2015/1953 of 29 October 2015 imposing a definitive anti-dumping duty on imports of certain grain-oriented flat-rolled products of silicon-electrical steel originating in the People's Republic of China, Japan, the Republic of Korea, the Russian Federation and the United States of America (OJ L 284, 30.10.2015). It should be noted though that in this particular case 3 MIPs were calculated instead of one.

recent period as the benchmark for the calculation of the cost increase. CSN alleged that the maximum value of the step 2 adjustment to the MIP corresponding to a change in capped prices of key raw materials between the investigation period and the period March – May 2017 cannot exceed 68.82 euro per tonne, not 89.5 euro per tonne. If a comparison would be made between the average raw material cost between the IP and the period June – July 2017, the change cannot exceed 71.62 euro per tonne. It therefore requested the Commission to recalculate the MIP.

- (607) The claims of the Brazilian exporting producer were rejected. First, the imports by ArcelorMittal from Brazil were dumped on the Union market, similar to the situations of the other exporting producers and should therefore not be treated differently. Second, the Commission recalled that it needed to calculate a MIP in such a way that it would at the same time remove the effect of injurious dumping and to prevent users from any adverse effect of undue price increases after the investigation period.
- (608) The Consortium argued that the methodology which was used by the Commission should be revised, also in light of the raw material peaks during the period March – May 2017 and calculated using a different approach. The Commission was of the opinion that the methodology it used is valid. Even if it were true that there were raw material peaks during the period March – May 2017, the Commission noted also that, as set out in recital (591), it did not fully attribute the calculated increase of 116 euro per tonne in the cost of manufacturing to the total cost increase in raw materials.
- (609) Furthermore the Consortium requested the Commission, to set the MIP at a level between 420 and 430 euro per tonne based on its own methodology. Its methodology was based on a construction of prices for a longer period (since 2013) and on the basis of data of various different sources and certain assumptions such as that the Union industry sells at a premium price of 25 to 30 EUR /tonne. In this respect the Commission noted that this methodology did not take into consideration neither the costs/prices of the exporting producers and the Union producers during the investigation period nor the dumping or injury margins found in the investigation. Therefore the proposed MIP does not meet the requirements of Article 9(4) of the basic Regulation.
- (610) As set out in recital (36), the Iranian exporting producer raised during the hearing of 3 August the issue of a clerical error made in its dumping calculation. The exporting producer explained that certain values were mistakenly rounded, probably due to their length.
- (611) The Commission analysed this claim and concluded that indeed there had been a clerical error in the dumping calculation for the Iranian exporting producer, which was corrected. As such, the dumping calculation and the MIP needed to be recalculated with the following outcome: the revised dumping margin and anti-dumping duty rate for Mobarakeh Steel Company amounted to 17,9 % and consequently, the revised MIP, adjusted for the increase in raw material prices amounted to 468.49 euro per tonne.
- (612) All parties were informed of this revision by means of an additional final disclosure on 4 August 2017 and were invited to comment thereon.
- (613) In case of a change of market circumstances, the basic Regulation provides several options. If the change is lasting in nature, Article 11(3) of the basic Regulation provides that a review of the need for a continued imposition of measures can be requested. The Commission will assess expeditiously the merits of any duly motivated request, so as to maintain a balanced level of protection against injurious dumping.
- (614) Following the final disclosure, the complainant argued that the form of the measure would make it effectively impossible to conduct such a review. Moreover, even if an interim review were to be conducted, the results of this review would be too slow to help the Union industry.
- (615) The Commission noted that such an interim review can be conducted expeditiously, and normally within a year's time.
- (616) The individual company anti-dumping measures specified in this Regulation were established on the basis of the findings of this investigation. Therefore, they reflected the situation found during this investigation with respect to these companies. These measures are exclusively applicable to imports of the product concerned originating in

the countries concerned and produced by the named legal entities. Imports of the product concerned produced by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, should be subject to the measures applicable to 'all other companies'. They should not be subject to any of the individual anti-dumping measures.

- (617) A company may request the application of these individual anti-dumping measures if it changes the name of its entity or sets up a new production or sales entity. The request must be addressed to the Commission ⁽¹⁾. The request must contain all the relevant information, including: modification in the company's activities linked to production; domestic and export sales associated with, for example, the name change or the change in the production and sales entities. The Commission will update the list of companies with individual anti-dumping measures, if justified.
- (618) In order to minimise the risks of circumvention, it is considered that special measures are needed in this case to ensure the proper application of the anti-dumping measures. These special measures include the following: the presentation to the customs authorities of the Member States of a valid commercial invoice and a valid declaration, which should conform to the requirements set out in the articles of this Regulation. Imports not accompanied by such an invoice and a declaration of honour should be made subject to the applicable *ad valorem* duty rate for all other companies.
- (619) Should a change in the pattern of trade due to the imposition of measures within the meaning of Article 13(1) of the basic Regulation take place, an anti-circumvention investigation may be initiated and, provided the conditions are met, *ad valorem* duties may be imposed.
- (620) Furthermore, in order to best guard against any possible absorption of the measures, particularly between related companies, the Commission will immediately initiate a review under Article 12(1) of the basic Regulation and may subject importations to registration in accordance with Article 14(5) of the basic Regulation, should any evidence of such behaviour be provided.
- (621) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive anti-dumping duties. They were also granted a period of time within which they could make representations following this disclosure. The comments submitted by other parties were duly considered but were not such as to change the conclusions.

8. RETROACTIVE IMPOSITION OF ANTI-DUMPING DUTIES

- (622) As mentioned in recital (20) above, the Commission made imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil and Russia subject to registration as of 7 January 2017 following a request by the complainant.
- (623) Pursuant to Article 10(4) of the basic Regulation, duties may be levied retroactively 'on products which were entered for consumption no more than 90 days prior to the date of application of provisional measures'. The Commission observes that no provisional measures were imposed in this case.
- (624) On this basis, the Commission considers that one of the legal conditions under Article 10(4) of the basic Regulation is not met and therefore the duties should not be levied retroactively on the registered imports.

9. APPEAL COMMITTEE AND FORM OF THE MEASURE

- (625) For the reasons set out in Sections 6 and 7 the Commission had disclosed its intention to impose the measure in the form of *ad valorem* duties capped by a MIP.
- (626) The committee established by Article 15(1) of the basic Regulation delivered a negative opinion on the draft Commission implementing Regulation, and a qualified majority of committee members voted against it. The Commission could hence not impose the measure in the form initially envisaged.
- (627) In line with Article 5(3) of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers ⁽²⁾, ('Comitology Regulation') the Commission submitted the same draft implementing Regulation to the appeal committee for further deliberation.

⁽¹⁾ European Commission, Directorate-General for Trade, Directorate H, 1049 Brussels, Belgium.

⁽²⁾ OJ L 55, 28.2.2011, p. 13.

- (628) During the appeal committee, different possible amendments were discussed. The chair of the appeal committee concluded that an amendment regarding the form of the measure, changing it from *ad valorem* duties capped by a MIP to duties to be expressed as a fixed amount per tonne, commanded the broadest possible support within the appeal committee.
- (629) The Commission subsequently modified the form of the measure and disclosed to the interested parties the changed form of the measure.
- (630) According to the case-law of the Union Courts, the Commission may decide to impose measures in different forms, inter alia, in the form of company-specific fixed amounts per tonne. When deciding on the form of the measures, the Commission needs to balance the different interests at stake, including the interest of users and consumers.
- (631) The Commission recalled that it hence enjoyed broad discretion how to weigh and balance the competing interests and this can be reflected in the choice of the form of the measure. It reiterated that the imposition of *ad valorem* duties runs the risk to burden users disproportionately, in particular when HRF prices risk increasing.
- (632) The Commission came to the conclusion that the appropriate balancing was different from its initial analysis. It considered that a measure in the form of a company-specific fixed amount per tonne more accurately reflected the injury caused by each exporting producer found to be dumping. Furthermore, it also ensures that the duty removes injury entirely. Finally, it ensures better stability and predictability for users and consumers, because it remains fixed over time.
- (633) The Commission considered that company-specific fixed duties per tonne take better into consideration the needs of users in the specific situation of the present case than *ad valorem* duties, because they ensure that even where world market prices increase significantly after the investigation period, they would not burden them disproportionately.
- (634) Therefore, the Commission considered appropriate to impose a fixed amount per tonne. By contrast to *ad valorem* duties capped by a MIP, this type of measure gives immediate protection to the Union industry against injurious dumping at a set level of duties, while excluding that importers and users may be forced to pay higher duties in the future. It, accordingly, achieves the type of balancing of interests exercise needed in the present investigation.
- (635) The fixed amount of duty per tonne is based on a level equal to the margin of dumping or injury established during the investigation for every cooperating exporting producer of the product concerned, whichever was found to be lower, in line with the second subparagraph of Article 9(4) of the basic Regulation.
- (636) The Commission established the specific duty by dividing the lesser amount of the dumping or injury margin calculated per exporting producer concerned by the total exports per tonne of the product concerned during the IP. The table below shows the applicable rates of the definitive anti-dumping duty which are based on the *ad valorem* duties as shown in the table in recital (583).

Country	Company	Definitive duty rate — euro per tonne net
Brazil	ArcelorMittal Brasil S.A	54,5
	Aperam Inox América do Sul S.A.	54,5
	Companhia Siderúrgica Nacional	53,4
	Usinas Siderúrgicas de Minas Gerais S.A. (USIMINAS)	63,0
	Gerdau Açominas S.A.	55,8

Country	Company	Definitive duty rate — euro per tonne net
Iran	Mobarakeh Steel Company	58,0
Russia	Novolipetsk Steel	53,3
	Public Joint Stock Company Magnitogorsk Iron Steel Works (PJSC MMK)	96,5
	PAO Severstal	17,6
Ukraine	Metinvest Group	60,5

- (637) Following the additional final disclosure of 22 September 2017, the Iranian exporting producer claimed that there was a clerical error in the calculation of its total exports of the product concerned during the IP made by the Commission.
- (638) After analysing the claim of the exporting producer, the Commission accepted that claim. As a result, the revised fixed amount of duty per tonne for Mobarakeh Steel Company (and all other companies) in Iran amounts to 57.5 euro per tonne net.
- (639) The Iranian exporting producer, the Brazilian exporting producer CSN, supported by its related Portuguese company Lusosider, the Brazilian exporting producer Usiminas, the Ukrainian exporting producer Metinvest submitted price undertakings. The Russian exporting producer NLMK already had submitted a price undertaking to the Commission on 13 February 2017.
- (640) 11 other interested parties (seven exporting producers, one related user of one of these exporting producers, the complainant; the Consortium and the Mission of Brazil to the European Union) submitted on 26 September 2017 the following comments.
- (641) The Brazilian exporting producer CSN commented that such a change of the form of the measure constitutes a very serious threat to the existence of its related Portuguese company Lusosider. Moreover, this exporting producer alleged that the change of the form of the measure does not achieve an appropriate balance between the interests of the Union industry on the one hand and of Lusosider and other users on the other hand. In addition, CSN alleged that there is, behind the change in the form of the measure, an undeniable change in the substance. The resulting effects of this change would catch Lusosider and many other users unprepared. Its related company Lusosider commented furthermore that such a substantial change in the form of the measure would force it to move its production of galvanised steel outside the Union. Moreover, Lusosider alleged that it would have to abandon its investment project of 70 million euro to allow them to produce an additional 300 000 tonnes a year in Portugal. Consequently, it alleged that the construction market on the Iberian peninsula would be in future without the appropriate supply of raw materials, supported by further data on the market developments in the Iberian Peninsula.
- (642) The Brazilian exporting producer Usiminas argued that its rights of defence were violated since a period of 1.5 working days is too short to make a meaningful submission. It also requested the Commission to proceed with its previous proposal to impose *ad valorem* duties capped by a MIP. Moreover, it alleged that due to the change of the measure the level of the injury margin becomes very important. Therefore, it reiterated that the post-importation cost which was applied by the Commission was too low and that the used target profit was unreasonably high and unlawfully inflated. It also reiterated its previous comment that the imports from Brazil, which allegedly caused material injury, are below the 'de minimis' threshold, if one excludes imports from the Brazilian exporting producer that is related to a Union producer, ArcelorMittal. Then it again- pointed out that it considered that the Commission had not chosen an appropriate target profit. Moreover, it commented again that the Commission's conclusion that the Union industry suffered material injury in the period of investigation in the present investigation appeared to be inconsistent with the finding, in the anti-dumping proceeding against HRF originating in China, that there was only a threat of material injury during 1 January 2015 to 31 December 2015. It also alleged that a mere mathematical difference between import prices of the countries concerned and the Union's domestic price does not satisfy the requirement of a proper price effect analysis under the basic Regulation.

- (643) The non-sampled cooperating Brazilian exporting producer Gerdau commented that the measure in the form initially envisaged (*ad valorem* duties capped at a MIP) had the support of many Member States. It believed that the Commission's original intention remains the most adequate treatment for the issue.
- (644) The Ukrainian exporting producer Metinvest alleged that the additional final disclosure was not supported by sound evidence and legal justification and also violated its rights of defence. Moreover, it alleged that the Commission ignored a number of key legal claims and arguments which would have significantly have reduced its dumping margin. It also argued that the proposed level of the fixed amount is prohibitive, discriminatory and disproportionate in light of the current high market prices and surging imports from other countries. The duration of the measures should be limited to two years. Finally, it commented that the Commission should seek constructive solutions for imports from Ukraine in accordance with the provisions of the EU-Ukraine Association Agreement and thus preference should be given to price undertakings, such as the one it had offered.
- (645) The Russian exporting producer NLMK considered that the Commission should have used the CIF value that corresponds to the sales invoice value of Novex, NLMK's internal export department company, and that the adjustment on the basis of Article 2(10)(i) of the basic Regulation the Commission had done when calculating the specific duty was not justified. It also referred to its price undertaking offer, complaining that it had not yet received a response.
- (646) The Russian exporting producer Severstal alleged that the change of the form of the measure following the General Disclosure Document constituted a violation of the EU general principles of the legitimate expectations and good administration. It suggested that the new form of measures should be applied with a reasonable delay of one month.
- (647) The Russian exporting producer MMK commented that it disagreed that the selected revised form of the measure better takes into consideration the needs of users and achieves better balancing of divergent interests at stake.
- (648) The Consortium alleged that that such a change of the form of the measure constitutes a worrying scenario for independent users. Moreover, it alleged that the change of the form of the measure does not achieve an appropriate balance between the interests of the Union industry on the one hand and of importers and users on the other hand. In addition, it alleged that there is, behind the change in the form of the measure, an undeniable change in the substance. The resulting effects of the measures would be a considerable increase of the purchase prices for users, putting them in a disadvantaged competition position vis-à-vis the Union producers. It therefore requested the Commission to reconsider its position and to maintain its initial proposal to cap the *ad valorem* duties by a MIP.
- (649) Both the Consortium and the Russian exporting producer MMK invited the Commission to analyse the impact of the recent signature of a Memorandum of Understanding between Tata Steel and ThyssenKrupp, regarding their combination of their European operations, and of the recent acquisition of Ilva by Arcelor Mittal, on the Union interest analysis.
- (650) The complainant commented that it continued to strongly disagree with the Union interest assessment that was the basis for the Commission's decision not to impose *ad valorem* duties. In this context, it repeated its claim that the Commission continued to ignore the legal test set out in Article 21(1) of the basic Regulation. It also commented that the per tonne duty had been set based on the historically low price levels that prevailed during the investigation period, meaning that such a duty would not be sufficient to remove the same margins of injurious dumping today. In particular, it alleged that the calculation of the fixed duty did not take into account the price developments after the investigation period. Furthermore, it claimed that the imposition of fixed duties is not appropriate in the current investigation given the large number of product types involved, referring to the position the Commission had taken in Commission Implementing Regulation (EU) 2016/387 concerning ductile cast iron from India, at recital 386. Moreover, it reiterated its earlier claim that the Commission must take into account the findings of the economic consultancy bureau, BKP, which had prepared an economic study on 12 June 2017 and a follow-up report on 24 July 2017. According to Eurofer, those provide clear evidence that the impact of duties on users would be minimal. Finally, it commented that the Commission should revisit its decision to exclude Serbia from the investigation in view of its increasing market share after the investigation period and future investment plans.

- (651) The Mission of Brazil to the European Union commented that the change in the form of the measure seems to offer excessive protection to the producers and to run counter to some of the key conclusions presented in the General Disclosure Document of 17 July 2017, particularly regarding the importance of the MIP to limit the effects of duties on importers and users and thus ensure balance between the different interests. It therefore expected that the Commission would revert to the original decision regarding definitive measures under this investigation.
- (652) The Commission analysed all these submissions in great detail. It grouped recurring themes on the operation of the Union interest test and on the rights of defence from different interested parties into the following recitals and then commented individual points one by one.
- (653) Several interested parties alleged that the change in the form of the measure did not strike the appropriate balance between the various interests. While the exporting producers and users warned against a disproportionate effect on users, the complainant maintained its position that *ad valorem* duties would be required. The Commission recalled first that according to the case-law, it has to include in its balancing exercise legal, economic and political aspects of the file. In the present case, the Commission and the Member States diverged on the political analysis of the balancing exercise. In such a situation, Article 6 of the Comitology Regulation mandates the chair of the appeal committee to endeavour to find a solution that yields the broadest support in the appeal committee. In the present case, that resulted in the proposal of imposing fixed duties.
- (654) The Commission maintained that the imposition of fixed duties does indeed constitute an appropriate mediation between the competing interests for the following reasons in the present case.
- (655) First, fixed duties remove injury entirely and give as such immediate protection to the Union industry. This responds to the political assessment that such immediate and full protection was warranted, as resulting from the deliberations of the appeal committee. Therefore, the imposition of such duties gives special consideration to the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition on the Union market, as required by Article 21(1) 2nd sentence of the basic regulation.
- (656) Second, in the present case, fixed duties ensure better stability and predictability for users and consumers, because they remain stable over time. The imposition of such duties thus excludes that users and consumers may be forced to pay higher duties if prices would further increase, which seems to be a likely scenario. The fact that the calculation of those duties was based on prices prevailing during the investigation period mediates the impact of those fixed duties, because they have been calculated on the basis of complete and verified data at a moment in time when prices were very low.

Consequently, the Commission did not reconsider its position by reverting to its initial proposal. It did also not shorten the duration of the measures, as requested by the Ukrainian exporting producer since there was not specific reason to depart from the ordinary 5-years-period indicated in Article 11(2) of the basic regulation. In particular, the market is the market of a well established product in a stable regulatory environment, contrary for example to the market for innovative products with heavy and variable government intervention, such as solar panels.

- (657) Prices could further increase if the consolidation of the Union industry continues and the Union industry gets more negotiating power. In that respect, the Commission accepted the comments that the acquisition of Ilva by a consortium, of which ArcelorMittal is the major shareholder, and the signature between Tata Steel and ThyssenKrupp to establish a joint venture are pertinent in this regard. However, these developments are ongoing and in particular still subject to approval of anti-trust authorities. Their possible impact on the market is hence uncertain and in any event only in the future. Therefore, the Commission considered that these developments do not warrant a recalibration of the competing interests for the purpose of the present Regulation. Concerning the claim of the complainant that the Commission ignored the findings of the economic consultancy bureau, BKP, the Commission reiterated its conclusions set out in recitals (473) and (474). This claim was therefore rejected.
- (658) Concerning its claim that the imposition of fixed duties is not appropriate in the current investigation given the large number of product types involved, the Commission noted the following. It acknowledged that fixed duties

are not ideal for non-homogeneous products. However, in this particular investigation, as established in recital (548), the imposition of *ad valorem* duties would have impacted the users disproportionately. On balance, the imposition of fixed duties is hence preferable in the present case. Therefore, this claim is rejected.

- (659) Concerning the comment of the complainant that the per tonne duty is based on historically low price levels that prevailed during the investigation period, the Commission recalled that anti-dumping duties are always based and calculated on the data of the investigation period regardless whether they are *ad valorem* or fixed. To establish the dumping margins with respect to the historically low prices in the IP, but to calculate the duties with higher post-IP prices would be tantamount to a result-oriented cherry-picking, and not be justified, because data from two different periods would have to be used. In any event, only the IP data were complete and verified. The circumstances invoked by the complainant are not extraordinary, but the normal play of market forces. Finally, in balancing the competing interests, the Commission has also taken into account the fact that the use of IP data moderates the impact of fixed duties, because they are based on historically low prices. Therefore, the claim to take post-IP data for the calculation of the fixed duty into account was firmly rejected.
- (660) Several interested parties alleged that the Commission breached their rights of defence by not setting a meaningful deadline for comments on the additional disclosure. In this respect, the Commission referred to Article 20(5) second sentence of the basic Regulation, providing that it can set a shorter deadline than 10 days for additional final disclosures. In the current case, the Commission was bound to wait for the outcome of the deliberations of the appeal committee which took place on 22 September. On the same day, it sent to all interested parties the additional final disclosure which was not longer than one page. Parties were thus informed on a Friday evening and had time to react on this limited change by Tuesday 2 pm. Parties had in total more than 3,5 days to prepare their comments on very limited additional text. In the light of the urgency of the matter, the Commission thus respected the rights of defence of the interested parties. The basic Regulation counts the days for disclosure as days, not as working days, as it can be expected that in a situation such as the present one, where all parties know perfectly well the schedule, interested parties take the necessary precautions to be able to work during a weekend.
- (661) Severstal claimed that the change in the form of the measure at such a late stage of the investigation breached the general principle of legitimate expectation and good administration. The Commission cannot accept the argument that a disclosure document gives legitimate expectations as to the final conclusion of an investigation. On the contrary, the purpose of disclosure is to inform interested parties of the Commission's preliminary findings and grant them the possibility to effectively exercise their rights of defence. For that reason, the cover letter to all interested parties expressly stated that 'this disclosure does not prejudice any subsequent decision which may be taken by the Commission, but where such decision is based on any different facts and considerations, these will be disclosed to your company as soon as possible'. This was what the Commission did with the additional final disclosure of 22 September 2017. Accordingly, an interested party cannot rely on the protection of legitimate expectations before the Commission has closed the review procedure at hand if the Commission chooses to act within the powers provided to it by the Union legislator⁽¹⁾. That argument, too, must, consequently, be rejected.
- (662) The claim of Metinvest that the proposed form of the measure is discriminatory, was not substantiated. The mere fact that imports from other countries increased after the investigation period does not make the proposed measure discriminatory within the meaning of Article 9(5) of the basic regulation. While injurious dumping has been found for the four countries at hand, no such findings exist vis-à-vis the imports from other countries. Hence, the reason for the different treatment is that the need to restore fair competition on the Union market exists for the imports from four countries.
- (663) Finally, the Commission reiterated that the imposition of fixed duties had commanded the broadest possible support in the appeal committee. Therefore, it rejected the comment of Gerdau that many Member States had supported the initial measures as factually incorrect. Indeed, in the appeal committee, only a limited number of Member States supported that proposal.
- (664) In addition, several interested parties resubmitted comments which were not part of the additional final disclosure: Usiminas referred to the used post-importation cost and the target profit, the 'de minimis' threshold, the price effect analysis, the target profit, and the allegation that the findings in the present investigation were

⁽¹⁾ See judgment of 7 May 1991 in Case C-69/89 Nakajima All Precision v Council, ECLI:EU:C:1991:186, at paragraph 120. See also, most recently, Opinion of Advocate General Campos Sánchez-Bordona of 20 July 2017 in Case C-256/16 Deichmann, ECLI:EU:C:2017:580, at paragraph 49.

inconsistent with the findings in the China investigation. Metinvest alleged that the Commission ignored a number of key legal claims and arguments, whereas NLMK alleged that the Commission wrongly adjusted its export price. In regard to these claims, the Commission noted that they were already addressed following the final disclosure. Concerning the claims of Usiminas, they were addressed with regard to post-importation cost in recital (576), and with regard to the target profit in recitals (563) to (565), with regard to 'de minimis' threshold in recitals (252) to (258), with regard to the price effect analysis in recital (273) and lastly with regard to the inconsistency with the China-investigation in recitals (330), (331) and (597). Concerning the claim of Metinvest and NLMK, the Commission referred to recitals (131) and (132) as well as (127) respectively and noted that the adjustment under Article 2(10)(i) of the basic Regulation had logically also a bearing on the calculation of the fixed duty.

- (665) The complainant reiterated its view that the Commission should have disclosed the injury margins for Serbia and its level of undercutting. It also called upon the Commission to revisit its decision to exclude Serbia from the investigation in view of its increasing market share on the Union market. The Commission acknowledged that the hearing officer had recommended to disclose the injury and undercutting margins to better understand whether the conditions under Article 3(4) of the basic Regulation are fulfilled. However, in the Commission's view, the disclosure of the injury margin and undercutting margins had not been necessary to evaluate its analysis on cumulation (recital (238)) as all necessary data had been properly disclosed in the information document. Its conclusion that the volume of the Serbian imports was negligible was based on the data available concerning the investigation period in line with Article 3(4) of the basic Regulation. The use of post-IP data has not been justified, because the developments described by the complainant are not extraordinary, but within the normal fluctuations of markets. Moreover, the Commission cannot base its analysis on injury on future investment plans of exporting producers. Should those plans materialise and lead to a lasting change in circumstances, the complainant may file a new anti-dumping complaint.
- (666) Five exporting producers offered price undertakings on 26 and 27 September 2017. The Commission observed that those offers have been received well after the deadline set by Article 8 of the basic Regulation read in conjunction with Article 20 of the basic Regulation, which refers to the final disclosure, and not to the additional final disclosure.
- (667) Article 8 of the basic Regulation foresees the possibility to offer (and accept) price undertakings in exceptional circumstances after that deadline.
- (668) The Commission will assess whether those circumstances are met, and whether the price undertakings can be accepted. However, since the additional final disclosure took place late in the investigation, the Commission could not perform the necessary analysis whether such price undertakings were acceptable prior to the adoption of the present Regulation. Therefore the Commission will exceptionally and in view of the complexity of the issue, notably the rights of defence of the interested parties, complete its analysis at a later stage in due course. This is explicitly foreseen by Article 8 of the basic Regulation, which provides for the possibility of accepting price undertakings in exceptional circumstances also after the definitive measure has been imposed. In this context, the Commission will also analyse the significance of the EU-Ukraine Association Agreement.
- (669) Concerning the allegation that the Commission did not reply to the price undertaking offer submitted to the Commission on 13 February 2017 by NLMK; the Commission referred to Article 8(1) of the basic Regulation, providing that undertakings can only be offered after provisional affirmative determination of dumping and injury has been made. In this particular case, no such determination had been made in February 2017. Therefore, the price undertaking offered by NLMK will be analysed at a later stage together with the other offers.
- (670) Moreover, with reference to Lusosider's comment that the construction market on the Iberian peninsula would be in future without the appropriate supply of raw materials, this claim will be analysed when reviewing the price undertaking offer by CSN/Lusosider.
- (671) The appeal committee did not deliver an opinion,

HAS ADOPTED THIS REGULATION:

Article 1

(1) A definitive anti-dumping duty is imposed on imports of certain flat-rolled products of iron, non-alloy steel or other alloy steel, whether or not in coils (including 'cut-to-length' and 'narrow strip' products), not further worked than hot-rolled, not clad, plated or coated originating in Brazil, Iran, Russia and Ukraine.

(2) The product concerned does not include:

- products of stainless steel and grain-oriented silicon electrical steel,
- products of tool steel and high-speed steel,
- products, not in coils, without patterns in relief, of a thickness exceeding 10 mm and of a width of 600 mm or more, and
- products, not in coils, without patterns in relief, of a thickness of 4,75 mm or more but not exceeding 10 mm and of a width of 2 050 mm or more.

The product concerned is currently falling within CN codes 7208 10 00, 7208 25 00, 7208 26 00, 7208 27 00, 7208 36 00, 7208 37 00, 7208 38 00, 7208 39 00, 7208 40 00, 7208 52 10, 7208 52 99, 7208 53 10, 7208 53 90, 7208 54 00, 7211 13 00, 7211 14 00, 7211 19 00, ex 7225 19 10 (TARIC code 7225 19 10 90), 7225 30 90, ex 7225 40 60 (TARIC code 7225 40 60 90), 7225 40 90, ex 7226 19 10 ((TARIC code 7226 19 10 90), 7226 91 91 and 7226 91 99.

(3) The rates of the definitive anti-dumping duty applicable to the product described in paragraph 1 and produced by the companies listed below shall be as follows:

Country	Company	Definitive duty rate — euro per tonne net	TARIC additional code
Brazil	ArcelorMittal Brasil S.A	54,5	C210
	Aperam Inox América do Sul S.A.	54,5	C211
	Companhia Siderúrgica Nacional	53,4	C212
	Usinas Siderúrgicas de Minas Gerais S.A. (USIMINAS)	63,0	C213
	Gerdau Açominas S.A.	55,8	C214
Iran	Mobarakeh Steel Company	57,5	C215
Russia	Novolipetsk Steel	53,3	C216
	Public Joint Stock Company Magnitogorsk Iron Steel Works (PJSC MMK)	96,5	C217
	PAO Severstal	17,6	C218
Ukraine	Metinvest Group	60,5	C219

(4) The rate of the definitive anti-dumping duty applicable to the product described in paragraph 1 and produced by any other company not specifically mentioned in paragraph 2 shall be the fixed duty as set out in the table below

Company	Definitive duty rate — euro per tonne net	TARIC additional code
All other Brazilian companies	63,0	C999
All other Iranian companies	57,5	C999
All other Russian companies	96,5	C999
All other Ukrainian companies	60,5	C999

(5) For the individually named producers and in cases where goods have been damaged before entry into free circulation and, therefore, the price actually paid or payable is apportioned for the determination of the customs value pursuant to Article 131(2) of Commission Implementing Regulation (EU) 2015/2447 ⁽¹⁾ the definitive duty rate, calculated on the basis of paragraph 2 above, shall be reduced by a percentage which corresponds to the apportioning of the price actually paid or payable. The duty payable will then be equal to the difference between the reduced definitive duty rate and the reduced net, free-at-Union-frontier price, before customs clearance.

(6) For all other companies and in cases where goods have been damaged before entry into free circulation and, therefore, the price actually paid or payable is apportioned for the determination of the customs value pursuant to Article 131(2) of Implementing Regulation (EU) 2015/2447, the amount of the anti-dumping duty rate, calculated on the basis of paragraph 3 above, shall be reduced by a percentage which corresponds to the apportioning of the price actually paid or payable.

(7) Unless otherwise specified, the provisions in force concerning customs duties shall apply.

(8) Where any exporting producer in Brazil provides sufficient evidence to the Commission that:

- (a) it did not export to the Union the product described in Article 1(1) during the investigation period (1 July 2015 to 30 June 2016);
- (b) it is not related to any of the exporters or producers in Brazil which are subject to the measures imposed by this Regulation; and
- (c) it has actually exported to the Union the product concerned after the investigation period or it has entered into an irrevocable contractual obligation to export a significant quantity to the Union, the Table in Article 1(2) may be amended by adding the new exporting producer to the cooperating companies not included in the sample and thus subject to the weighted average duty rate of the companies in the sample, which is 55,8 euro per tonne net.

Article 2

The anti-dumping proceeding concerning imports into the Union of the product concerned originating in Serbia is hereby terminated in accordance with Article 9(2) of the basic Regulation.

Article 3

Commission Implementing Regulation (EU) 2017/5 of 5 January 2017 making imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Russia and Brazil subject to registration shall be definitively repealed without the retroactive collection of duties.

Article 4

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

⁽¹⁾ Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ L 343, 29.12.2015, p. 558).

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 October 2017.

For the Commission

The President

Jean-Claude JUNKER

COMMISSION IMPLEMENTING REGULATION (EU) 2017/1796**of 5 October 2017****fixing the allocation coefficient to be applied to applications for export licences for cheese to be exported to the United States of America in 2018 under the quotas referred to in Regulation (EC) No 1187/2009**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ⁽¹⁾, and in particular Article 188 thereof,

Whereas:

- (1) Chapter III, Section 2 of Commission Regulation (EC) No 1187/2009 ⁽²⁾ opens the procedure for the allocation of export licences for cheese to be exported to the United States of America under the quotas referred to in Article 21 of that Regulation.
- (2) The quantities covered by the export licence applications for certain product groups and quotas exceed the quantities available for the 2018 quota year. The extent to which the export licences may be issued should therefore be determined by fixing the allocation coefficients to be applied to the quantities requested, calculated in accordance with Article 23(1) of Regulation (EC) No 1187/2009.
- (3) The quantities covered by the export licence applications for certain product groups and quotas are less than the quantities available for the 2018 quota year. The remaining amounts should be divided between the applicants, in proportion to the amounts applied for, by applying an allocation coefficient, in accordance with Article 23(4) of Regulation (EC) No 1187/2009.
- (4) Given the deadline established in Article 23(1) of Regulation (EC) No 1187/2009 for fixing allocation coefficients, this Regulation should come into force the day following that of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The quantities covered by export licence applications lodged pursuant to Regulation (EC) No 1187/2009 in respect of the product groups and quotas identified by '16-Tokyo and 16-, 17-, 18-, 20-, 21-Uruguay' in column 3 of the Annex to this Regulation shall be multiplied by the allocation coefficients set out in column 5 of that Annex.

Article 2

Applications for export licences lodged pursuant to Regulation (EC) No 1187/2009 in respect of the product groups and quotas identified by '22-, 25-Tokyo and 22-, 25-Uruguay' in column 3 of the Annex to this Regulation shall be accepted for the quantities applied for.

Export licences may be issued for further quantities distributed amongst applicants in accordance with the allocation coefficients set out in column 6 of the Annex, after acceptance by the operator within one week of publication of this Regulation and subject to the lodging of the requisite security.

⁽¹⁾ OJ L 347, 20.12.2013, p. 671.

⁽²⁾ Commission Regulation (EC) No 1187/2009 of 27 November 2009 laying down special detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards export licences and export refunds for milk and milk products (OJ L 318, 4.12.2009, p. 1).

Article 3

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 October 2017.

*For the Commission,
On behalf of the President,
Jerzy PLEWA
Director-General
Directorate-General for Agriculture and Rural Development*

ANNEX

Identification of group in accordance with Additional Notes in Chapter 4 of the Harmonised Tariff Schedule of the United States		Identification of group and quota	Quantity available for 2018 (in kg)	Allocation coefficient provided for in Article 1	Allocation coefficient provided for in Article 2
Note No	Group				
(1)	(2)	(3)	(4)	(5)	(6)
16	Not specifically provided for (NSPF)	16-Tokyo	908 877	0,1296811	
		16-Uruguay	3 446 000	0,0880789	
17	Blue Mould	17-Uruguay	350 000	0,0754310	
18	Cheddar	18-Uruguay	1 050 000	0,1212471	
20	Edam/Gouda	20-Uruguay	1 100 000	0,0955026	
21	Italian type	21-Uruguay	2 025 000	0,0704102	
22	Swiss or Emmentaler cheese other than with eye formation	22-Tokyo	393 006		19,6493175
		22-Uruguay	380 000		4,4705882
25	Swiss or Emmentaler cheese with eye formation	25-Tokyo	4 003 172		1,0007930
		25-Uruguay	2 420 000		1,4447761

DECISIONS

COMMISSION DECISION (EU) 2017/1797

of 23 May 2017

on the aid schemes SA.42393 (2016/C) (ex 2015/N) implemented by Germany for certain end-consumers (reduced CHP surcharge) and SA.47887 (2017/N) which Germany is planning to implement in order to extend the CHP support scheme as regards CHP installations used in closed networks

(notified under document C(2017) 3400)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having given notice to the parties concerned to submit their comments ⁽¹⁾ and having regard to their comments,

Having regard also to the Treaty on the Functioning of the European Union, and in particular of Article 108(3) thereof,

Whereas:

1. PROCEDURE

- (1) On 28 August 2015, the German authorities notified to the Commission the draft bill on the Reform of the Combined Heat and Power Generation Act (*Kraft-Wärme-Kopplungsgesetz*, 'the KWKG 2016, as notified'), which was then adopted into law on 21 December 2015. The KWKG 2016 replaced the Combined Heat and Power Generation Act of 19 March 2002 ('the KWKG 2002').
- (2) By letter dated 24 October 2016 ('the Opening Decision'), the Commission informed the German authorities that it had approved the support to Combined Heat and Power (CHP) installations, storage facilities and district heating/cooling networks granted under the KWKG 2016, as notified, but that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the reductions of the CHP surcharge for certain end-consumers granted under the KWKG 2016, as notified.
- (3) The Opening Decision was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the aid measures.
- (4) The Commission received comments from interested parties. It forwarded them to the German authorities, who were given the opportunity to react; their comments were received on 13 January 2017 by letter dated the same day.
- (5) The German authorities submitted their comments on the Opening Decision on 10 November 2016. Further to requests for information of 6 February 2017, 29 March 2017 and 28 April 2017, they provided additional information on 10 February 2017, 31 March 2017 and 2 May 2017.
- (6) The German authorities also informed the Commission that the provisions governing the CHP surcharge and the reductions of the CHP surcharge for certain end-consumers which were the object of the formal investigation procedure had been amended by a law of 22 December 2016 amending the provisions on electricity production from cogeneration and autogeneration (*Gesetz zur Änderung der Bestimmungen zur Stromerzeugung aus Kraft-Wärme-Kopplung und zur Eigenerzeugung*, the 'Law of 22 December 2016').

⁽¹⁾ OJ C 406, 4.11.2016, p. 21.

⁽²⁾ Commission Decision of 24 October 2016 on State aid SA.42393 (2016/C) (ex 2015/N) — Germany — Reform of support for cogeneration in Germany — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 406, 4.11.2016, p. 21).

- (7) On 29 March 2017 the German authorities notified to the Commission a planned modification of the support to CHP installations that the Commission had approved on 24 October 2016. The notification of that amendment was registered under SA.47887 (2017/N). On 3 April 2017 the German authorities provided additional information. The preliminary assessment of that amendment pursuant to Article 108(3) TFEU and Article 4 of Council Regulation (EU) 2015/1589 ⁽³⁾ is included in the present decision (Section 7).
- (8) On 25 April 2017, in both procedures, the German authorities informed the Commission that they exceptionally accept that the decision in both cases SA.42393 and SA.47887 be adopted and notified in the English language.

2. DETAILED DESCRIPTION OF THE AID MEASURE IN RESPECT OF WHICH THE FORMAL INVESTIGATION PROCEDURE HAS BEEN OPENED (REDUCED CHP SURCHARGES)

2.1. Presentation of the KWKG 2016: objectives and context

- (9) The KWKG 2016 (as notified and as amended) aims at improving the energy efficiency of energy production in Germany by increasing the net electricity production from CHP installations to 110 TWh/year by 2020 and to 120 TWh/year by 2025, as compared to the current yearly production of 96 TWh/year. The German authorities expect that such an increase would contribute to an additional reduction by 4 million tonnes of CO₂ emissions by 2020 in the electricity sector as in Germany electricity from CHP installations displaces separated production of heat and electricity by coal-fired power plants. It forms part of the different measures adopted in the framework of the *Energiewende* (energy transition).
- (10) Under the KWKG 2016 aid is granted to new, modernised and retrofitted high-efficiency CHP installations ⁽⁴⁾. Also, in order to maintain the current production level of 15 TWh/year of existing installations in the district heating sector and possibly bring it back to a previous level of 20 to 22 TWh/year, Germany grants support to existing gas-fired CHP installations in the district heating sector until 2019. The KWKG 2016 further supports new heat/cooling storage facilities or retrofitted storage facilities, as they increase the flexibility of CHP facilities, and can therefore help further reducing CO₂ emissions in the electricity sector. Finally, aid can be granted for the construction or expansion of heating/cooling networks given that using CHP installations in connection with district heating increases the energy efficiency of the system. All those aid measures were approved by the Commission in its Opening Decision ⁽⁵⁾.
- (11) The KWKG 2016, as notified, entered in force on 1 January 2016. It did not suspend the entry into force of the provisions on the surcharge and reductions of the surcharge. The Law of 22 December 2016 amends the provisions governing the CHP surcharge and the reductions of the CHP surcharge for certain end-consumers (the 'KWKG 2016, as amended') entered into force on 1 January 2017.
- (12) The KWKG 2002 that the KWKG 2016 has replaced was already pursuing objectives of climate protection, environmental protection and energy efficiency. Specifically, it already provided for premium payment to operators of CHP installations with the objective of reducing CO₂ emissions in Germany by 10 million in 2005 and at least 20 million in 2010 (compared to 1998). The premium was established by the KWKG 2002 and came on top of the price obtained for the sale of the electricity. The support under the KWKG 2002 was also financed from a surcharge (also designated hereinafter as the 'CHP surcharge') and the KWKG 2002 provided reductions of this surcharge to certain end-consumers. However the KWKG 2002 has not been notified the Commission pursuant to Article 108(3) TFEU.

2.2. The CHP surcharges and the reductions for certain end-consumers

2.2.1. Normal CHP surcharge and reductions for certain end-consumers under the KWKG 2016

- (13) The support for CHP installations, storage facilities and district heating/cooling networks is financed by a surcharge imposed on electricity that is supplied to end-consumers through the public electricity grid or through a closed distribution network ('the CHP surcharge'). It is collected by network operators as a supplement to network charges. That surcharge is designated as the *KWKG-Umlage* in the KWKG 2016 (see paragraph 26(1) of the KWKG 2016). Network operators have to keep separate accounts in respect of the collected CHP surcharge (paragraph 26(1) of the KWKG 2016, as notified, and paragraph 26(3) of the KWKG 2016, as amended).

⁽³⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽⁴⁾ Coal and lignite CHP installations are excluded from the support under the KWKG 2016.

⁽⁵⁾ Cf. footnote 1.

- (14) The amount of the CHP surcharge is calculated each year by the transmission system operators as a uniform rate per kWh supplied to end-consumers connected to the public grid or to closed distribution networks.
- (15) Paragraph 27b of the KWKG 2016, as amended provides that electricity that is stored is subject to the CHP surcharge when it is withdrawn from the storage facility and not when it is fed into the storage facility.
- (16) Some categories of end-consumers benefit however from a reduced rate established in accordance with the KWKG 2016. For end-consumers with a yearly consumption of more than 1 GWh ('Category B end-consumers'), the KWKG 2016, as notified, established a maximum CHP surcharge of 0,04 EUR cent/kWh. The other category of end-consumers benefitting from a reduced CHP rate are end-consumers active in the manufacturing sector consuming more than 1 GWh and for which the electricity cost represents more than 4 % of turnover ('Category C end-consumers'). For the latter category of end-consumers, the KWKG 2016, as notified, establishes a maximum CHP surcharge of 0,03 EUR cent/kWh (paragraph 26(2) of the KWKG 2016, as notified). End-consumers paying the full CHP surcharge are called 'Category A end-consumers'.
- (17) The CHP surcharge rates (in EUR cent/kWh) ⁽⁶⁾ that were applicable under the KWKG 2016, as notified, for the year 2016 are set out in Table 1 below:

Table 1

CHP surcharge rates in 2016

Category A	Category B	Category C
0,445	0,04	0,03

- (18) Based on the forecasts ⁽⁷⁾ made by transmission network operators to determine the CHP surcharge in 2016 ⁽⁸⁾, the German authorities have provided the following figures showing the relative size of each category and the importance of the reductions:

Table 2

Relative share in consumption and in the CHP funding by each end-consumer category

	Total	Cat. A	Cat. B	Cat. C
Forecasted consumption in GWh	485 149	259 748	143 883	81 518
Share of total consumption	100 %	53,54 %	29,66 %	16,80 %
CHP surcharge 2016 (EUR cent/kWh), rounded		0,445	0,04	0,03
Forecasted CHP surcharge (total in million EUR)	1 239	1 157	58	24
Share of total revenue	100 %	93 %	5 %	2 %
Notional ⁽¹⁾ CHP surcharge 2016 (EUR cent/kWh), rounded	0,255			

⁽⁶⁾ See https://www.netztransparenz.de/de/file/KWKG-Aufschlaege_2016_V01.pdf

⁽⁷⁾ Germany indicated that final figures would not be available before second semester 2017.

⁽⁸⁾ Forecasts available under: https://www.netztransparenz.de/de/file/KWKG_Prognose_2016_nach_KWKG_2016_internet.pdf

	Total	Cat. A	Cat. B	Cat. C
Difference compared to notional CHP surcharge		– 0,19 ⁽²⁾	0,215 ⁽³⁾	0,225 ⁽⁴⁾
Advantage (in million EUR) — rounded		– 494	310	184

⁽¹⁾ The notional CHP surcharge is the surcharge that would apply to all users if Categories B and C end-consumers were not benefitting from reductions.

⁽²⁾ If Categories B and C end-consumers were not benefitting from reductions, the CHP surcharge for Category A end-consumers would be 0,19 EUR ct/kWh lower.

⁽³⁾ If Categories B and C end-consumers were not benefitting from reductions, the CHP surcharge would be 0,215 EUR ct/kWh higher for Category B end-consumers (comparison with the notional CHP surcharge).

⁽⁴⁾ If Categories B and C end-consumers were not benefitting from reductions, the CHP surcharge would be 0,225 EUR ct/kWh higher for Category C end-consumers (comparison with the notional CHP surcharge).

- (19) Reductions of the CHP surcharge were introduced by the KWKG 2002. For end-consumers with a yearly consumption of more than 100 000 kWh ('Category B end-consumers'), the KWKG 2002 established a maximum CHP surcharge of 0,05 EUR ct/kWh. For end-consumers active in the manufacturing sector consuming more than 100 000 kWh and for which the electricity cost represents more than 4 % of turnover ('Category C end-consumers'), the KWKG 2002 established a maximum CHP surcharge of 0,025 EUR ct/kWh.

2.2.2. The CHP surcharge and the reductions under the KWKG 2016 as amended on 22 December 2016

- (20) The German authorities indicated that as of 1 January 2017 the reductions would be granted only to electro-intensive users that are eligible for reductions of the EEG surcharge (i.e. the surcharge that is levied in Germany on electricity in order to finance the support to renewables under the EEG Act) on the basis of paragraph 63(1) of the Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz*, EEG 2014 ⁽⁹⁾) read in conjunction with paragraph 64 of the EEG (see paragraph 27a of the KWKG 2016, as amended). That requirement implies that:

- (a) the undertaking must belong to one of the sectors listed in Annex 4 to the EEG;
- (b) the electricity that is subject to the EEG surcharge and that has been used by the undertaking itself was at least 1 GWh in the last financial year at the consumption point concerned;
- (c) the undertaking concerned can be classified at the consumption point concerned in one of the sectors of Annex 4 to the EEG;
- (d) the electro-intensity of the undertaking reaches:
 - 14 % for undertakings of list 1 of Annex 4 to the EEG,
 - 20 % for undertakings of list 2 of Annex 4 to the EEG;
- (e) the undertaking must have a certified energy or environmental management system in place. If it consumes less than 5 GWh, it can use alternative systems of improvement of the energy-efficiency.
- (f) the electro-intensity of the undertaking is calculated as the ratio between the electricity costs and the arithmetic mean of the gross added value ('the GVA') over the 3 last closed accounting years. The relevant electricity costs correspond to the undertaking's assumed electricity consumption multiplied by the assumed electricity price. The assumed electricity consumption corresponds to the arithmetic mean over the last 3 closed accounting years ⁽¹⁰⁾. The assumed electricity price corresponds to the average retail electricity price applying to undertakings with a similar level of electricity consumption.

⁽⁹⁾ The EEG 2014 is available under http://www.gesetze-im-internet.de/eeg_2014/. The EEG 2014 has been published in the German Official Gazette on 24 July 2014 (BGBl I 2014 No 33, p. 1066).

⁽¹⁰⁾ This methodology to determine electro-intensity of the undertaking has been approved by the Commission in State aid cases SA.38632 and SA.44679 (see Commission Decision of 23 July 2014 on State aid SA.38632 (2014/N) — Germany — EEG 2014 (OJ C 325, 2.10.2015, p. 4) and Commission decision of 20 December 2016 on State aid SA.44679 (2016/N) — Germany — Modification of the method used to define electro-intensity under the EEG (OJ C 68, 3.3.2017, p. 10).

- (21) For an undertaking fulfilling those conditions, the CHP surcharge is capped as follows:
- (a) consumption up to 1 GWh: no cap — full CHP surcharge;
 - (b) for the rest of the consumption: 15 % of the full CHP surcharge.
- (22) However, the total amount of the surcharge is limited for all consumption points benefitting from a reduction to the following percentages applied to the arithmetic mean of the GVA of the undertaking over the last 3 closed accounting years to:
- (a) 0,5 % of the GVA for undertakings reaching at least 20 % of electro-intensity;
 - (b) 4 % of the GVA for undertakings having an electro-intensity below 20 %.
- (23) In any event, the reduction of the CHP surcharge resulting from the caps may not result in an amount that is lower than 0,03 EUR ct/kWh for the electricity above 1 GWh.
- (24) For the year 2017, the amended KWKG 2016 establishes the level of the full CHP surcharge at 0,438 EUR ct/kWh (paragraph 37 of the KWKG 2016, as amended).

2.2.3. The adjustment plan

- (25) The German authorities have indicated the following CHP surcharge rates for the period 2011-2016:

	Full rate (in EUR ct/kWh)	Cat. B end-consumers		Cat. C end-consumers	
		(in EUR ct/kWh)	% of full rate	(in EUR ct/kWh)	% of full rate
2011	0,03	0,03	100	0,025	83
2012	0,002	0,05	2 500	0,025	1 250
2013	0,126	0,06	48	0,025	20
2014	0,178	0,055	31	0,025	14
2015	0,254	0,051	20	0,025	10
2016	0,445	0,04	9	0,03	7

- (26) The German authorities explained that the surcharge being established based on the estimated financing needs for the support and with a correction mechanism when estimates had been too high (or too low), the surcharge for Category A end-consumers has sometimes been very low, either because the estimated support was low in a given year or because of corrections for previous years in which the surcharge had been too high. This was for instance the case in 2012 where the CHP surcharge was low because of a correction due to the 2009 CHP surcharge which proved to be too high compared to real figures. By contrast the surcharge for Category C end-consumers remained fixed, representing therefore in 2012 a higher percentage of the normal surcharge.
- (27) The German authorities presented an adjustment plan for end-consumers of categories B and C. This plan aims at bringing progressively the CHP surcharges paid by the categories B and C end-consumers to a level of 100 % in the case of non-electro-intensive users and to a level of 15 % of the full CHP surcharge in the case of electro-intensive users by 2019.
- (28) The adjustment plan starts in 2011. Given that the surcharges paid by Category B or category C end-consumers represented in total for 2011 and 2012 more than 100 % of the normal surcharge, the adjustment plan applies to non-electro-intensive users only as of 2013. Category B consumers actually paid for 2013-2016 in total more than what the adjustment plan requires (21 % instead of up to 12,5 %), they will thus in practice have to be adjusted as of 2017 only. Category C consumers will be adjusted as of 2016 because for the period 2013-2015 they paid in total more than what the adjustment plan required (13 % instead of up to 12,5 %).

- (29) As for electro-intensive users, they paid in total for the period 2011 to 2016 15 % of the CHP surcharge. The adjustment plan will in practice apply to them as of 2017.
- (30) For the years 2017 and 2018 the adjustment plan is based on the rule that the surcharge represents double the surcharge of the previous year, i.e. the surcharge will amount to 0,060 EUR ct/kWh or 0,080 EUR ct/kWh in 2017, depending on the end-consumers belonging to Category B or C and 0,120 EUR ct/kWh or 0,160 EUR ct/kWh in 2018, depending on the end-consumers belonging to Category B or C. In 2019, they will pay 100 % of the surcharge. However, for electro-intensive users, the CHP surcharge will be capped at 15 % of the full CHP surcharge.
- (31) The adjustment plans follows the following path:

(%)

	Cat. B end-consumers (non-electro-intensive)	Cat. C end-consumers (non-electro-intensive)	Electro-intensive user
2011	7	7	7
2012	8,1	8,1	8,1
2013	9,2	9,2	9,2
2014	10,3	10,3	10,3
2015	11,4	11,4	11,4
2016	12,5	12,5 (0,056 EUR ct/kWh)	12,5
2017	18,3 (0,08 EUR ct/kWh)	13,7 (0,06 EUR ct/kWh)	13,7 (0,06 EUR ct/kWh) if former category C end-consumer and 15 if former category B end-consumer.
2018	36,5 (0,16 EUR ct/kWh)	27,4 (0,12 EUR ct/kWh)	15
2019	100	100	15

- (32) In case that the CHP surcharge paid in the past was lower than the level set in the adjustment plan, the beneficiaries will be requested to pay the difference.
- (33) This is the case for non-electro-intensive users belonging to Category C. For 2016 they will be requested to pay additional 0,026 EUR ct/kWh given that they paid 0,03 EUR ct/kWh while they should have paid 0,056 EUR ct/kWh according to the adjustment plan (see paragraph 36 of the KWKG 2016, as amended). This amount will be included in the final bill for 2016. However, the undertaking will not have to pay the additional 0,026 EUR ct/kWh if the total value of the reductions for the period 2014-2016 does not exceed EUR 160 000. Germany indicated that this threshold ensures that the reductions do not fulfil all criteria of the state aid within the meaning of the regulation adopted pursuant to Article 2 of the Council Regulation (EC) No 994/98 ⁽¹⁾ (*de minimis*).
- (34) The adjustment plan has been enacted as from 2016 in the Law of 22 December 2016 (paragraph 36 of the KWKG 2016, as amended).

2.3. Further details on the establishment and collection of the CHP surcharge

- (35) In order to make sure that each network operator is compensated for the extra costs resulting from his compensation obligation, the KWKG 2016 organises a system by which the burden resulting from the purchase and compensation obligations is spread evenly between transmission network operators in proportion to the consumption of end-consumers connected to their network or the distribution networks connected to their

⁽¹⁾ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

transmission networks and then compensated entirely to them through the CHP surcharge which is proportionate to the consumption in their respective network, as well (paragraphs 26-28 of the KWKG 2016, as notified and paragraph 29 of the KWKG 2016, as amended). That system can be summarised as follows:

- (a) network operators collect the CHP surcharge from end-consumers connected to their grid;
 - (b) all distribution network operators can require full compensation of the extra-costs (resulting from their obligation to pay premiums to CHP-installations connected to their grid, see recital 65 of the Opening Decision) from their respective transmission network operator; the burden is thus transferred to the transmission network operators;
 - (c) transmission network operators balance the financial burden out between themselves in such a way that each of them bears the same burden in proportion to the consumption of end-consumers (directly or indirectly) connected to their grid; then
 - (d) transmission network operators obtain compensation from the distribution network operators so that each network operator bears the same burden in proportion to the consumption of end-consumers connected to their respective distribution networks and in proportion to the CHP surcharge collected. In concrete terms, that implies that distribution network operators transfer the monies collected from the CHP surcharge to their respective transmission system operator (given that they already also transferred the entire financial burden to them under step b above) ⁽¹²⁾.
- (36) That system is maintained under the KWKG 2016, as amended; it is however spelled out in greater detail and in a clearer way in the KWKG 2016, as amended. There is one change in respect of how the CHP surcharge is collected from beneficiaries: following the amendments introduced by the Law of 22 December 2016, the reduced CHP surcharge that electro-intensive users pay is collected directly by the transmission system operators (paragraph 27(2) of the KWKG 2016, as amended).
- (37) As already described in the Opening Decision (recital 79), the KWKG 2016, as notified, establishes the methodology to be used by transmission network operators to calculate the CHP surcharge. The level of the CHP surcharge is on the one hand a function of the projected aid amount and the projected supplies of electricity to the end-consumers connected to the public grid and the closed distribution networks. On the other hand it will take into account corrections for preceding years and reductions for certain categories of end-consumers. The law also sets a yearly limit to the budget of the scheme and hence the total CHP surcharge (paragraph 29 of the KWKG 2016, as notified).
- (38) This methodology is maintained in the KWKG 2016 as amended (paragraph 26a of the KWKG 2016, as amended). For 2017, though, the KWKG 2016, as amended, deviates from this methodology and sets the level of the normal CHP surcharge rate directly in the law (at 0,438 EUR ct/kWh, see paragraph 37(1) of the KWKG 2016, as amended).

2.4. Duration

- (39) The German authorities committed to renotify the reductions of the CHP surcharge at the latest 10 years from the date of adoption of the final Commission decision.

2.5. Recipient(s)

- (40) Before the amendments made by the Law of 22 December 2016, there were two categories of beneficiaries of reductions.
- (41) On the one hand, recipients were so-called Category B end-consumers, i.e. end-consumers with a yearly consumption of more than 1 GWh (see also recital 15 above). The German authorities submitted that they do not possess exact information on the sectors in which beneficiaries of Category B would be active but indicated that companies of the manufacturing sectors generally had consumption above 1 GWh with the exception of 17 sectors in which average consumption is below 1 GWh/a listed in Table 23 to the Opening Decision.

⁽¹²⁾ That step is now explained in more explicit terms under paragraph 28(3) of the KWKG, as amended.

- (42) Also, the information provided during the preliminary investigation phase showed that undertakings active in the service sectors have generally consumption levels below 1 GWh with the exception of a few sectors like hospital care and hotels (see Tables 6 and 7 of the Opening Decision and recital 127 of the Opening Decision).
- (43) On the other hand, before the amendments made by the Law of 22 December 2016, the second category of beneficiaries of reductions were so-called Category C end-consumers, i.e. end-consumers active in the manufacturing sector and consuming more than 1 GWh and for which the electricity cost represents more than 4 % of turnover.
- (44) The German authorities did not provide detailed information on the sectors or types of undertakings that would comply with those conditions but indicated that most of them would qualify as electro-intensive users within the meaning of the 'Besondere Ausgleichregelung' under the EEG ('the BesAR').
- (45) After the amendments introduced by the Law of 22 December 2016, beneficiaries of reductions will be electro-intensive users fulfilling the criteria described under recital 20 above. That is, electro-intensive users within the meaning of the BesAR. In that connection, the German authorities had indicated during the preliminary investigation phase that companies benefitting from reduced EEG surcharges and included in the BesAR were mainly active in the sectors set out in table 3 below.

Table 3

Overview of the sectors of the BesAR

Economic activities [WZ 2008]	Number of delivery points	Privileged electricity [GWh]
0800 Mining and quarrying except energy producing materials	171	516
1000 Manufacture of food products	414	3 754
1100 Manufacture of beverages	38	364
1300 Manufacture of textiles	63	687
1600 Manufacture of wood and of products of wood and cork, except furniture; etc.	142	3 038
1700 Manufacture of pulp, paper and paper products	118	11 843
1800 Manufacture of paper and paper products etc.	28	353
1900 Manufacture of coke and refined petroleum products	15	[...] (*)
2000 Manufacture of chemicals and chemical products	283	28 421
2200 Manufacture of rubber and plastic products	351	3 984
2300 Manufacture of glass and glass products, ceramic, etc.	285	7 550
2400 Manufacture of basic metals	280	24 351
2500 Manufacture of fabricated metal products, except machinery and equipment	205	1 453
2600 Manufacturing of computers, etc.	21	337
2700 Manufacture of electrical equipment	26	799
2800 Machinery	21	474
2900 Manufacture of motor vehicles, trailers and semi-trailers	30	320
3100 Manufacture of furniture	5	[...] (*)
3800 Waste collection, treatment and disposal activities; etc.	90	544
4900 Land transport and transport via pipeline services	130	12 443
Aid to other sectors	61	1 624
Total	2 777	105 935

(*) Business secret

Source: BAFA, May 2016.

- (46) The German authorities also indicated that the beneficiaries would amount under the new reduction regime to around 2 000 manufacturing companies with an estimated total yearly electricity consumption of around 100 TWh.

2.6. Objective of reduced CHP surcharges

- (47) The German authorities have explained that in their views the reductions are needed in order to maintain the CHP support as that support is only possible if the levies do not jeopardise the competitiveness of the companies concerned. The German authorities fear that the full surcharge could in the medium term lead to an important reduction of investments and a weakening of the value chains in Germany and add that without the reductions the CHP support as well as the related objective of energy efficiency and reduced CO₂ emissions would not be accepted anymore.
- (48) The German authorities finally stressed that the burden of the CHP surcharge adds to the burden already resulting from the EEG surcharge, which is also aimed at providing sufficient financial resource to finance support to renewable energy, the latter being a policy that is — like CHP support — aiming at decarbonisation of electricity production in Germany.

2.7. Grounds for initiating the procedure

- (49) In its Opening Decision the Commission acknowledged the similarities between the CHP support and renewable support and the similarities between CHP surcharges and renewable surcharges. It acknowledged that there might be reasons to finance CHP support from electricity surcharges and that in order to ensure a regular but also sustainable financing source for the support and thus maintain the ambitious climate change objectives pursued with CHP support, reductions for certain end-consumers might be needed. However, the Commission had doubts as to proportionality and necessity of the aid measures and hence the distortion of competition.
- (50) The Commission also indicated that it would use the eligibility and proportionality criteria of recitals 185 to 192 of the Guidelines on State aid for environmental protection and energy 2014-2020 ⁽¹³⁾ ('the EEAG') as guidance and observed in this respect that the reductions granted by Germany were not limited to the same categories of users, in particular the reductions did not seem to be limited to undertakings that would be electro-intensive and facing international competition (and hence not being able to pass on their costs to customers).
- (51) The Commission therefore opened the formal investigation procedure.

3. COMMENTS FROM INTERESTED PARTIES AS REGARDS THE REDUCED CHP SURCHARGE

3.1. Comments from BV Glas

- (52) The Commission received comments from BV Glas, the trade association of the German glass industry. BV Glas indicates that the glass industry employs directly 53 000 people in Germany, has a turnover of EUR 9,2 billion (2015), that the sector has a high exposure to trade and that most of the glass-making companies qualify as Category C end-consumers.
- (53) BV Glas submits that the measure does not qualify as State aid given that it does not involve financial flows from the State budget. It does not provide any details in support of this view but merely observes that the CHP surcharge is similar to the EEG surcharge which it also considers as not qualifying as a State resource and refers to the comments it sent to the Commission in the framework of procedure SA.33995 (2013/C) ⁽¹⁴⁾. It also considers that the measure does not provide for an advantage, is not selective and has no impact on trade and competition without further explanations.

⁽¹³⁾ OJ C 200, 28.6.2014, p. 1.

⁽¹⁴⁾ State aid case SA.33995 (2013/C) (ex 2013/NN) on the aid scheme implemented by Germany for the support of renewable electricity and of energy-intensive users (see Commission Decision (EU) 2015/1585 of 25 November 2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and of energy-intensive users) (OJ L 250, 25.9.2015, p. 122)).

- (54) BV Glas further considers that the reductions granted to Categories B and C end-consumers are compatible with the internal market as they are necessary to secure the *Energiewende* in Germany and the related climate protection objectives. Without the reductions the climate change objective pursued by the support measures financed from the surcharge would be put at risk: on the one hand without reductions, the CHP surcharge is unsustainable for the sectors concerned. It would result in so many job losses that the CHP support policy (and ambitious climate change goals) would need to be abandoned; in addition, the industry would likely move towards countries with less ambitious climate policies. The proportionality of the measure results from the fact that concerned beneficiaries still pay a certain share of the CHP surcharge.
- (55) In particular for the glass industry, the disappearance of CHP surcharges would imply a 17-fold increase of the surcharge which would add on to the energy tax, the EEG surcharge and increased network charges resulting from an increased renewable share in production mix. In this respect BV Glas underlines that investments in the glass industry in Germany are decreasing, which is due to high energy surcharges. BV Glas further points to value chains linked to the glass industry; they would also disappear if the glass industry were to delocalise.
- (56) BV Glas also considers that the limitation of Category C reductions to end-consumers active in the manufacturing sector is not discriminatory and also within the logic of the system because the manufacturing sector is generally a price taker contrary to service providers, faces intense international competition and cannot pass on costs to customers. BV Glas further submits that the service sector generally has lower CO₂ emissions and delocalisation of service activities would not imply risks of carbon leakage; also, they would generally relocate to another Member State and not outside the Union.
- (57) BV Glas also explains that the glass industry has already reached a high degree of energy efficiency and that an increased charge rate would not incentivise further reductions. BV Glas further explains that electro-intensive users are constantly incentivised to improve energy-efficiency given the high share that energy prices represent in total production costs (often between 20 % and 50 %). It has also underlined that the German glass industry continuously improved its energy efficiency rate over the years and that the German glass industry is taking part in several initiatives aimed at improving energy efficiency. It is also part of an agreement (through the BDI) by which the industry has committed to improve energy efficiency by 1,35 % per year.
- (58) Finally, BV Glas considers that legitimate expectations prevent recovery in the present case given that the Commission concluded in a 2002 decision that a previous version of the KWKG did not constitute aid.

3.2. Trimet

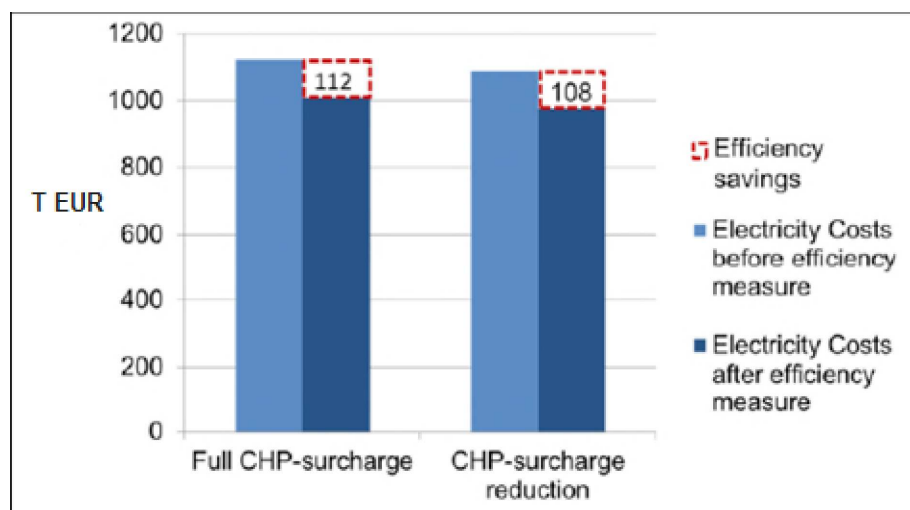
- (59) The Commission also obtained a short letter from Trimet in which Trimet views the reductions as necessary as the full surcharge would represent an amount of around EUR [...] (*) and would thereby eat up a large part of the group result. Trimet indicated that it was in favour of limiting the reductions to electro-intensive users eligible for reductions of the EEG surcharge under the BesAR.

4. COMMENTS SUBMITTED BY THE GERMAN AUTHORITIES AFTER THE OPENING DECISION AS REGARDS THE REDUCED CHP SURCHARGE

- (60) The German authorities consider that opening the formal investigation procedure was unjustified because it demonstrated during the preliminary investigation phase that the reductions are necessary and proportionate. It does not provide any additional elements on this point but indicates that the reduction system was amended and that the reductions are now granted to electro-intensive users only that are facing international competition.
- (61) The German authorities stress that the new reduction system introduced by the Law of 22 December 2016 is entirely built on the eligibility and proportionality criteria used for granting reductions of the EEG surcharge under the BesAR that the Commission approved in case SA.38632 (2014/N) Germany — EEG 2014 — Reform of the Renewable Energy Law.

(*) Business secret

- (62) The German authorities further explain that the objective of the CHP surcharge is to contribute to the common aim of energy efficiency and environmental protection. They admit that reductions of electricity prices in general could in theory reduce the incentive to save electricity but that this is not the case here because for electro-intensive users the electricity price in itself is a sufficient incentive to become more energy-efficient. Even a reduced CHP surcharge increases the electricity costs of those companies and the incentive to become more energy-efficient.
- (63) The German authorities give the example of a company with a total yearly energy consumption of 10 GWh that has a saving potential of 1 GWh. The potential savings would amount to EUR 112 000 if the full CHP surcharge was paid. With a reduced CHP surcharge savings would still amount to EUR 109 000 ⁽¹⁵⁾. The German authorities underline that the example shows that electricity savings pay off also with CHP surcharge reduction. Additionally, beneficiaries generally use a certified energy management system. With rising awareness the likelihood that companies will identify and implement energy efficiency measures will therefore potentially increase. Moreover, due to the parallelism between the reduction schemes of CHP surcharge and EEG surcharge, the incentives for energy-efficiency would be increased further by the EEG surcharge.



- (64) The German authorities stress that the new system of reductions introduced by the Law of 22 December 2016 targets electro-intensive users subject to international competition i.e. the ones at threat of bankruptcy or delocalisation if they would have to bear the full CHP surcharge but that those companies will nevertheless still contribute to financing the support (in principle 15 % of the surcharge unless the surcharge reaches a certain level of GVA).
- (65) The German authorities note that the reductions have a limited impact as the CHP surcharge in relative terms is not so high. In any event negative impacts would be outweighed by positive impact.
- (66) Also, based on the data available for companies eligible to a reduced EEG surcharge, the German authorities simulated that the full CHP surcharge would amount to 0,255 EUR cent/KWh if no reductions were to apply ('notional' CHP surcharge in the table below) and that this surcharge rate would still represent between 1 and 9 % of GVA for a sample of around 100 companies eligible to reduced EEG levies and having a consumption above 1 GWh. It provided updated figures during the formal investigation showing that for the 20 first eligible companies to the BeSAR (in terms of consumption), the notional CHP surcharge would represent between 0,8 and 6 % (based on 2015 figures) of the companies' GVA and the full CHP surcharge (amounting to 0,445 EUR ct/kWh) would represent between 1 % and 11 % of GVA.

⁽¹⁵⁾ Assumption: Electricity tariff after EEG surcharge reduction 11,2 EUR cent/kWh.

- (67) It also submitted the following simulation to illustrate the possible impact of a full surcharge on companies:

Table 4

Simulation of the impact of a full surcharge

	Notional CHP surcharge	Surcharge under the CHP law 2016	End-consumer	Consumption (GWh)	Burden w/out privilege (GWh)	Burden under the CHP law KWKG 2016 (EUR)	Increase in burden by factor
Cat B	0,255	0,04	Industry 1	10	0,0255	8 050	3,17
			Industry 2	100	0,255	44 050	5,79
Cat C	0,255	0,03	Industry 3	1 000	2,55	304 150	8,38

- (68) Germany finally stressed that the burden of the CHP surcharge adds to the burden already resulting from the EEG surcharge.

5. DETAILED DESCRIPTION OF THE NOTIFIED AID SCHEME SUBJECT TO PRELIMINARY EXAMINATION (SA.47887)

- (69) The support to new CHP installations with installed capacity between 1 and 50 MWe¹ that was notified by the German authorities as SA.42393 (2015/N) and approved by the Opening Decision is to be granted as of the winter 2017/2018 to operators selected in tenders (see recital 91 of the Opening Decision). Participation in those tenders was to be subject to the condition that the entire electricity produced in the CHP installation is injected into the public grid and that if the electricity produced by the CHP installation is directly consumed by the owner of the CHP installation or is injected into a closed distribution network without being first injected into the public grid, the installation concerned would not be eligible to participate in the tender. The German authorities had indicated that without that exclusion a level playing field in the tender would not have been ensured. It explained that given that self-consumed CHP electricity is eligible for a reduced EEG surcharge CHP installations used for self-consumption would have had a systematic advantage over CHP installations feeding electricity into the grid (see recital 94 of Opening Decision).
- (70) On 29 March 2017, the German authorities informed the Commission that they were considering using the empowerment laid down in paragraph 33a(2)(b)(bb) of the KWKG 2016, as amended, to allow the participation in tenders of CHP installations whose electricity is injected into a closed distribution network instead of being injected in the public grid. CHP installations used for autoconsumption would however remain ineligible for participation in the tenders support and are not concerned by the notified amendment.
- (71) Concerning CHP installations used in closed distribution networks, the German authorities explained that the exclusion had initially been based on the following assumptions: when the production and the consumption occurs in the same closed network, network charges can be lower compared to a constellation where all the consumption is produced by CHP installations outside the closed distribution network. This can — in certain circumstances — allow the operator of the CHP installation in the closed distribution network to obtain a better price for the electricity produced compared to an operator injecting electricity into the public grid. In a tender in which operators compete for a fixed premium that will be paid on top of the market price, operators of CHP installations to be used in closed distribution networks could have benefitted from a competitive advantage and if that competitive advantage had been systematic and significant, it would have allowed those operators to bid strategically above their costs and this would have resulted in overcompensation. The German authorities added that the above mentioned effect could also be possible outside closed distribution networks but that an advantage for the operator of a CHP installation is only feasible if only a few end-consumers are connected to the same grid. Therefore in a public grid, the effect does generally not lead to a distortion of competition.
- (72) However, after having conducted a more detailed study of the issue, the German authorities have observed that closed distribution networks come in different constellations and that generally network charges are not saved or the savings are rather low and the risks of strategic bidding mentioned in recital 71 above is much lower than assumed. That conclusion results from a number of observations that the German authorities could make in the meantime.

- (73) First, for the strategic bidding to materialise, the CHP installation would need to obtain a much better price for the electricity produced, which implies that the saving of network charges has to be substantial. For a measurable effect, the production would need to be sold for a high share to local consumption. Otherwise there would be no potential to obtain better prices.
- (74) Secondly, the beneficiaries of lower network charges are all the end-consumers in the closed distribution network, regardless if they conclude an energy supply contract with the CHP operator or not. Therefore the CHP operator would have to make contracts with all or at least with the majority of the end-consumers. If there are many end-consumers connected to the closed distribution network, free rider behavior is likely to be the result. The end-consumers would not be willing to pay the CHP operator higher prices as network charges would be lower anyway. As CHP installations are long-term assets, the operator furthermore would have to make sure to have long term contracts with the majority of the end-consumers connected to the closed distribution network, which again reduces the possibility to obtain (much) higher prices from the end-consumers.
- (75) Thirdly, end-consumers in closed distribution networks are often industrial users who are entitled to reduced network fees because of different exemptions in paragraph 19 of the Electricity Network Fee Regulation (*Stromnetzentgeltverordnung*). As the reductions are based on the stable or specific consumption profile of the end-consumers concerned and not to the fact that the network is a closed distribution network, there is only little or no margin for significant reductions of network fees which could be used to negotiate higher prices.
- (76) As a result, the German authorities observed that the supposed competitive advantage was not necessarily significant and would also not be systematic so that the strategic bidding risk would also be much lower than initially feared (if existing at all). The German authorities are therefore contemplating to allow the participation of CHP installations producing electricity that is injected into a closed distribution network to the tenders without any further changes in the tender design. If however further enquiries during the ongoing legislative procedure show that there remains a distortion of competition and that specific measures in the tender design are needed, the German authorities committed to notify these effects and any countermeasures to the Commission. In any event, the German authorities committed to include into the evaluation of the CHP support scheme also the participation of CHP installations producing electricity that is injected into closed distribution networks.
- (77) The German authorities confirmed that the CHP installations concerned are the CHP installations described under recitals 23 and 63 of the Opening Decision and for which the German authorities had provide the following LCOE calculations.

Table 5

LCOE calculations for projects implemented by contractors, outside the BesAR, larger than 100 kWel, over 15 years (2016-2030) up to 10 MW and over 20 years (2016 to 2035) above 10 MW, discount rate 30 % per year — in EUR cents/kWh (2013 values)

Sector in which the client of the contractor is active	manufacture of automotive components	automobile manufacturer	automobile manufacturer	automobile manufacturer	automobile manufacturer	automobile manufacturer
Installation type	BHKW 5	BHKW 5	DT 1	GT 1	BHKW 6	GUD 1
El. Capacity	2 000 kW	2 000 kW	5 000 kW	10 000 kW	10 000 kW	20 000 kW
Full-load hours	4 500 h/a	8 000 h/a	5 500 h/a	5 500 h/a	5 500 h/a	5 000 h/a
Self-consumption rate	50 %	100 %	100 %	100 %	100 %	80 %
LCOE	10,42	7,22	12,13	8,42	8,49	11,56
Average market price	6,77	6,25	6,25	6,25	6,25	5,87
Difference between LCOE and market price	3,65	0,97	5,88	2,17	2,24	5,7

- (78) Like the other CHP-installations that can take part in the tenders, they will have to be high-efficiency CHP installations to be eligible.
- (79) The aid to the CHP installations selected in the tender will be granted as premium on top of the market price during 30 000 full load operating hours. No premium will be paid when the value of hour contracts is null or negative on the spot exchange (day ahead) for Germany (paragraph 7(8) KWKG 2016 as notified, paragraph 7(7) of the KWKG 2016, as amended). The electricity generated during this period is not taken into account for the calculation of the number of full load hours during which support can be granted. Also the CHP operator is responsible for balancing.

6. ASSESSMENT OF THE REDUCTIONS OF THE CHP SURCHARGE

6.1. Existence of State aid within the meaning of Article 107(1) of the Treaty

- (80) Pursuant to Article 107(1) of the Treaty, 'save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (81) In determining whether a measure constitutes State aid within the meaning of Article 107(1) of the Treaty, the Commission has to assess whether the measure:
- (a) confers an advantage on certain undertakings or certain sectors (selective advantage);
 - (b) is imputable to the State and involve State resources;
 - (c) distorts or threatens to distort competition;
 - (d) is liable to affect trade between Member States.

6.1.1. Selective advantage

- (82) As recalled by the Court in its judgment of 21 December 2016 in the Joined Cases *Commission v World Duty Free Group* and *Commission v Banco Santander and Santusa* ⁽¹⁶⁾, for establishing the selectivity of a tax measure or a levy, it is necessary to determine whether that measure introduces, between operators that are, in the light of the objective pursued by the general tax system concerned, in a comparable factual and legal situation, a distinction that is not justified by the nature and general structure of that system.
- (83) In its Opening Decision the Commission had found that in principle the CHP surcharge is to be paid on each kWh supplied to end-consumers through the public grid or the closed distribution network operated by the respective network operators. That surcharge is a uniform surcharge by kWh. As described under Sections 2.2.1 and 2.3 above, the system for determining the surcharge remained basically unchanged under the KWKG 2016, as amended and remains based on the principle of a uniform CHP surcharge. The normal CHP surcharge amounted to 0,445 EUR ct/kWh in 2016 and amounts to 0,438 EUR ct/kWh in 2017.
- (84) Hence, by limiting the CHP surcharge respectively to 0,04 EUR cent/kWh and to 0,03 EUR cent/kWh, the KWKG 2016, as notified, reduces the CHP surcharge of companies qualifying as Category B or C end-consumers and thus relieves them from a burden which they would normally have to bear. Also, by limiting the CHP surcharge respectively to 0,056 EUR ct/kWh in 2016, to 0,06 and 0,08 EUR ct/kWh in 2017 and to 0,12 EUR ct/kWh and 0,16 EUR ct/kWh in 2018 the KWKG 2016, as amended, reduces the financial burden for undertakings qualifying as Category B or C end-consumers and thus relieves them from a burden which they would normally have to bear. Also by limiting the CHP surcharge to 15 % of the full surcharge (and to 0,5 % or 4 % of their GVA) for the electro-intensive users fulfilling the conditions set out in recital 20 above the KWKG 2016, as amended, reduces the financial burden for undertakings qualifying as Category B or C end-consumers and thus relieves them from a burden which they would normally have to bear. Such a reduction constitutes an advantage ⁽¹⁷⁾.

⁽¹⁶⁾ Judgment of 21 December 2016, *Commission v World Duty Free Group*, Joined Cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, paragraph 60.

⁽¹⁷⁾ Judgment of 11 December 2014, *Austria v Commission*, T-251/11, ECLI:EU:T:2014:1060, paragraph 112; Judgment of 10 May 2016, *Germany v Commission*, T-47/15, ECLI:EU:T:2016:281, paragraph 55.

- (85) The advantage is also selective. Indeed, as far as Category C is concerned, the reduction is limited to the manufacturing sector only. Within this sector, the reduction is further granted only to companies having an annual consumption of more than 1 GWh and having electricity costs that represent more than 4 % of their turnover (which excludes further manufacturing sectors as they typically do not reach those values, see recital 127 of the Opening Decision). The same observation applies to the reductions granted to electro-intensive users fulfilling the conditions set out in recital 20 above. The reductions are selective given that they are granted to undertakings active in specific sectors only and within the sector the reductions are granted only to undertakings reaching 1 GWh of consumption at a given consumption point and when they reach a certain electro-intensity threshold.
- (86) As to Category B, the advantage is limited to undertakings reaching an annual consumption level of 1 GWh. The Commission notes further that although Category B seems open to all sectors, the 1 GWh threshold *de facto* excludes several sectors and undertakings of the economy which typically never reach that consumption threshold.
- (87) However, in the light of the objective pursued by the surcharge (contribute to the CHP support), end-consumers of Categories B or C and electro-intensive users are in a comparable legal and factual situation. In particular, those end-consumers consume electricity injected into the public grid or closed network as the end-consumers of Category A. They benefit also similarly to end-consumers of Category A from the lower level of CO₂ emissions due to high energy efficient CHP support financed by the CHP surcharge.
- (88) The German authorities did not submit any comments on the selectivity of the measure.
- (89) BV Glas seems to argue that the fact that the reductions are limited to the manufacturing sector would be in the logic of the system because undertakings active in the manufacturing sectors are generally price takers and cannot pass on their extra costs to customers while service sectors would generally pass on surcharges to customers.
- (90) The Commission notes first that when the Commission has established that a given measure creates differences between undertakings which, with regard to the objective of the measure in question, are in a comparable factual and legal situation, it is for the Member State which has introduced such a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question ⁽¹⁸⁾. The German authorities have not claimed that the reductions would be in the nature and general scheme of the CHP surcharge. In particular, it has not claimed that the CHP surcharge would rest on the principle that the CHP surcharge is imposed on undertakings only if they can pass on their extra costs to their customers. In addition, the eligibility conditions do not support the — unsubstantiated — assumption that the normal charge system of the CHP surcharge rests on the principle that the CHP surcharge is imposed on undertakings only if they can pass on their extra costs to their customers.
- (91) First, eligibility for reductions under the KWKG 2016, as notified does not depend on the undertakings demonstrating that they cannot pass on their extra costs to their customers. Second, no elements have been provided demonstrating that all sectors and undertakings benefitting from the Category B and C reductions *de facto* cannot pass on their extra costs and that those excluded from the reductions can all pass on their extra costs. Third, BV Glas's arguments that it is normal that the reductions would be limited to undertakings active in the manufacturing sector is at odds with reductions granted to Category B end-consumers: they can be active in the service sector and do not need to be electro-intensive. As to the KWKG 2016, as amended, the German authorities did not submit that the CHP surcharge was based on the ability of end-consumers to pass on costs. Also, the inability to pass on costs is not a formal eligibility condition for the reductions.
- (92) The Commission therefore concludes that the reductions cannot be viewed as within the logic of the CHP surcharge system and maintains its conclusion that the reductions under examination constitute a selective advantage for the beneficiaries of the reductions.
- (93) The German authorities have also introduced paragraph 27b in the KWKG 2016, as amended, which provides that electricity that is stored is subject to the CHP surcharge when it is withdrawn from the storage facility and not when it is fed into the storage facility. The Commission considers that that provision is in the nature and

⁽¹⁸⁾ Judgment of 8 September 2011, *Commission v the Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraph 32.

general scheme of the CHP surcharge (and thus does not constitute a selective advantage): it aims at avoiding double taxation, a principle that is generally applied in tax or levy systems. That provision is in line with the principle that the surcharge is due when electricity is taken from the grid and consumed. Germany has explained that electricity that is stored in the storage facility has however not yet been consumed. The Commission therefore considers that the exemption provided under paragraph 27b in the KWKG 2016, as amended, is not selective.

6.1.2. State resources and imputability

- (94) The Commission found in its Opening Decision that the reductions were imputable to the State as all reductions were granted by law (KWKG 2016) and were thus imputable to the State. In addition, the Commission observed that the BAFA (i.e. the Federal Office for Economic Affairs and Export Control, a higher federal authority subordinated to the Federal Ministry for Economic Affairs and Energy) is in charge of verifying that only eligible operators obtain the support.
- (95) The Commission further found in its Opening Decision that the reductions were financed from State resources.
- (96) In that respect, the Commission first observed that in order to finance the CHP support, Germany introduced a special surcharge, the CHP surcharge (see paragraph 26 of the KWKG 2016, as notified, and paragraph 26 of the KWKG 2016, as amended, establishing the CHP surcharge and giving the right to network operators to impose the CHP surcharge on end-consumers), and defined its purpose (i.e. the financing of State policies in the energy field: CHP-support and the investment subsidies for storage and district heating/cooling networks) and the methodology to determine its amount, which for some categories of end-consumers is set directly by the State (Category B and Category C end-consumers and electro-intensive users). Also, deficits and surpluses of the collected CHP surcharge (in comparison to the support needed) are corrected in the following year, thereby ensuring that network operators are entirely compensated for the extra costs resulting from their obligation to pay the support, but also implying that they cannot use the revenue from the surcharge for anything else than the financing of the support of CHP electricity, heating and cooling storage, and district heating/cooling. On that basis, the Commission concluded that, like in the case giving rise to the judgment of 19 December 2013 in the case *Association Vent de Colère!* ⁽¹⁹⁾, the State had, within the framework of the KWKG 2016, created a system where the costs incurred by the network operators in connection to the support of CHP electricity, storage facilities and district heating/cooling networks are fully compensated by the CHP surcharge imposed on electricity end-consumers. That circumstance distinguishes the present case from the case giving rise to the judgment of 13 March 2001 in the case *PreussenElektra* ⁽²⁰⁾, as in the latter case the electricity suppliers had to finance the additional costs from their own means. In addition, neither the CHP support granted to generators of CHP electricity nor the investment subsidies granted to operators of district heating and cooling networks and of storage facilities constitute prices or fees for goods or services. Indeed, the CHP support is paid by the network operators to operators of CHP installations although the electricity is not sold to the network operators but to third parties; in certain cases, it is even consumed by the operator of the CHP installation itself. Also, as far as the district heating/cooling networks and the storage facilities are concerned, they remain in the ownership of the operator asking for the subsidy and the payment of the subsidy does not entitle the electricity network operators to any right in respect of the district heating/cooling networks and storage facilities concerned (on the support to district heating/cooling networks and the storage facilities, see recitals 33 to 45 of the Opening Decision).
- (97) The Commission further noted in the Opening Decision that transmission network operators play a special role in the system. They have been entrusted with the calculation of the CHP surcharge based on the methodology set out in the KWKG 2016 and manage the financial flows of the CHP surcharge. The financial burden resulting from the support to CHP, district heating network and heating systems is entirely transferred to them; they then have to ensure that the financial burden is equally spread between transmission network operators (in proportion to category A, B and C end-consumers connected to their grid) and they are being transferred the CHP surcharge from distribution network operators to compensate them for the financial burden resulting from the support. They also have to warn the BAFA in case the budget would be exceeded. In that regard they display similarities

⁽¹⁹⁾ Judgment of 19 December 2013, *Vent De Colère and Others*, C-262/12 ECLI:EU:C:2013:851.

⁽²⁰⁾ Judgment of 13 March 2001, *PreussenElektra*, C-379/98 ECLI:EU:C:2001:160.

with the situation of the Samenwerkende Elektriciteits-Productiebedrijven NV in the case giving rise to the judgment of 17 July 2008 in the case *Essent Network Noord* ⁽²¹⁾ and with that of the Transmission System Operators in the case giving rise to the judgment of 10 May 2016 in the case *Germany v Commission* (EEG 2012) ⁽²²⁾.

- (98) Furthermore, the Commission had also found in its Opening Decision that the following elements confirmed that the CHP surcharge is under State control: the CHP surcharge has to be placed on a separate account so that the regulator can verify the absence of cross-subsidies between the various activities of the network operators. In addition, the law requires that the invoicing between transmission network operators be controlled by an auditor or a chartered accountant. Finally, the law also limits the total budget of the measure and the total amount of the surcharge. When there is a risk that the budget would be exceeded, transmission network operators have to warn the BAFA which will then calculate new but reduced support rates to ensure that the budget is not exceeded. This is a further confirmation that the CHP surcharge constitutes a resource under the control of the State.
- (99) The German authorities did not submit any comments on this point. BV Glas has commented that the measure does not constitute State aid because it is not burdening the State budget. However, the Commission notes in this respect that according to settled case law, resources do not need to transit through the State budget to be considered as State resources. It is sufficient that they remain under public control ⁽²³⁾. Indeed, advantages which are granted directly or indirectly through State resources are to be regarded as aid within the meaning of Article 107(1) of the Treaty. The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State ⁽²⁴⁾.
- (100) Based on those elements, the Commission maintains its conclusion that the CHP surcharge qualifies as State resource and that as a result, the reduced CHP surcharge rates are also financed from State resources. Those reductions are financed from State resources as the CHP support. Any reduction of the CHP surcharge has been set up in the law and involved state control to the same extent as the full CHP surcharge (see above). Therefore, also the reduction of the CHP surcharge must be considered as financed from State resources ⁽²⁵⁾.

6.1.3. Effect on trade and impact on competition

- (101) As regards reductions of CHP surcharges, they can distort competition between undertakings within the same sector as not all undertakings are eligible (depending on their consumption level for and/or the respective importance of electricity costs compared to turnover for and/or depending on the respective importance of electricity costs compared to GVA) and are also likely to affect trade between Member States and competition with undertakings in other Member States. Indeed, the undertakings benefitting from reductions are typically active in certain manufacturing sectors where electricity costs represent a larger share of production costs (metal industry, paper and chemical sector, glass-making industry, refineries, wood industry, food and feed sector, see Opening Decision recital 127 and also Table 3 above). Companies active in sectors like the chemical sector, the paper industry, automobile manufacturing and automotive supply are in competition with undertakings located in other Member States.
- (102) BV Glas submitted that there was no impact on competition but did not explain why. BV Glas seems to imply that there would be no impact on competition because the measure aims at reducing a competitive disadvantage compared to undertakings in other Member States. Given that CHP surcharges also exist in other Member States

⁽²¹⁾ Judgment of 17 July 2008, *Essent Network Noord and Others*, C-206/06, ECLI:EU:C:2008:413.

⁽²²⁾ Judgment of 10 May 2016, *Germany v Commission*, T-47/15, ECLI:EU:T:2016:281.

⁽²³⁾ Judgment of 16 May 2002, *France v Commission*, C-482/99 EU:C:2002:294, paragraph 37, and judgment of 10 May 2016, *Germany v Commission*, T-47/15, ECLI:EU:T:2016:281, paragraph 83.

⁽²⁴⁾ To this effect, see judgment of 22 March 1977, *Steinike & Weinlig*, C-78/76, EU:C:1977:52, paragraph 21; judgment of 17 March 1993, *Sloman Neptun v Bodo Ziesemer*, Joined Cases C-72/91 and C-73/91, EU:C:1993:97, paragraph 19, and judgment of 10 May 2016, *Germany v Commission*, T-47/15, ECLI:EU:T:2016:281, paragraph 81.

⁽²⁵⁾ See also judgment of 10 May 2016, *Germany v Commission*, T-47/15, ECLI:EU:T:2016:281, paragraph 112, and judgment of 11 December 2014, *Austria v Commission*, T-251/11, ECLI:EU:T:2014:1060, paragraph 76.

(for instance in France ⁽²⁶⁾), that argument is not supported by the facts. In addition, it is established case law that the fact that a measure is aimed at harmonising through unilateral measures competition conditions between Member States would not prevent such a measure from being qualified as State aid ⁽²⁷⁾.

6.1.4. Conclusion on the existence of State aid

- (103) The Commission therefore concludes that the reductions of the CHP surcharge granted to Categories B and C end-consumers and to electro-intensive users foreseen in KWKG 2016 involve State aid within the meaning of Article 107 of the Treaty.

6.2. Existing aid/new aid and lawfulness of the aid

- (104) BV Glas has underlined that the KWKG 2016 is very similar to the KWKG 2002 and therefore constitutes existing aid.
- (105) The Commission notes, however, that while there are many similarities between the KWKG 2002 and the KWKG 2016, that cannot lead to the conclusion that the aid scheme of the CHP surcharge reductions as provided for by the KWKG 2016 would qualify as an existing aid scheme.
- (106) It is true that the Law of 12 May 2000 for the protection of electricity generation on the basis of CHP ('the KWKG 2000'), one of the precursors of the KWKG 2016, had been considered not to involve State aid by the Commission ⁽²⁸⁾. However, as the Commission noted in its Opening Decision (recital 288), the KWKG 2000 has been abolished already in 2002 and replaced by the KWKG 2002 which was in turn replaced by the KWKG 2016.
- (107) The aid measure can thus not be regarded as existing aid, in particular since there are several substantial differences between the KWKG 2000 and the KWKG 2016 and actually already between the KWKG 2000 and the KWKG 2002.
- (108) The first difference being that the reductions of the CHP surcharge which are the subject matter of the formal investigation did not exist in the KWKG 2000 and the Commission did not examine them in its decision of 22 May 2002 on State aid NN 68/2000 — Germany — Law for the protection of electricity generation on the basis of combined heat and power of 12 May 2000 ⁽²⁹⁾.
- (109) In addition, under the KWKG 2000, the law simply established a purchase obligation together with the price to be paid for that good. There was a burden sharing between network operators. The law, however, did not establish any CHP surcharge to finance the support and as mentioned in the previous recital there were no reduced CHP surcharges for certain categories of end-consumers.
- (110) The KWKG 2016 is different from the KWKG 2000 in the following respects: first the purchase obligation has been replaced by the obligation to pay a premium for electricity that is most of the time not purchased by the network operator. Second, the KWKG 2016 also provides for support for electricity that is auto-consumed, i.e. aid that is not even injected into the grids operated by network operators. Third, the KWKG 2016 also provides for support to heat storage and district heating networks, i.e. infrastructure not related to the electricity grid. Fourth, the law guarantees that network operators are fully compensated for their extra costs through the CHP surcharge established by the law and the transmission network operators centralise financial flows linked to premium payments and the CHP surcharge. The CHP surcharge is a uniform surcharge per kWh across all networks. Fifth, the law contains a maximum budget that also limits the increase of the CHP surcharge. And sixth, the KWKG 2016 provides for a cap to the CHP surcharge for Category B and Category C end-consumers. Finally, support for CHP installations, district heating networks etc. is available only after having obtained an authorisation from the BAFA. Such a confirmation of eligibility for support did not exist under the KWKG 2000.

⁽²⁶⁾ Commission Decision of 27 March 2014 on State aid SA.36511 (2014/C) (ex 2013/NN) — France — Support mechanism for renewable energies and caps on the CSPE — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 348, 3.10.2014, p. 78).

⁽²⁷⁾ Judgment of 1 February 2017, *Portovesme v Commission*, C-606/14 P, ECLI:EU:C:2017:75, paragraph 91.

⁽²⁸⁾ Commission Decision of 22 May 2002 on State aid NN 68/2000 — Germany — Law for the protection of electricity generation on the basis of combined heat and power of 12 May 2000 (OJ C 164, 10.7.2002, p. 5).

⁽²⁹⁾ Ibidem.

- (111) Already the KWKG 2002 presents several important alterations to the KWKG 2000: obligation to pay a premium on top of market price (instead of mere purchase obligation of electricity for a given price), guarantee provided by law that network operators will be compensated for the extra costs resulting from the obligation to pay the premium, creation of the uniform CHP surcharge, central role of transmission network operators in centralising the financial flows linked to support payments and CHP surcharge and introduction of caps to the CHP surcharge for two categories of end-consumers (Category B and Category C). Also the obligation to obtain an authorisation from the BAFA to obtain access to support was introduced in 2002. In 2009, the KWKG 2002 was amended to provide support also for auto-consumption and for district heating networks. In 2012, the KWKG 2002 was amended to include also support for heating and cooling storage facilities as well as for district cooling networks. The budget limitation was introduced by the KWKG 2016.
- (112) Based on these elements, the Commission thus concludes that the KWKG 2016 shares several features with the KWKG 2002 but that it cannot qualify as an existing aid measure given that the decision in case NN 68/2000 ⁽³⁰⁾ did not concern the KWKG 2002 but the KWKG 2000 and given that the KWKG 2016 presents several substantial alterations compared to the KWKG 2000.
- (113) The similarities between the KWKG 2002 and the KWKG 2016 (obligation to pay a premium on top of market price, guarantee provided by law that network operators will be compensated for the extra costs resulting from the obligation to pay the premium, introduction of a uniform CHP surcharge and introduction of reduced CHP surcharge for certain end-consumers, central role of transmission network operators in centralising the financial flows linked to support payments and CHP surcharge, authorisation from the BAFA to obtain access to support) and the differences to the KWKG 2000 actually lead to the conclusion that reductions of the CHP surcharge granted under the KWKG 2002 qualified as State aid already. The Commission acknowledges that pursuant to Article 1(a)(iv) in conjunction with Article 17 of Regulation (EU) 2015/1589 only the CHP surcharge reductions that were granted 10 years before 24 October 2016 qualify as existing aid.
- (114) In addition Germany submitted the adjustment plan starting from 2011 thus explicitly recognising that the CHP surcharge reductions as from 2011 did involve new state aid compared to the KWKG 2002.

6.3. Compatibility with the internal market

- (115) In the Opening Decision, the Commission concluded that the State aid to high-efficiency CHP installations, to storage facilities and to energy-efficient district heating/cooling networks granted under the KWKG 2016 was compatible with the internal market.
- (116) In its Opening Decision, the Commission however raised doubts as to whether the reduced CHP surcharges for Category B and Category C end-consumers could be declared compatible with the internal market on the basis of Article 107(3) c) TFUE.
- (117) The compatibility assessment below only covers the reductions granted to Category B and Category C end-consumers since 2007 and to electro-intensive users described under recital 20 above. This Decision does not cover reductions granted to railway undertakings on payments of the CHP surcharge. Those reductions were approved under decision SA.43666 ⁽³¹⁾.
- (118) The capped surcharge relieves Category B and Category C end-consumers and electro-intensive users from a part of the CHP surcharge that they would normally have had to bear in their day-to-day operations as part of their electricity costs; it thus reduces operating costs for the companies concerned.
- (119) Article 107(1) of the Treaty provides for the general principle of prohibition of State aid within the Union. Article 107(2) and 107(3) of the Treaty provide for exemptions to that principle.
- (120) As the Commission noted in its Opening Decision, the reductions do not fall within the scope of the EEAG. First the CHP surcharge does not qualify as environmental tax within the meaning of Section 3.7.1 of the EEAG. Indeed, the CHP-surcharge pursues a specific objective namely financing of a support for CHP installations. The CHP-surcharge in contrast to environmental taxes does not have a behavioural steering effect (see paragraphs 167 and 181 of the EEAG). It does not aim at changing the behaviour of the CHP surcharge payers itself. Thus the assessment of its reductions under Section 3.7.1 may be excluded. The CHP surcharge presents many similarities

⁽³⁰⁾ Ibidem.

⁽³¹⁾ Commission Decision of 22 August 2016 on State aid SA.43666 (2015/N) — Germany — Reduction of the KWKG surcharge for railways (OJ C 406, 4.11.2016, p. 1).

with renewable surcharges that are dedicated to the funding of the support to renewable electricity as it indirectly pursues the environmental objective of reducing CO₂ emissions of electricity production through the financing of cogeneration support. However, Section 3.7.2 of the EEAG applies only to surcharges dedicated to the funding of the support of the energy from renewable sources thus does not cover funding of energy efficiency measures like high energy efficient CHP. No other Commission Guidelines can apply to the notified measure.

(121) However, the Commission may declare an aid measure compatible directly under Article 107(3)(c) of the Treaty if it is necessary and proportionate and if the positive effects for the common objective outweigh the negative effects on competition and trade. Those conditions can be considered as fulfilled if the following questions can be answered in the affirmative:

- (a) Is the aid measure aimed at a well-defined objective of common interest? ⁽³²⁾
- (b) Is it targeted towards a situation where aid can bring about a material improvement that the market alone cannot deliver (for example because it addresses a market failure)?
- (c) Is the aid measure well designed to deliver the objective of common interest (necessity of the aid)? ⁽³³⁾ In particular:
 - Is the aid measure an appropriate and necessary instrument, i.e. are there other, better-placed instruments?
 - Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - Is the aid measure proportionate, i.e. could the same change in behaviour be obtained with less aid?
- (d) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

6.3.1. *Objective of common interest*

(122) The Commission observed in its Opening Decision that the CHP surcharge is dedicated to the funding of the support for high-efficiency cogeneration and therefore indirectly contributes to the achievement of the objectives pursued by those support measures, i.e. reducing the environmental impact of electricity production by increasing the energy efficiency of energy production and reducing CO₂ emissions in the electricity sector, which the Commission found to correspond to an objective of common interest.

(123) The Commission also observed that reductions of CHP surcharges dedicated to finance support for cogeneration of heat and power can also indirectly contribute to the objective of the support measures financed from the surcharges (i.e. the increase of energy efficiency of energy production and the reduction of CO₂ emissions linked to electricity consumption) because they can help securing a sufficient financing base for the support measures themselves in a similar way to how reductions in the funding of support for renewable electricity help securing a sufficient financing base for renewable electricity support (see Section 3.7.2 of the EEAG and in particular paragraph 182 of the EEAG). Hence, if reductions are needed to secure the financing of those support measures, they would also indirectly contribute to the objectives pursued by the support measures examined under Sections 3.3.1 to 3.3.5 of the Opening Decision.

(124) The Commission also observed that the Union has not established mandatory targets per Member State for the production of high-efficiency CHP electricity, contrary to what is the case for renewable energies. The funding needs for supporting CHP installations are thus generally lower than funding needs for the support to renewable energy, which makes it less imperative to finance the support measures from a levy on electricity consumption. However, the Directive 2012/27/EU of the European Parliament and the Council ⁽³⁴⁾ has set a 20 % headline

⁽³²⁾ Judgment of 14 January 2009, *Kronoply v Commission*, T-162/06, ECLI:EU:T:2009:2, especially paragraphs 65, 66, 74 and 75.

⁽³³⁾ Judgment of 7 June 2001, *Agrana Zucker und Stärke v Commission*, Case T-187/99, ECLI:EU:T:2001:149, paragraph 74; judgment of 14 May 2002, *Graphischer Maschinenbau v Commission*, Case T-126/99, ECLI:EU:T:2002:116, paragraphs 41-43; judgment of 15 April 2008, *Nuova Agricast*, Case C-390/06, ECLI:EU:C:2008:224, paragraphs 68-69.

⁽³⁴⁾ Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1).

target on energy efficiency and provides for indicative national efficiency targets to which high-efficiency CHP installations, energy-efficient district heating networks and storage systems can make an important contribution. In addition Member States are under the obligation to assess their potential for the implementation of energy efficiency measures, including CHP installations, district heating and storage facilities and to deploy the identified potential. As a result, financing needs for energy efficiency support measures could also potentially become significant, thereby increasing the need for Member States to be able to finance the measures from energy consumption levies. In addition, the target of 27 % improvement in energy efficiency for 2030 that the European Council endorsed on 23 October 2014 ⁽³⁵⁾ will continue to lead the Union and its Member States towards further reductions of CO₂ emissions and towards further energy savings.

- (125) To avoid that electricity end-consumers particularly affected by the financing costs of the promotion of high-efficiency CHP (and the related promotion of energy-efficient district heating networks and heat storage facilities connected to CHP installations) could be put at a significant competitive disadvantage, Germany may need to grant partial reductions, in particular since the CHP surcharge adds up to the EEG surcharge in order to finance a set of support measures in the electricity sector to reduce CO₂ emissions and fight against climate change. Indeed, bankruptcy or delocalisation of too many undertakings particularly impacted by the EEG or the CHP surcharge might erode the financing basis: instead of paying a reduced surcharge, the relevant companies would not contribute at all to the financing implying an even higher financial effort from other end-consumers to finance the support of CHP, again reducing acceptability of the surcharge and hence of the support of CHP as such.
- (126) In its Opening Decision, the Commission had observed that while the CHP surcharge was not aimed at creating incentives to reduce energy consumption but only at financing energy efficiency measures, it should be avoided that the magnitude of the reductions induce companies to be less energy-efficient, as this would run counter to the objective of the supported energy efficiency measures.
- (127) Concerning the risk of reducing the incentives to be energy-efficient, the German authorities have submitted that the reductions do not eliminate incentives for electro-intensive users to be energy-efficient given that the CHP surcharge represents only a small portion of electricity costs. The mere electricity price in itself, given the high share of energy costs compared to total production costs, provides for an incentive to increase energy efficiency (see recitals 62 and following above). Also BV Glas submitted that electro-intensive users are constantly incentivised to improve energy-efficiency given the high share that energy prices represent in total production costs (often between 20 and 50 %).
- (128) The Commission agrees that for electro-intensive companies exposed to international trade the mere electricity price in itself can provide an incentive to increase energy efficiency given that for energy-intensive energy represents a high share of production costs. This incentive will be more important for companies facing a certain level of international trade as the competitive pressure will induce companies to be efficient. As also those companies will have to pay at least 15 % of the CHP-surcharge, this minimum contribution will actually reinforce incentives that electro-intensive companies facing international competition have to invest in energy efficiency measures. No elements were provided though to demonstrate that the reductions would not eliminate incentives for undertakings that are not electro-intensive. However, the German authorities have limited the reductions to electro-intensive users that face a certain level of international competition as of 1 January 2017 and the great part of beneficiaries in 2016 could be considered as energy-intensive users. It has also subjected the reductions to participation in an energy or environmental management system. Finally, as will be examined more in detail below, the German authorities have maintained an own contribution of 15 % of the CHP surcharge. The Commission therefore concludes that the reductions, as amended, will not remove incentives for electro-intensive users to increase their energy-efficiency. As the period 2011-2018 and as regards non-electro-intensive users, the German authorities submitted an adjustment plan which will increase incentives for energy-efficiency for non-electro-intensive users.
- (129) Based on those elements, the Commission concludes that the reduced CHP surcharges contribute to a common objective.

⁽³⁵⁾ Conclusions of the European Council of 23-24 October 2014.

6.3.2. *Need for State intervention, appropriateness of aid and incentive effect*

- (130) Under Sections 3.3.1.2, 3.3.2.2, 3.3.4.2 and 3.3.5.2 of its Opening Decision, the Commission concluded that the promotion of high-efficiency cogeneration installations, energy-efficient district heating/cooling networks and heating/cooling storage installations would not be delivered by the market alone and that the aid measures (and their financing) were needed to incentivise the investments into and/or operation of those installations and facilities.
- (131) The aid measures examined under Sections 3.3.1 to 3.3.5 of the Opening Decision are all directed at increasing energy-efficiency of energy production and at reducing the carbon footprint of electricity production and thus consumption. They are aimed at fighting against climate change.
- (132) While the CHP surcharge is not the only conceivable financing means, it is appropriate to finance aid measures for the production of high-efficiency cogenerated electricity, energy-efficient district heating networks and heat storage facilities on the basis of a surcharge on electricity consumed by end-consumers connected to the grid and withdrawn from this grid, because of the close link between the supported measures and the electricity withdrawn from the grid. Also, such a surcharge provides a relatively stable financing stream and does not impair budgetary discipline. Those are the reasons why such a financing system is often used to finance support for the production of renewable electricity. As already mentioned in recital 125 above, financing needs for energy efficiency support measures could become significant, thereby increasing the need for Member States to be able to finance the measures from electricity surcharges.
- (133) The Commission considers therefore that a reduced CHP surcharge could be deemed necessary to reach the objectives of energy efficiency and environmental protection pursued by the measures examined under Sections 3.3.1 to 3.3.5 of the Opening Decision if in the absence of reductions the CHP surcharge financing those measures and the objective pursued by those measures would be put at risk.
- (134) That could be the case if the payment of the full CHP surcharge would imply the delocalisation or bankruptcy of too many undertakings or sectors. That would in turn significantly reduce the acceptability of the CHP surcharge as well as the number of surcharge payers and would risk jeopardising the aid measures as such.
- (135) The Commission indicated in its Opening Decision (recital 274) that the criteria developed under paragraphs 185, 186 and 187 of the EEAG could serve as guidance in order to identify sectors at risk of delocalisation or bankruptcy in case of too high energy surcharges aimed at the financing of cogeneration support. That seems appropriate in particular given that, on the one hand, the measures that are financed from the CHP surcharge serve the same environmental objective as the measures that are financed from the renewable surcharges falling within the scope of Section 3.7.2 of the EEAG (fight against climate change by reducing CO₂ emissions resulting from electricity production) and given that, on the other hand, the CHP surcharge in Germany adds to the renewable surcharges (the EEG surcharge in Germany) and is structured in a similar way. As it is levied in proportion to electricity withdrawn from the grid, the CHP surcharge will impact in particular undertakings for which electricity costs represent an important share of gross added value and which cannot easily pass on their costs to end-consumers without losing important market shares given the intensity of the international trade of the sector in which they are active. Those are the undertakings that the criteria set out under paragraphs 185, 186 and 187 of the EEAG aim at identifying.
- (136) During the preliminary investigation the German authorities had explained that the reduced CHP surcharges were needed to ensure the competitiveness of the companies (energy users) concerned and that ultimately they would be needed to secure the financing for the support measures. However, the German authorities had not provided sufficient information to show that the reduced CHP surcharges were needed for all types of undertakings or sectors included within categories C and B end-consumers to secure the financing of aid measures laid down in the KWKG 2016, as notified. It had only provided information related to electro-intensive users exposed to international competition and eligible for reductions of renewable surcharges acknowledging, however, that end-consumers in Categories B and C were not all such undertakings.
- (137) In its Opening Decision, the Commission observed that it had accepted that some sectors with high electro-intensity and high exposure to international trade were very likely to be significantly affected by the full EEG surcharge and that this threat to their competitiveness and viability would be sufficiently material to jeopardise

support for renewable energies ⁽³⁶⁾. Assuming that beneficiaries would correspond to companies eligible for support under the EEG, the full CHP surcharge would, for a significant number of those companies, represent between 1 % and 9 % of GVA. That would constitute indeed a sizable burden, in particular since it would be added to the burden resulting already from the EEG surcharge, a surcharge that finances measures pursuing the same environmental objective as the measures financed from the CHP surcharge.

- (138) During the formal investigation procedure, the German authorities did not provide any additional information allowing the Commission to verify which share of the beneficiaries would indeed correspond to undertakings eligible for reduced EEG surcharges or for reductions under Section 3.7.2 of the EEAG, nor did it provide information that would demonstrate the necessity of reductions also for companies that are neither electro-intensive nor facing international competition. Also, while BV Glas maintains that all reductions are needed, it did not submit information that would indicate that also reductions for non-electro-intensive users would be needed. In fact, the information submitted by BV Glas is limited to electro-intensive users. However as of 1 January 2017 reductions will be limited to electro-intensive users that are qualifying for reductions of the renewable surcharge (i.e. to EIU at risk of relocation or bankruptcy). Non-electro-intensive users of Category B and C will not be eligible for reductions any more. For non-electro-intensive users, the German authorities provided an adjustment plan under which reductions will be phased out totally by 2019, also the reductions granted to non-electro-intensive users starting in 2011 have been adjusted based on an adjustment plan submitted to the Commission (see also Section 6.4 below on the adjustment plan).
- (139) Based on those elements, in particular the modifications and adjustment plan provided by the German authorities ensuring that the reductions are limited to electro-intensive users exposed to international trade, the Commission concludes that the reductions are appropriate and necessary to ensure the sustainability of the financing of cogeneration support and have an incentive effect.

6.3.3. Proportionality

- (140) In its Opening Decision, the Commission observed that reductions cannot correspond to full exemptions or be so significant as to jeopardise the purpose of the support measure because they result in too heavy a burden on the other end-consumers (recital 269 of the Opening Decision). Also, too significant reductions increase the distortion of competition resulting from them. This is why under the EEAG, as far as reductions in the funding of support for energy from renewable sources are concerned, undertakings eligible for reductions should pay a minimum contribution corresponding in principle to 15 % of the normal levy (see paragraph 188 of the EEAG), with additional reductions possible when the levy represents more than a certain share of the GVA of the company (paragraph 189 of the EEAG).
- (141) In its Opening Decision (recital 282), the Commission had indicated that it would use paragraphs 188 and 189 of the EEAG as guidance to assess the proportionality of the reductions. That seems appropriate in particular given that, on the one hand, the measures that are financed from the CHP surcharge serve the same environmental objective as the measures that are financed from the renewable surcharges falling within the scope of Section 3.7.2 of the EEAG (fight against climate change by reducing CO₂ emissions resulting from electricity production) and given that, on the other hand, the reductions aim at ensuring the sustainability of the financing of those support measures by limiting the burden for undertakings or particularly affected by energy surcharges but still requiring from them a sufficient own contribution.
- (142) The Commission had observed in its Opening Decision (recital 283) that the German authorities had not shown during the preliminary investigation that the caps of 0,04 and 0,03 EUR cent/kWh were limited to the necessary minimum. The German authorities did not show that less significant reductions would not have been acceptable. It has insisted on the cumulation effect with the EEG but did not provide concrete information related to the beneficiaries of the reductions that would compare the ratio between the reduced CHP surcharge and the GVA with the ratio between slightly higher CHP surcharges (for instance 15 %) and the GVA or with the ratio between the reduced CHP surcharge cumulated to the reduced EEG surcharge and the GVA.

⁽³⁶⁾ See Commission Decision of 23 July 2014 on State aid SA.38632 (2014/N) — Germany — EEG 2014 (OJ C 325, 2.10.2015, p. 4).

- (143) The German authorities did not provide any additional information during the formal investigation. BV Glas has submitted that the reductions were limited to the minimum necessary but without explaining why the reductions would be limited to the minimum.
- (144) However, Germany modified the KWKG 2016 and as a result, reductions are limited as of 1 January 2017 to electro-intensive users that are qualifying for reductions of the renewable surcharge and the surcharge will be at least 15 % of the surcharge (see recital 21 above). Non-electro-intensive users will not be eligible for reductions anymore. Also the German authorities provided an adjustment plan for previous Category B and C end-consumers under which reductions will be phased out totally by 2019 for Category B and C end-consumers who do not qualify as electro-intensive users and under which the reductions granted to non-electro-intensive users in the past were adjusted starting in 2011. The German authorities also provided an adjustment plan for previous Category B and C end-consumers who qualify as electro-intensive users starting in 2011.
- (145) Based on those elements, in particular the modifications introduced as of 1 January 2017 to the level of reductions and the adjustment plan provided by the German authorities, the Commission concludes that the reductions of the CHP surcharges are proportionate to the objective pursued.

6.3.4. *Distortion of competition*

- (146) The Commission had observed in its Opening Decision that it had during the preliminary investigation phase not obtained enough elements that would enable the Commission to assess the overall balance of the potential distortion of competition and trade between Member States. Moreover, as the necessity, appropriateness, incentive effect and the proportionality of the aid measure had not yet been demonstrated, the Commission had doubts that the aid measure ensured that the distortions of competition resulting from the relief of companies from part of their operating costs were limited and that the overall balance of the measure would be positive.
- (147) The German authorities have underlined in their comments on the Opening Decision (recital 287) that the distortions are limited given the positive impact of the measures financed from the CHP surcharge and given that with the amendments adopted on 22 December 2016 the reductions will be limited to the minimum necessary to ensure the sustainability of the CHP surcharge.
- (148) Concerning the positive impacts, the Commission had observed in its Opening Decision that the measures financed from the CHP surcharge were aimed at important reductions in terms of CO₂ emissions and were also important for improving the integration of cogenerated electricity into the electricity market. Those positive impacts are summarised under recitals 9 and 10 above.
- (149) The Commission further notes that Directive 2012/27/EU has set a 20 % headline target on energy efficiency and obliges Member States to assess their potential for the implementation of energy efficiency measures, including CHP installations, district heating and storage facilities and to deploy the identified potential. In addition, the 2030 target of 27 % improvement in energy efficiency that the European Council endorsed on 23 October 2014 ⁽³⁷⁾ will continue to lead the Union and its Member States towards further reductions of CO₂ emissions and towards further energy savings. As a result, there are financing needs for energy efficiency support measures and they could also potentially become more significant in the future given that the 20 % target has not yet been reached and will after that have to be further improved to reach the 2030 target. Therefore, ensuring the availability and sustainability of financial means for CHP installations, district heating and storage facilities is an important element to pave the way for increased energy efficiency of energy production and further CO₂ emission reductions. Indeed, the Commission also found in its Opening Decision that there were still market failures in this domain and that support measures were still needed to increase energy efficiency.
- (150) Further, the Commission notes that with the amendments introduced on 22 December 2016 Germany limits the eligibility for reductions to undertakings eligible for reductions under the BesAR, i.e. to undertakings and sectors which are the most at risk of delocalisation and bankruptcy in case of payment of the full surcharge and hence which would constitute the largest threat to the sustainability of the surcharge. Also, beneficiaries are still required to contribute their share to the financing of the energy efficiency measures and the reductions do not undermine beneficiaries' incentives to remain energy-efficient.

⁽³⁷⁾ Conclusions of the European Council of 23-24 October 2014.

- (151) Finally, the Commission notes that the reductions are granted to all undertakings active in the same sector when they are in the same situation in terms of electro-intensity.
- (152) On this basis, the Commission concludes that the overall balance of the aid measure is positive in that its positive effects outbalance the possible distortion of competition.

6.4. Adjustment plan

- (153) The reduced CHP surcharges were introduced in 2002 by the KWKG 2002. The German authorities have mentioned in that respect that in 2002 the Commission found that the then applicable KWKG 2000 did not contain State aid and did not indicate to Germany that the KWKG 2002 would be a notifiable act ⁽³⁸⁾. They submitted that the fact that the Commission did not object to the KWKG 2002 and declared the KWKG 2000 as not constituting aid would raise legitimate reasons that the reductions of the CHP surcharges did not constitute aid, at least until 2014 when the Commission adopted the 2014 EEAG and made clear that renewable or CHP support schemes financed from surcharges would constitute aid. Also BV Glas submits that Commission decision of 22 May 2002 on State aid NN 68/2000 — Germany — Law for the protection of electricity generation on the basis of combined heat and power of 12 May 2000 (the ‘2002 Commission Decision’) created legitimate expectations that the KWKG 2002 and then the KWKG 2016 did not contain any aid.
- (154) Nevertheless, Germany submitted to the Commission an adjustment plan starting in 2011 and progressively adjusting Category B and Category C end-consumers to the eligibility and proportionality criteria introduced by the Law of 22 December 2016 and incorporated in the KWKG 2016, as amended (i.e. reductions limited to electro-intensive users fulfilling the conditions set out in recital 20 above and reductions limited to 85 % of the CHP surcharge or to 4 % or 0,5 % of GVA, depending on the electro-intensity of the undertaking).
- (155) It aligns the payments of CHP surcharges of all previous Category B and C end-consumers who qualify as electro-intensive users to the levels compatible by 2018. While the Commission assesses this adjustment plan on the basis of Article 107(3)c TFUE solely, the comparison with assessment criteria set out in EEAG with regard to the adjustment of RES-surcharge reductions applied before 1 July 2014 shows that the progressive adjustment of CHP surcharge foreseen in the submitted plan would allow to consider the past payments of CHP surcharges compatible with the internal market.
- (156) In fact the plan foresees a progressive increase of the CHP surcharge for the categories B and C end-consumers from 2011 on so that in 2019 they will have to pay the full CHP surcharge (100 %). This path is stricter than the transitional provision with regard to reductions in funding of RES foreseen in EEAG. For the EIU, the plan foresees an adjustment to 15 % already in 2018, thus earlier than the Commission requires with regard to the adjustment of reductions in funding of RES (see paragraph 193 EEAG). Thus the Commission considers that the implementation of the submitted adjustment plan would render the reductions of CHP-surcharges in the past compatible with the internal market.
- (157) Given that the CHP-surcharges paid by Category B and category C end-consumers represented in total for 2011 and 2012 more than 100 % of the full CHP-surcharge paid by Category A of end-consumers, the adjustment plan applies to non-electro-intensive users only as of 2013. Category B consumers actually paid for 2013-2016 in total more than what the adjustment plan requires (21 % instead of up to 12,5 %), they will thus in practice have to be adjusted as of 2017 only. Category C consumers will be adjusted as of 2016 because for the period 2013-2015 they paid in total more than what the adjustment plan required (13 % instead of up to 12,5 %).
- (158) As for electro-intensive users, they paid in total for the period 2011 to 2016 15 % of the CHP surcharge. The adjustment plan will in practice apply to them as of 2017.

⁽³⁸⁾ Commission decision of 22 May 2002 on State aid NN 68/2000 — Germany — Law for the protection of electricity generation on the basis of combined heat and power of 12 May 2000 (OJ C 164, 10.7.2002, p. 5).

- (159) Thus in light of the actual amounts of CHP-surcharge paid by the beneficiaries in the previous years the implementation of the adjustment plan will not require any increase of the surcharge in past years, except for 2016 for Category C end-consumers who do not qualify as electro-intensive users. However, this increase of the CHP surcharge has already been enacted in the law of 22 December 2016 and the increased CHP surcharge for this category of end-consumer has been included in the final bill for 2016. Indeed, under paragraph 36 of the KWKG 2016 as amended, an additional surcharge of 0,026 EUR ct/kWh is due, unless reductions for the period 2014-2016 are below EUR 160 000 (i.e. 20 % below the *de minimis* threshold).
- (160) The Commission also finds that the starting point of the adjustment plan in 2011 is justified. Indeed in June 2010 the European Council agreed upon a 20 % energy efficiency target to be reached by 2020. In the course of 2010 and 2011, the EU adopted several Action Plans and Communications ⁽³⁹⁾ stressing the importance of energy efficiency and the need to step up efforts, including in energy generation and including through schemes, to increase energy efficiency. This together with also Directive 2012/27/EU induced Member States to step up support measures and surcharges, including CHP-surcharge, started to increase as a result.
- (161) Concerning legitimate expectations that would arise from the 2002 Commission Decision, the Commission notes that its 2002 Decision did not relate to reductions of a CHP surcharge and it is unclear how it could then raise legitimate expectations as to the absence of aid. In any event, assuming that there could have been legitimate expectations based on the 2002 Commission Decision and based on the status of the case law (*PreussenElektra* ⁽⁴⁰⁾), those legitimate expectations would have ended by 2011 at the latest as several developments in case law and case practice would have lead a prudent and alert economic operator to realise that it was no longer possible to assume that reductions of CHP surcharge would not constitute aid.
- (162) The Court of Justice has repeatedly held that the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a Community institution has caused him to entertain expectations which are justified by precise assurances provided to him. However, if a prudent and alert economic operator could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted ⁽⁴¹⁾.
- (163) Indeed, in the meantime, the Court clarified in its *Essent* judgment of 17 July 2008 ⁽⁴²⁾ the boundaries of the *PreussenElektra* judgment ⁽⁴³⁾ and concluded that also qualifies as State resource a surcharge imposed by the State and managed by an entity designated by the State even if the monies do not transit via a fund or account directly managed by the State; in addition, on 22 July 2009, the Commission opened the formal investigation procedure on a cap introduced by an Austrian law that exempted companies in energy intensive industries from the

⁽³⁹⁾ See Conclusions of the European Council of 17 June 2010. The Conclusions of the European Council of 17 June 2010 confirmed the energy efficiency target as one of the headline targets of the Union's new strategy for jobs and smart, sustainable and inclusive growth. Under this process and in order to implement this objective at national level, Member States are required to set national targets in close dialogue with the Commission and to indicate, in their National Reform Programmes, how they intend to achieve them. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy 2020 — A Strategy for competitive, sustainable and secure energy (COM(2010) 639 final of 10 November 2010). It places energy efficiency at the core of the Union energy strategy for 2020 and outlines the need for a new energy efficiency strategy that will enable all Member States to decouple energy use from economic growth. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: See also Conclusions of the European Council of 4 February 2011 acknowledging that the Union energy efficiency target was not on track and that determined action is required to tap the considerable potential for higher energy savings in buildings, transport, products and processes. See also Communication of 8 March 2011 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Efficiency Plan 2011. The Communication confirmed that the Union is not on track to achieve its energy efficiency target. To remedy that, the Energy Efficiency Plan 2011 spelled out a series of energy efficiency policies and measures covering the full energy chain, including energy generation of heat and electricity and underlying that waste heat should be recovered where possible and a greater use of high efficient cogeneration should be made where possible.

⁽⁴⁰⁾ Judgment of 13 March 2001, *PreussenElektra*, Case C-379/98, ECLI:EU:C:2001:160.

⁽⁴¹⁾ Judgment of 22 June 2006, *Forum 187 v Commission*, Joined Cases C-182/03, C-217/03, ECLI:EU:C:2005:266, paragraph 147.

⁽⁴²⁾ Judgment of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, ECLI:EU:C:2008:413.

⁽⁴³⁾ Judgment of 13 March 2001, *PreussenElektra*, Case C-379/98, ECLI:EU:C:2001:160.

obligation to purchase green electricity if expenses for green electricity were larger than 0,5 % of their respective production value ⁽⁴⁴⁾. On 8 March 2011, the Commission confirmed its position in a final decision that the Austrian cap for energy-intensive users under the Green Electricity Act constituted State aid ⁽⁴⁵⁾.

- (164) The Commission notes also that the adjustment plan leads in practice to an adjustment for Category C end-consumers who do not qualify as electro-intensive users in 2016. In 2016, any prudent and alert economic operator would have realised that before believing that the reductions constituted no aid, it was prudent to wait for the Commission's position, in particular since it was known that the KWKG 2016 had been notified to the Commission for approval.
- (165) Finally, the Commission notes that the adjustment plan avoids too high and too abrupt financial disruptions for individual undertakings and in that sense also contributes to the sustainability of the financing of the CHP support as described under recitals 124 and following above.
- (166) For the reductions of CHP-surcharges applied prior to the starting date of the adjustment plan the Commission considers that in light of the development state of high efficient CHP (period prior to the establishment of 20 % EU-energy efficiency target) the amounts of reductions awarded under the KWKG 2002 after November 2006 could be considered as not fulfilling all the criteria in Article 107(1) TFUE and thus falling under the Regulation pursuant to Article 2 of Council Regulation (EC) No 994/98 which was applicable at the time (*de minimis* aid) or that the reductions granted from December 2008 until December 2010 would fall under the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis ⁽⁴⁶⁾.

6.5. Conclusion

- (167) The Commission finds that Germany has unlawfully implemented reduced CHP surcharges for certain end-consumers in breach of Article 108(3) of the Treaty. However, the Commission finds that those reductions as amended by the Law of 22 December 2016 and as complemented by the adjustment plan are compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty.

7. PRELIMINARY EXAMINATION OF THE INTENDED EXTENSION OF CHP SUPPORT BASED ON THE KWKG 2016, AS AMENDED BY THE LAW OF 22 DECEMBER 2017

- (168) As described under recital 7 the German authorities notified an amendment to the CHP support scheme that the Commission approved on 24 October 2016. That amendment consists in changing the conditions to be fulfilled by CHP installations in order to be eligible for participation in the tenders to be organised as of winter 2017/2018 to select CHP projects that will benefit from support. As a result of that amendment, CHP installations injecting electricity into closed distribution networks will also be eligible for participation in the said tenders ('the amendment'). CHP used for autoconsumption would however remain ineligible for support and are not concerned by the notified amendment. The following section contains the preliminary examination pursuant to Article 4 of Regulation (EU) 2015/1589 of that amendment.

7.1. Existence of aid

- (169) As a result of the amendment described under Section 5 above, a further category of CHP operators would be eligible to take part in the tenders to obtain a fixed premium on top of the market price for electricity. The amendment would thus increase the circle of beneficiaries of the approved aid scheme. It does not change the Commission's assessment of the existence of aid made in recitals 123, 128 to 137, 139 and 144(a) of the Opening Decision. The amendment therefore also constitutes an aid scheme.
- (170) In particular, the amendment gives the CHP installations concerned access to the tenders organised for CHP installations injecting the electricity into public grids. CHP installations selected in the tender will obtain a premium on top of the market price. It provides them with an advantage over other electricity producers who are only obtaining the market price for the electricity they produce. As only operators of CHP installations and

⁽⁴⁴⁾ Commission Decision of 22 July 2009 on State aid SA.26036 (C 24/2009) — Austria — Aid to Large Electricity Consumers (OJ C 217, 11.9.2009, p. 12).

⁽⁴⁵⁾ Commission Decision 2011/528/EU of 8 March 2011 on State aid measure C 24/09 (ex N 446/08) — State aid for energy-intensive businesses under the Green Electricity Act in Austria (OJ L 235, 10.9.2011, p. 42).

⁽⁴⁶⁾ OJ C 83, 7.4.2009, p. 1.

only certain types of CHP operators can take part in the tender, the advantage is selective. The support is financed from the CHP surcharge described under Sections 2.2 and 2.3 above and is therefore financed from State resources for the reasons set out above under Section 6.1.2 above. The advantage is also likely to affect trade between Member States and competition. Indeed, the operators of CHP installations injecting electricity into closed distribution networks are in competition with electricity providers injecting electricity into public grids. As electricity injected in public grids is subject to trade between Member States and competition between Member States, also the amendment extending the possibility for CHP installations injecting electricity in closed distribution networks is likely to affect trade and competition between Member States.

7.2. Legality

- (171) As the addition of a new category of CHP installations eligible to take part in the tenders has not yet been adopted, Germany has complied with its obligations under Article 108(3) of the Treaty.

7.3. Compatibility

7.3.1. *Contribution to an objective of common interest.*

- (172) The objective of the support remains the same as described in recital 148 of the Opening Decision: it is directed at an increased level of environmental protection through promoting electricity from high energy-efficient cogeneration. The Commission notes in this respect that CHP installations which would become eligible to participate in the tenders would continue to be subject to the high-efficiency requirement in line with paragraph 139 of the EEAG.
- (173) The Commission therefore concludes that the amendment contributes to an objective of common interest in the same way as the original scheme did (see in this regard Section 3.3.1.1 of the Opening Decision).

7.3.2. *Need for State intervention and incentive effect*

- (174) CHP installations injecting electricity into a private grid correspond to the type of CHP installations referred to in the Opening Decision as 'Kontraktor' (see recital 23 of the Opening Decision) and for which the German authorities have provided Levelised Cost of Energy calculations and comparison with market price projections (see Table 5 above).
- (175) Member States need to demonstrate that State aid is necessary to remedy a market failure that otherwise would remain unaddressed (cf. paragraph 37 of the EEAG). In the case of cogeneration, the Commission presumes that energy efficiency measures target negative externalities by creating individual incentives to attain environmental targets for energy efficiency and for the reduction of greenhouse gas emissions (cf. paragraphs 35 and 142 of the EEAG).
- (176) According to paragraph 49 of the EEAG, the Member State must demonstrate that the aid has the effect of incentivising the beneficiaries to change their behaviour in line with the objective of common interest pursued.
- (177) The calculations provided by the German authorities (see Table 5) show that the production costs of electricity from high-efficiency CHP (LCOE) are higher than the electricity market price and that without support such activity would be unlikely to be economically viable.
- (178) CHP installations that are concerned by the amendment will obtain support only if selected in a competitive bidding process; there is thus no need to comply with the form requirement contained in paragraph 51 of the EEAG (see paragraph 52 of the EEAG).
- (179) The Commission therefore concludes that the German authorities have demonstrated that the aid for CHP installations injecting electricity into private grids is needed and that the aid scheme will have an incentive effect.

7.3.3. *Appropriateness of the aid, proportionality and avoidance of undue distortion of competition*

- (180) In line with paragraph 145 of the EEAG, State aid may be considered an appropriate instrument to finance energy efficiency measures, independent of the form in which it is granted. Premiums on top of market price are appropriate aid instruments to compensate CHP plants for the higher production costs of electricity from highly efficient cogeneration as they target the additional cost element that is not covered by the market price.

- (181) The notified amendment would add a new category of CHP operators who could participate to the tender in order to obtain a premium on top of the market price. It corresponds to operating aid for the production of electricity in highly energy-efficient CHP installations, thus paragraph 151 of the EEAG is applicable for the assessment of proportionality.
- (182) For the assessment of proportionality, paragraph 151 of the EEAG makes reference to the conditions applying to operating aid for electricity from renewable energy sources as established in Section 3.3.2.1 of the EEAG.
- (183) The CHP plants concerned by the amendment fall into the category defined in paragraph 151(a) of the EEAG: the electricity produced will be sold to the public (albeit a more limited number of customers than electricity sold into the public grid).
- (184) For the assessment of proportionality, paragraph 151 of the EEAG makes reference to the conditions applying to operating aid for electricity from renewable energy sources as established in Section 3.3.2.1 of the EEAG.
- (185) According to paragraph 124 of the EEAG, the aid must be granted as a premium in addition to the market price whereby the generators sell their electricity directly on the market. In addition, the beneficiaries must be subject to standard balancing responsibilities, unless no liquid intra-day balancing markets exist and finally the scheme must ensure that generators have no incentive to generate electricity when market prices are negative.
- (186) The aid scheme complies with paragraph 124(a) of the EEAG given that the aid paid to selected undertakings will be paid out as a premium on top of the market price and the operator of the CHP installation has to sell the electricity on the market (see recital 79 above). The operator is also subject to normal balancing responsibilities (see recital 79 above). Finally, the scheme does not create any incentives to produce at time of negative prices. Indeed the aid is paid out as a fixed premium and for a limited amount of full load hours. This increases the incentives to sell the electricity at times of higher demand, as this will maximise the revenues and conversely reduces incentives to produce at times of negative prices. In addition, Germany suspends the support at times of negative prices (see recital 79 above).
- (187) Paragraph 126 of the EEAG requires that, from 1 January 2017, aid is granted in a competitive bidding process.
- (188) The amendment complies with this requirement as it consists in adding a category of CHP operators eligible to take part in the tenders that will be organised as of winter 2017/2018. As for the issue of strategic bidding, the Commission notes that the German authorities conducted a study into the economics of CHP installations injecting electricity into private grids which revealed that the competitive advantage was much more limited than initially thought (if at all existing), so that the risk of strategic bidding was sufficiently low for making it possible to include this kind of CHP installations in the same tender. In addition, the German authorities indicated that they will include this element into the evaluation of tenders and further indicated that if signs of strategic bidding are detected, the German authorities would address them in the framework of the tender design and notify the amendments to the eligibility conditions and tender design to the Commission.

7.3.4. *Transparency*

- (189) The amendment does not alter the commitment provided by the German authorities to implement all conditions laid down in Section 3.2.7 of the EEAG. The measures comply with the transparency provision.

7.3.5. *Conclusion*

- (190) Based on the reasons set out in Sections 7.3.1 to 7.3.4, the Commission concludes that the support to new highly-efficient CHP installations used in closed distribution networks is in line with the EEAG, in particular Section 3.4 thereof, and is therefore compatible with the internal market pursuant to Article 107(3)(c) TFUE,

HAS ADOPTED THIS DECISION:

Article 1

The reductions of the CHP surcharges which Germany has implemented pursuant to KWKG 2016 in breach of Article 108(3) TFUE are compatible with the internal market pursuant to Article 107(3)c TFUE following the amendments of 22 December 2016.

Article 2

Individual aid granted on the basis of the aid schemes referred to in Article 1 does not constitute State aid within the meaning of Article 107(1) of the Treaty if, at the time it was granted, it fulfilled the conditions laid down in the Regulation adopted pursuant to Article 2 of Regulation (EC) No 994/98 which was applicable at the time the aid was granted.

Article 3

The Commission accepts the adjustment plan for the period 2011-2019 as notified by Germany. Germany shall inform the Commission of the implementation of the adjustment plan.

Article 4

The Commission does not raise objections to the extension of the aid scheme approved by the Decision C(2016) 6714 to new highly-efficient CHP installations used in closed distribution networks, which Germany is planning to implement on the basis of paragraph 33a(2)(b)(bb) of the KWKG 2016, as amended by the Law of 22 December 2016, on the grounds that the extension of the aid scheme is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 May 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission

