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Contents

II *Non-legislative acts*

INTERNATIONAL AGREEMENTS

- ★ **Council Decision (CFSP) 2023/1614 of 10 July 2023 on the signing and conclusion on behalf of the Union of an Agreement in the form of an Exchange of Letters between the European Union and the Republic of Seychelles to facilitate the transfer by a Member State of the European Union of persons arrested and detained under its national law for participating, off the coast of Somalia, in violation of the United Nations arms embargo on Somalia or in narcotic drugs trafficking 1**
- ★ **Agreement in the form of an Exchange of Letters between the European Union and the Republic of Seychelles to facilitate the transfer by a Member State of the European Union of persons arrested and detained under its national law for participating, off the coast of Somalia, in violation of the United Nations arms embargo on Somalia or in narcotic drugs trafficking 3**

REGULATIONS

- ★ **Commission Delegated Regulation (EU) 2023/1615 of 3 May 2023 supplementing Regulation (EU) 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the conditions under which compensation, cash equivalent of such compensation or any proceeds that are due pursuant to Article 63(1) of that Regulation are to be passed on to clients and indirect clients and the conditions under which passing on is to be considered proportionate ⁽¹⁾ 9**

⁽¹⁾ Text with EEA relevance.

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

★ Commission Delegated Regulation (EU) 2023/1616 of 3 May 2023 supplementing Regulation (EU) 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the circumstances in which a person is deemed to be independent from the resolution authority and from the central counterparty, the methodology for assessing the value of assets and liabilities of a central counterparty, the separation of the valuations, the methodology for calculating the buffer for additional losses to be included in provisional valuations, and the methodology for carrying out the valuation for the application of the ‘no creditor worse off’ principle ⁽¹⁾	14
★ Commission Implementing Regulation (EU) 2023/1617 of 8 August 2023 amending Commission Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People’s Republic of China	34
★ Commission Implementing Regulation (EU) 2023/1618 of 8 August 2023 imposing a definitive anti-dumping duty on imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder originating in the People’s Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council	48
★ Commission Implementing Regulation (EU) 2023/1619 of 8 August 2023 on temporary emergency measures derogating in respect of the year 2023 from certain provisions of Regulations (EU) No 1308/2013 and (EU) No 2021/2117 of the European Parliament and of the Council, to resolve specific problems in the fruit and vegetables and wine sectors caused by adverse meteorological events	96
★ Commission Implementing Regulation (EU) 2023/1620 of 8 August 2023 on temporary emergency measures derogating in respect of the year 2023 from certain provisions of Regulation (EU) 2021/2115 of the European Parliament and of the Council, to resolve specific problems in the fruit and vegetables sector caused by adverse meteorological events and measures linked to them	101

DECISIONS

★ Decision No 1/2023 of the Specialised Committee established by Article 8(1)(r) of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, of 19 June 2023 establishing a standard form for requests for mutual assistance [2023/1621]	103
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⁽¹⁾ Text with EEA relevance.

II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

COUNCIL DECISION (CFSP) 2023/1614

of 10 July 2023

on the signing and conclusion on behalf of the Union of an Agreement in the form of an Exchange of Letters between the European Union and the Republic of Seychelles to facilitate the transfer by a Member State of the European Union of persons arrested and detained under its national law for participating, off the coast of Somalia, in violation of the United Nations arms embargo on Somalia or in narcotic drugs trafficking

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 37 thereof, in conjunction with Article 218(5) and (6) of the Treaty on the Functioning of the European Union,

Having regard to the proposal from the High Representative of the Union for Foreign Affairs and Security Policy,

Whereas:

- (1) On 22 December 2020, the Council by Decision (CFSP) 2020/2188 ⁽¹⁾ extended the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), established under Council Joint Action 2008/851/CFSP ⁽²⁾, to 31 December 2022 and expanded its mandate to the two secondary executive tasks of contributing to the implementation of the United Nations arms embargo on Somalia and to countering narcotic drugs trafficking off the coast of Somalia.
- (2) Joint Action 2008/851/CFSP provides that agreements may be concluded with third States, on the basis of authorisations granted on a case-by-case basis by the Council, to facilitate the transfer by a Member State of persons arrested and detained under its national law for participating in violations of the United Nations arms embargo on Somalia or in narcotic drugs trafficking off the coast of Somalia, with a view to the prosecution of such persons. Such agreements are to include conditions for the transfer of such persons consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that the persons concerned are not to be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.
- (3) On 20 May 2021, the Council adopted a Decision to authorise the High Representative of the Union for Foreign Affairs and Security Policy to open negotiations with the Republic of Seychelles with a view to the conclusion of an agreement to facilitate the transfer by a Member State of persons arrested and detained under its national law for participating in violations of the United Nations arms embargo on Somalia or in narcotic drugs trafficking off the coast of Somalia.

⁽¹⁾ Council Decision (CFSP) 2020/2188 of 22 December 2020 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (OJ L 435, 23.12.2020, p. 74).

⁽²⁾ Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to maritime security in the West Indian Ocean and in the Red Sea (EUNAVFOR ATALANTA) (OJ L 301, 12.11.2008, p. 33).

- (4) On 12 December 2022, the Council by Decision (CFSP) 2022/2441 ⁽³⁾ renamed Atalanta as 'EUNAVFOR ATALANTA', extended its mandate until 31 December 2024 and decided that, while exercising its tasks, it is to contribute to maritime security in the West Indian Ocean and the Red Sea.
- (5) An agreement has been negotiated between the Union and the Republic of Seychelles on the basis of the authorisation granted by the Council on 20 May 2021.
- (6) The agreement between the Union and the Republic of Seychelles should be approved on behalf of the Union,

HAS ADOPTED THIS DECISION:

Article 1

The Agreement in the form of an Exchange of Letters between the European Union and the Republic of Seychelles to facilitate the transfer by a Member State of the European Union of persons arrested and detained under its national law for participating, off the coast of Somalia, in violation of the United Nations arms embargo on Somalia or in narcotic drugs trafficking (the 'Agreement') is hereby approved on behalf of the Union ⁽⁴⁾.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement in order to bind the Union.

Article 3

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

Done at Brussels, 10 July 2023.

For the Council
The President
P. NAVARRO RÍOS

⁽³⁾ Council Decision (CFSP) 2022/2441 of 12 December 2022 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (OJ L 319, 13.12.2022, p. 80).

⁽⁴⁾ See page 3 of this Official Journal.

AGREEMENT

in the form of an Exchange of Letters between the European Union and the Republic of Seychelles to facilitate the transfer by a Member State of the European Union of persons arrested and detained under its national law for participating, off the coast of Somalia, in violation of the United Nations arms embargo on Somalia or in narcotic drugs trafficking

A. Letter from the European Union

Brussels, 19 July 2023

H.E. Sylvestre RADEGONDE

Minister for Foreign Affairs and Tourism – Republic of Seychelles

Your Excellency,

The European Union ('EU') has been carrying out a military operation to contribute to maritime security in the West Indian Ocean and in the Red Sea ('operation Atalanta').

The EU has given that military operation the additional tasks of contributing to the implementation of the United Nations arms embargo off the coast of Somalia in accordance with the United Nations Security Council Resolution 2182 of 2014, and to countering narcotic drugs trafficking off the coast of Somalia in the context of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

In the above context, I have the honour to propose that the EU and the Republic of Seychelles further consolidate their excellent relations, thereby contributing to peace, security and the rule of law in the Indian Ocean region, especially off the coast of Somalia, by concluding an Agreement through an Exchange of Letters to Facilitate the Transfer by a Member State of the EU of Persons Arrested and Detained Under its National Law for Participating, Off the Coast of Somalia, in Violation of the United Nations Arms Embargo on Somalia or in Narcotic Drugs Trafficking, reading as follows.

'This Agreement shall be guided by the principles set out below.

The EU and the Republic of Seychelles:

- (a) reaffirm their commitment to maintaining a legal order for the seas and oceans based upon the principles of international law, as reflected in particular in the United Nations Convention on the Law of the Sea (UNCLOS), done at Montego Bay on 10 December 1982;
- (b) underline the urgent need for international cooperation in suppressing illicit maritime drug traffic, in particular off the coast of Somalia, which is recognised as an unlawful activity in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988, specifically its Article 17 regarding "Illicit traffic by sea";
- (c) recall that the abovementioned Convention provides, *inter alia*, that the Parties to that Convention shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of Article 17 thereof regarding "illicit traffic by sea";
- (d) emphasise the urgent need for international cooperation in the implementation of the United Nations arms embargo off the coast of Somalia in accordance with United Nations Security Council Resolution (UNSCR) 2662(2022), which renewed the provisions set out in paragraph 15 of UNSCR 2182 (2014) authorizing States, acting nationally or through voluntary multinational naval partnerships, to inspect, without undue delay, in Somali territorial waters and on the high seas off the coast of Somalia extending to and including the Arabian sea and the Persian Gulf, vessels bound to or from Somalia which they have reasonable grounds to believe are carrying weapons or military equipment to Somalia, directly or indirectly, in violation of the arms embargo on Somalia; and
- (e) note that the EU Member States participating in operation Atalanta may arrest, detain and transfer to a third State, in their national capacity on the basis of their domestic law, persons involved in arms trafficking or in narcotic drugs trafficking and that the EU may conclude agreements with that third State to facilitate the transfer by an EU Member State of persons arrested and detained under its national law for participating in violations of the United Nations arms embargo on Somalia or in narcotic drugs trafficking off the coast of Somalia, with a view to the prosecution of such persons.

In addition, the EU and the Republic of Seychelles agree on the following arrangements:

1. The Government of the Republic of Seychelles may authorise an EU Member State contributing to operation Atalanta to transfer to the Republic of Seychelles suspected arms traffickers or narcotic drugs traffickers arrested in the context of operation Atalanta in the exclusive economic zone, territorial sea, archipelagic waters and internal waters of the Republic of Seychelles. That authorisation is extended to Seychelles flagged vessels and Seychellois citizens on non-Seychelles flagged vessels beyond the limit aforementioned, and in other circumstances on the high seas, at the discretion of the Republic of Seychelles.
2. The EU, aware of the limited capacities of the Republic of Seychelles to accept requests for the transfer, detention, prosecution and incarceration of suspected arms traffickers and narcotic drugs traffickers, shall provide the Republic of Seychelles with financial, human resource, material, logistical, legislative and infrastructural assistance for the detention, incarceration, maintenance, investigation, prosecution, trial and repatriation of the suspected or convicted arms traffickers and narcotic drugs traffickers. The Republic of Seychelles and the EU may, as necessary, enter into further implementing arrangements regarding financial matters for the implementation of this provision.
3. Unless otherwise agreed by the Republic of Seychelles and the EU Member State which transferred the suspected arms traffickers or narcotic drugs traffickers to the Republic of Seychelles, the Atalanta Liaison Officer shall be the primary contact person for the Republic of Seychelles in the implementation of this Agreement.
4. If the Republic of Seychelles agrees to the transfer of a prisoner under point 1 above, the Attorney General of Seychelles shall have 10 working days from the expiration of an order of the competent court for the holding of the transferred suspects to decide on the sufficiency of the available evidence for prosecution.
5. The EU Member State which has transferred the suspected arms or narcotic drugs traffickers to the Republic of Seychelles shall promptly ensure, upon a request by the Republic of Seychelles, that the transferred persons are transferred back to their country of origin or to any other appropriate country, within 10 days of the EU Member State having been notified of such a decision, in the event of:
 - (a) a decision by the Attorney General of Seychelles that there is insufficient evidence to prosecute;
 - (b) where the Republic of Seychelles decides that it no longer wishes to prosecute the transferred persons;
 - (c) their acquittal or discharge of the suspected offences or otherwise culmination of the case; or
 - (d) completion of the terms of imprisonment or of the procedure for transferring to the country of origin or to any another country to serve any period of imprisonment in accordance with relevant agreements.
6. The EU and the Government of the Republic of Seychelles agree that the transferred persons, in the event of any request by the Republic of Seychelles to that effect under point 5 above, should be accommodated in designated facilities in Seychelles pending their further transfer.
7. The EU and the Government of the Republic of Seychelles further agree that the following guarantees shall apply in respect of transferred persons:
 - (a) transferred persons shall be treated humanely and shall not be subjected to torture or cruel, inhuman or degrading treatment or punishment, or to the death penalty, shall receive adequate accommodation and nourishment, access to medical treatment and shall be able to carry out religious observance;
 - (b) transferred persons shall be brought promptly before a judge or other officer authorised by law to exercise judicial power, who shall decide without delay on the lawfulness of their detention and shall order their release if the detention is not lawful;
 - (c) transferred persons shall be entitled to trial within a reasonable time or to release;
 - (d) in the determination of any criminal charge against them, any transferred persons shall be entitled to a fair and public hearing by a competent, independent and impartial court or tribunal established by law;
 - (e) transferred persons charged with a criminal offence shall be presumed innocent until proven guilty according to law;

- (f) in the determination of any criminal charge against them, transferred persons shall be entitled to the following minimum guarantees, in full equality:
 - (i) to be informed promptly and in detail in a language which he understands of the nature of the charge against them;
 - (ii) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of their own choice;
 - (iii) to defend themselves in person or through legal assistance of their own choice; to be informed, if they do not have legal assistance, of that right; and to have legal assistance assigned to them, in any case where the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it;
 - (iv) to examine, or have examined, all evidence against them, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
 - (v) to have the free assistance of an interpreter if they cannot understand or speak the language used in court; and
 - (vi) not to be compelled to testify against themselves or to confess guilt.
 - (g) transferred persons convicted of a crime shall be permitted to have the right to have their conviction and sentence reviewed by, or appealed to, a higher tribunal in accordance with the law of Seychelles; and
 - (h) the Republic of Seychelles shall not transfer any transferred person to any other State without prior written consent from the EU Member State which brought the person to the Republic of Seychelles.
8. Disputes arising out of the implementation or interpretation of this Agreement shall be resolved by the EU and the Government of the Republic of Seychelles through negotiations via diplomatic channels.
9. This Agreement may be amended by written consent between the EU and the Republic of Seychelles. Such amendments shall enter into force on such date as may be agreed by the EU and the Republic of Seychelles.
10. The EU and the Republic of Seychelles may terminate this Agreement at any time by a written notification informing the other Party of the intent to terminate it. The termination shall take effect six months after the date of receipt of the notification. The termination of this Agreement shall not affect any rights of the Parties arising out of the execution of this Agreement before such termination, including the rights of any transferred persons as long as they are held in custody or are being prosecuted by the Republic of Seychelles when the termination takes effect, nor shall it affect any other obligation under this Agreement, including financial obligations; unless otherwise agreed by the EU and the Republic of Seychelles.”

Your Excellency,

If the principles and arrangements set out above are acceptable to the Republic of Seychelles, I have the honour to propose that this letter and Your Excellency's reply to that effect constitute a legally binding international agreement between the European Union and the Republic of Seychelles, which will enter into force on the date on which your letter of reply is received.

Accept, Excellency, the assurances of my highest consideration.

Yours sincerely,

For the European Union
Josep BORRELL FONTELLES

B. Letter from the Republic of Seychelles

Victoria, 3 August 2023

Mr Josep BORRELL FONTELLES

High Representative of the European Union for Foreign Affairs and Security Policy

Your Excellency,

I have the honour to acknowledge receipt of your letter dated 19 July 2023 proposing an Agreement between the Republic of Seychelles and the European Union through an Exchange of Letters to Facilitate the Transfer by a Member State of the EU of Persons Arrested and Detained Under its National Law for Participating, Off the Coast of Somalia, in Violation of the United Nations Arms Embargo on Somalia or in Narcotic Drugs Trafficking, which reads as follows:

‘This Agreement shall be guided by the principles set out below.

The EU and the Republic of Seychelles:

- (a) reaffirm their commitment to maintaining a legal order for the seas and oceans based upon the principles of international law, as reflected in particular in the United Nations Convention on the Law of the Sea (UNCLOS), done at Montego Bay on 10 December 1982;
- (b) underline the urgent need for international cooperation in suppressing illicit maritime drug traffic, in particular off the coast of Somalia, which is recognised as an unlawful activity in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988, specifically its Article 17 regarding “Illicit traffic by sea”;
- (c) recall that the abovementioned Convention provides, *inter alia*, that the Parties to that Convention shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of Article 17 thereof regarding “illicit traffic by sea”;
- (d) emphasise the urgent need for international cooperation in the implementation of the United Nations arms embargo off the coast of Somalia in accordance with United Nations Security Council Resolution (UNSCR) 2662(2022), which renewed the provisions set out in paragraph 15 of UNSCR 2182 (2014) authorizing States, acting nationally or through voluntary multinational naval partnerships, to inspect, without undue delay, in Somali territorial waters and on the high seas off the coast of Somalia extending to and including the Arabian sea and the Persian Gulf, vessels bound to or from Somalia which they have reasonable grounds to believe are carrying weapons or military equipment to Somalia, directly or indirectly, in violation of the arms embargo on Somalia; and
- (e) note that the EU Member States participating in operation Atalanta may arrest, detain and transfer to a third State, in their national capacity on the basis of their domestic law, persons involved in arms trafficking or in narcotic drugs trafficking and that the EU may conclude agreements with that third State to facilitate the transfer by an EU Member State of persons arrested and detained under its national law for participating in violations of the United Nations arms embargo on Somalia or in narcotic drugs trafficking off the coast of Somalia, with a view to the prosecution of such persons.

In addition, the EU and the Republic of Seychelles agree on the following arrangements:

1. The Government of the Republic of Seychelles may authorise an EU Member State contributing to operation Atalanta to transfer to the Republic of Seychelles suspected arms traffickers or narcotic drugs traffickers arrested in the context of operation Atalanta in the exclusive economic zone, territorial sea, archipelagic waters and internal waters of the Republic of Seychelles. That authorisation is extended to Seychelles flagged vessels and Seychellois citizens on non-Seychelles flagged vessels beyond the limit aforementioned, and in other circumstances on the high seas, at the discretion of the Republic of Seychelles.
2. The EU, aware of the limited capacities of the Republic of Seychelles to accept requests for the transfer, detention, prosecution and incarceration of suspected arms traffickers and narcotic drugs traffickers, shall provide the Republic of Seychelles with financial, human resource, material, logistical, legislative and infrastructural assistance for the detention, incarceration, maintenance, investigation, prosecution, trial and repatriation of the suspected or convicted arms traffickers and narcotic drugs traffickers. The Republic of Seychelles and the EU may, as necessary, enter into further implementing arrangements regarding financial matters for the implementation of this provision.

3. Unless otherwise agreed by the Republic of Seychelles and the EU Member State which transferred the suspected arms traffickers or narcotic drugs traffickers to the Republic of Seychelles, the Atalanta Liaison Officer shall be the primary contact person for the Republic of Seychelles in the implementation of this Agreement.
4. If the Republic of Seychelles agrees to the transfer of a prisoner under point 1 above, the Attorney General of Seychelles shall have 10 working days from the expiration of an order of the competent court for the holding of the transferred suspects to decide on the sufficiency of the available evidence for prosecution.
5. The EU Member State which has transferred the suspected arms or narcotic drugs traffickers to the Republic of Seychelles shall promptly ensure, upon a request by the Republic of Seychelles, that the transferred persons are transferred back to their country of origin or to any other appropriate country, within 10 days of the EU Member State having been notified of such a decision, in the event of:
 - (a) a decision by the Attorney General of Seychelles that there is insufficient evidence to prosecute;
 - (b) where the Republic of Seychelles decides that it no longer wishes to prosecute the transferred persons;
 - (c) their acquittal or discharge of the suspected offences or otherwise culmination of the case; or
 - (d) completion of the terms of imprisonment or of the procedure for transferring to the country of origin or to any another country to serve any period of imprisonment in accordance with relevant agreements.
6. The EU and the Government of the Republic of Seychelles agree that the transferred persons, in the event of any request by the Republic of Seychelles to that effect under point 5 above, should be accommodated in designated facilities in Seychelles pending their further transfer.
7. The EU and the Government of the Republic of Seychelles further agree that the following guarantees shall apply in respect of transferred persons:
 - (a) transferred persons shall be treated humanely and shall not be subjected to torture or cruel, inhuman or degrading treatment or punishment, or to the death penalty, shall receive adequate accommodation and nourishment, access to medical treatment and shall be able to carry out religious observance;
 - (b) transferred persons shall be brought promptly before a judge or other officer authorised by law to exercise judicial power, who shall decide without delay on the lawfulness of their detention and shall order their release if the detention is not lawful;
 - (c) transferred persons shall be entitled to trial within a reasonable time or to release;
 - (d) in the determination of any criminal charge against them, any transferred persons shall be entitled to a fair and public hearing by a competent, independent and impartial court or tribunal established by law;
 - (e) transferred persons charged with a criminal offence shall be presumed innocent until proven guilty according to law;
 - (f) in the determination of any criminal charge against them, transferred persons shall be entitled to the following minimum guarantees, in full equality:
 - (i) to be informed promptly and in detail in a language which he understands of the nature of the charge against them;
 - (ii) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of their own choice;
 - (iii) to defend themselves in person or through legal assistance of their own choice; to be informed, if they do not have legal assistance, of that right; and to have legal assistance assigned to them, in any case where the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it;
 - (iv) to examine, or have examined, all evidence against them, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;

- (v) to have the free assistance of an interpreter if they cannot understand or speak the language used in court; and
 - (vi) not to be compelled to testify against themselves or to confess guilt.
 - (g) transferred persons convicted of a crime shall be permitted to have the right to have their conviction and sentence reviewed by, or appealed to, a higher tribunal in accordance with the law of Seychelles; and
 - (h) the Republic of Seychelles shall not transfer any transferred person to any other State without prior written consent from the EU Member State which brought the person to the Republic of Seychelles.
8. Disputes arising out of the implementation or interpretation of this Agreement shall be resolved by the EU and the Government of the Republic of Seychelles through negotiations via diplomatic channels.
9. This Agreement may be amended by written consent between the EU and the Republic of Seychelles. Such amendments shall enter into force on such date as may be agreed by the EU and the Republic of Seychelles.
10. The EU and the Republic of Seychelles may terminate this Agreement at any time by a written notification informing the other Party of the intent to terminate it. The termination shall take effect six months after the date of receipt of the notification. The termination of this Agreement shall not affect any rights of the Parties arising out of the execution of this Agreement before such termination, including the rights of any transferred persons as long as they are held in custody or are being prosecuted by the Republic of Seychelles when the termination takes effect, nor shall it affect any other obligation under this Agreement, including financial obligations; unless otherwise agreed by the EU and the Republic of Seychelles.'

I have the honour to confirm, on behalf of the Republic of Seychelles, that the Agreement proposed in your letter is acceptable to the Republic of Seychelles.

Your Excellency's letter and this reply constitute a legally binding international agreement between the European Union and the Republic of Seychelles, which will enter into force on the date on which this letter of reply is received.

Accept, Excellency, the assurances of my highest consideration.

Yours sincerely,

For the Republic of Seychelles
Sylvestre RADEGONDE

REGULATIONS

COMMISSION DELEGATED REGULATION (EU) 2023/1615

of 3 May 2023

supplementing Regulation (EU) 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the conditions under which compensation, cash equivalent of such compensation or any proceeds that are due pursuant to Article 63(1) of that Regulation are to be passed on to clients and indirect clients and the conditions under which passing on is to be considered proportionate

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to the Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 ⁽¹⁾, and in particular Article 63(2), third subparagraph, thereof,

Whereas:

- (1) Article 63 of Regulation (EU) 2021/23 states that contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) of Regulation (EU) 2021/23 or any cash equivalent of such recompense or compensation or any proceeds they have received following a claim made in accordance with Article 62 of Regulation (EU) 2021/23 ('reimbursement'), to the extent that such proceeds are related to client positions and their contributions, and that those provisions shall also apply to the contractual arrangements by clients and indirect clients providing indirect clearing services to their clients.
- (2) To ensure an equivalent and proportionate distribution of the reimbursement, clearing service providers should distribute, in a fair and non-discriminatory manner, the different forms of reimbursement to the clearing service users concerned. The part of the reimbursement received by each clearing service user concerned should be proportionate to the contribution made by such clearing service user to the resolution of the CCP, to which it had indirect access through the clearing service provider concerned and where such contribution results in a payment under Article 27(6) or Article 62 of Regulation (EU) 2021/23 ('qualifying contribution'). For the same reason, clearing service users should receive their reimbursement without any set-off, unless a clearing service user owes an obligation that is due and payable to a clearing service provider that is at the same time under the obligation to pass on reimbursement to that clearing service user. However, in order to prevent such set-off or netting from resulting in an undue reduction of the amounts owed to the clearing service users further down the clearing chain, where the recipient is also a clearing service provider, the reimbursement to be passed on to its clearing service users should be calculated based on the reimbursement received by the clearing service provider before any deductions or set-off were made.

⁽¹⁾ OJ L 22, 22.1.2021, p. 1.

- (3) Reimbursements should be allocated in a fair and non-discriminatory manner to all clearing service users that have made a qualifying contribution and to the own accounts of the clearing service provider where such clearing service provider have also made a qualifying contribution. To further avoid discrimination or unfair treatments, clearing service providers should not apply any subordination clauses, nor any ranking when distributing such reimbursements.
- (4) Market conditions during a resolution phase are likely to be very stressed. It is therefore necessary to provide clearing service users with transparency and to reassure them that the financial assets and instruments intended for the distribution of the reimbursement are protected in the event of a default of their clearing service provider. Clearing service providers should therefore, when receiving reimbursement on behalf of a clearing service user, hold such reimbursement on a separate and segregated account.
- (5) The range of financial assets or financial instruments that may be used to compensate clearing members, clients and indirect clients is very wide and different assets and instruments bear different risks. To ensure the fair and equal distribution of the reimbursement, clearing service providers should divide the different types of financial assets and financial instruments that they have received as a reimbursement equally between each of the clearing service users and their own accounts. Such division should be proportional to the qualifying contribution made by those clearing service users to the resolution of the CCP to which they have indirect access through those clearing service providers, or by clearing service providers in that resolution procedure.
- (6) It is necessary to account for the operational specificities and obstacles associated with some types of financial assets and financial instruments. It is also necessary to ensure to the maximum extent that the clearing service user receives a fair reimbursement where the clearing service user is not able to receive a certain type of financial asset or financial instrument or would prefer not to receive a certain type of financial asset or financial instrument for other reasons. The clearing service provider should therefore, upon the request of the clearing service user and to the extent possible, transfer the asset or instrument concerned to another recipient appointed by the clearing service user. Where that is not possible, the clearing service provider should, sell the relevant assets or instruments in the market to a third party at the prevailing market price and subsequently transfer the proceeds of the sale to the clearing service user.
- (7) To ensure transparency and traceability, clearing service providers should inform their clearing service users, to the best of their possibilities, about any decision taken in the resolution process to compensate for qualifying contributions made. Such information should provide, to the extent possible, the scope of the decision to contribute to the resolution under Regulation (EU) 2021/23, the composition of the reimbursement and the calculation of the reimbursement including how the clearing service provider has calculated the clearing service user's reimbursement. For the same reason and to ensure that clearing service users understand the relationship between the contribution they have made and the reimbursement they have received, clearing service providers should inform clearing service users, where possible and without breaching any confidentiality restrictions, of the overall distribution and composition of the reimbursement.
- (8) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).
- (9) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽²⁾,

⁽²⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation, the following definitions apply:

1. 'clearing service provider' means a clearing member as defined in Article 2, point (14) of Regulation (EU) No 648/2012 of the European Parliament and of the Council ⁽³⁾, a client as defined in Article 2, point (15), of Regulation (EU) No 648/2012, an indirect client, a second indirect client or a third indirect client as defined in Article 1, point (b),(d) or (e) of Commission Delegated Regulation (EU) 2017/2154 ⁽⁴⁾, that provides clearing services, directly or indirectly, in the Union;
2. 'clearing service user' means a client as defined in Article 2, point (15), of Regulation (EU) No 648/2012, or an indirect client, a second indirect client or a third indirect client as defined in Article 1, point (b),(d) or (e) of Delegated Regulation (EU) 2017/2154, that uses clearing services provided by a clearing service provider;
3. 'reimbursement' means the recompense or compensation clearing members receive in accordance with Article 27(6) of Regulation (EU) 2021/23, including instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profits, or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 of Regulation (EU) 2021/23 including where any of these amounts, referred to under those articles, are passed on to a clearing service user;
4. 'qualifying contribution' means the contribution, made via a clearing member of the CCP, under the conditions set out in Article 63 of Regulation (EU) 2021/23, by a clearing service user to the CCP in resolution to which it has indirect access through a clearing service provider and where the contribution made, via the clearing member of the CCP, in the resolution procedure, has resulted in a reimbursement.

Article 2

Form of the reimbursement

The reimbursement credited or awarded to a clearing service provider and passed on to a clearing service user may take the form of cash, financial instruments, instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profit.

Article 3

Distribution of the reimbursement

1. Clearing service providers shall, in a fair and non-discriminatory manner, distribute the relevant reimbursement among all clearing service users that have made a qualifying contribution, including clearing service users that are no longer clearing service users of the clearing service provider receiving the reimbursement, proportionally to the qualifying contribution made by each of those clearing service users.

⁽³⁾ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

⁽⁴⁾ Commission Delegated Regulation (EU) 2017/2154 of 22 September 2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements (OJ L 304, 21.11.2017, p. 6).

2. Clearing service providers shall calculate the reimbursement to be distributed in a transparent manner and inform each clearing service user separately in accordance with Article 5(2), point (c).

3. Clearing service providers shall allocate the reimbursement to their own accounts and to the accounts of their clearing service users that made a qualifying contribution on the basis of a calculation of the qualifying contribution made and shall not discriminate between different recipients, nor rank them. Clearing service providers shall not allocate any part of the reimbursement to their own account before having allocated to the accounts of their clearing service users that made a qualifying contribution the part of the reimbursement to which those clearing service users are entitled.

4. Clearing service providers may apply deductions from or set-off towards the reimbursement where a clearing service user owes an obligation that is due and payable to a clearing service provider that is under the obligation, in accordance with Article 63 of Regulation (EU) 2021/23, to pass on reimbursement to that same clearing service user.

However, where the recipient is also a clearing service provider, the reimbursement to be passed on to its clearing service users shall be calculated based on the reimbursement that was to be received by the clearing service provider before any deductions or set-off as referred to in the first subparagraph were made.

5. A clearing service provider shall hold the reimbursement received pursuant to Article 27(6) or 62 of Regulation (EU) 2021/23 on a separate and segregated account until all reimbursements due are fully distributed.

Article 4

Type of reimbursement and delivery

1. Where the reimbursement consists of different types of financial assets or financial instruments, irrespective of whether those assets or financial instruments take the form of cash, instruments of ownership, debt instruments, or any other instruments recognising a claim on the future profits of the CCP in resolution, clearing service providers shall break that reimbursement down by type of assets or instruments. Each clearing service provider shall subsequently allocate and distribute the reimbursement to each of its clearing service users and to its own account, where entitled to reimbursement, proportionally to the qualifying contribution made and in the same proportion of each type of financial assets or financial instruments.

2. A clearing service provider that, due to settlement restrictions or due to another impediment to the transfer of some assets or instruments, is unable to distribute the reimbursement to a clearing service user, that made a qualifying contribution, in the form required by paragraph 1, shall notify the clearing service user concerned thereof without delay.

3. Where the settlement restriction or impediment referred to in paragraph 2 cannot be remedied within three working days from the receipt by the clearing service user of the notification referred to in that paragraph, the clearing service provider shall request the clearing service user to appoint an alternative recipient for the relevant assets or instruments within five working days. A clearing service user may also request the clearing service provider to distribute the financial assets or financial instruments to an alternative recipient. Where an alternative recipient has been appointed by the clearing service user, the clearing service provider shall transfer the financial assets or financial instruments to that alternative recipient to the extent possible and at a reasonable cost for the clearing service user.

4. Where a transfer to an alternative recipient under paragraph 3 is not possible, the clearing service provider shall inform the clearing service user concerned thereof in writing within three working days of the appointment of the alternative recipient, stating the reason for that impossibility. In that case, the clearing service provider shall sell the assets or instruments concerned to a third party on an established securities market at the prevailing market price and transfer the proceeds of the sale, net of any reasonable costs of sale, to the clearing service user.

*Article 5***Reimbursement information**

1. Clearing service providers shall notify, in writing, the clearing service users that have made a qualifying contribution of any reimbursement they are entitled to.
2. The notification referred to in paragraph 1 shall contain all of the following information:
 - (a) where applicable, a copy of the decision by the resolution authority that the clearing member is entitled to the payment of the difference referred to in Article 62 of Regulation (EU) 2021/23;
 - (b) where applicable, a copy of the decision of the resolution authority requiring the CCP to provide compensation to the clearing members that have incurred excess losses as referred to in Article 27(6), first subparagraph, of Regulation (EU) 2021/23, together with an explanation of how that amount is deducted from any entitlement to the payment of the difference referred to in Article 62 of Regulation (EU) 2021/23;
 - (c) clear and precise information on the reimbursement that is to be distributed to the clearing service user and on the methodology used to calculate such reimbursement;
 - (d) clear and precise information on the reimbursement received by the clearing service provider before any set-off or other deductions were made in accordance with Article 3(4) of this Regulation;
 - (e) clear and precise information on the form in which the reimbursement has been provided to the clearing service provider, distinguishing between cash and financial instruments and between each of the different forms of financial instruments, including instruments of ownership, debt instruments or instruments recognising a claim on the future profits of the CCP, and information on the composition of the reimbursement for the clearing service user;
 - (f) subject to any confidentiality restrictions, general details on the overall distribution of the reimbursement between the clearing service users of the clearing service provider and the own accounts of the clearing service provider;
 - (g) any calculation of interest or any other relevant factor affecting the reimbursement.

*Article 6***Entry into force**

This Regulation shall enter into force on the twentieth 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, 3 May 2023.

For the Commission
The President
Ursula VON DER LEYEN

COMMISSION DELEGATED REGULATION (EU) 2023/1616**of 3 May 2023**

supplementing Regulation (EU) 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the circumstances in which a person is deemed to be independent from the resolution authority and from the central counterparty, the methodology for assessing the value of assets and liabilities of a central counterparty, the separation of the valuations, the methodology for calculating the buffer for additional losses to be included in provisional valuations, and the methodology for carrying out the valuation for the application of the ‘no creditor worse off’ principle

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 ⁽¹⁾, and in particular Article 25(6), third subparagraph, Article 26(4), third subparagraph, and Article 61(5), third subparagraph, thereof,

Whereas:

- (1) Article 25(1) and Article 61(1) of Regulation (EU) 2021/23 require the person carrying out the valuation referred to in Articles 24 and 61 of that Regulation (‘the valuer’) to be independent from any public authority and from the central counterparty (‘CCP’) under valuation. Accordingly, uniform rules should apply to determine the circumstances in which a person shall be considered independent both from the relevant public authorities, including the resolution authority, and from the CCP for the purposes of Article 25(1) of Regulation (EU) 2021/23. Those rules should include requirements ensuring the absence of material common or conflicting interest of that person with the resolution authority or the CCP; requirements concerning the qualifications, experience, ability, knowledge and resources of that person and their ability to carry out the valuation effectively without undue reliance on any relevant public authority or the CCP, and requirements concerning the structural separation between the person and both the relevant public authorities and the CCP.
- (2) To address threats to independence such as self-review, self-interest, advocacy, familiarity, trust or intimidation, it is necessary to ensure that the valuer does not have any material interest in common or in conflict with any relevant public authority, including the resolution authority, or with the CCP, including its senior management, controlling shareholders or group entities. In addition, a valuer should not be considered as independent where the valuer has material interests in common or in conflict with any significant clearing member, client or creditor which would be materially affected by a resolution action or which has significantly contributed to the situation that led to the CCP’s resolution. Similarly, personal relationships could represent a material interest. Accordingly, the resolution authority should assess whether any material common or conflicting interests are present.
- (3) To enable the resolution authority to assess whether any material common or conflicting interests are present, the valuer should notify the resolution authority of any actual or potential interest which the valuer considers could, in the assessment of that authority, amount to a material interest and should provide any information that the resolution authority could reasonably request. Following their appointment, the valuer should maintain policies and

⁽¹⁾ OJ L 22, 22.1.2021, p. 1.

procedures in accordance with the applicable codes of ethics and professional standards to identify any actual or potential interest which the valuer considers could amount to a material common or conflicting interest. The resolution authority should be notified immediately of any actual or potential interests identified and should consider whether those amount to a material interest, in which case the valuer's appointment should be terminated and a new valuer appointed.

- (4) Structural separation arrangements constitute safeguards that mitigate the risks of conflicts of interest. As such, their existence should be taken into account in the assessment of a potential valuer. Thus, in the case of legal persons, the independence of a valuer should be assessed by reference to the company or partnership as a whole but taking account of any structural separation and other arrangements that have possibly been put in place to differentiate between those staff members who could be involved in the valuation and other staff members. If the significance of those threats compared to the safeguards applied is such that the independence of the company or partnership applying to be a valuer is compromised, that company or partnership should not be retained as a valuer.
- (5) In order to avoid threats to independence from self-review, a statutory auditor who has completed an audit of the CCP in the year preceding their assessment for eligibility to act as valuer should not be regarded as independent under any circumstances. As regards other audit or valuation services provided to the CCP concerned in the years immediately preceding the date on which independence is to be assessed, those services should also be assumed to present a material common or conflicting interest.
- (6) Independence of the valuer can be reinforced by conditions ensuring that the expertise and resources of the valuer are sufficient and appropriate. It is therefore necessary to ensure that the valuer possesses the necessary qualifications, experience, ability and knowledge in all relevant subjects, including the valuations of the financial instruments cleared by the CCP, the applicable CCP requirements under Regulation (EU) No 648/2012 of the European Parliament and of the Council ⁽²⁾, existing CCP recovery plans and rulebooks, and applicable resolution tools under Regulation (EU) 2021/23.
- (7) In order for the valuer to be able to carry out the valuation effectively, it should also be ensured that the valuer holds, or has access to, sufficient human and technical resources to carry out the valuation.
- (8) In order to ensure their independence and to avoid undue interference with their duties, the valuer should be capable of carrying out the valuation effectively without undue reliance on any relevant public authority, including the resolution authority, or on the CCP. However, the provision of instructions or guidance necessary to support the conduct of the valuation, for example in relation to the methodology provided pursuant to Union legislation in the field of valuation for purposes relating to resolution, should not be seen as constituting undue reliance where such instructions are, or such guidance is, considered necessary to support the conduct of the valuation. In addition, the provision of assistance, such as the provision by the CCP concerned of systems, financial statements, regulatory reports, market data, other records or other assistance to the valuer should not be prevented where, in the assessment of resolution authority, this is considered necessary to support the conduct of the valuation. In accordance with any procedures which have possibly been put in place, the provision of instructions, guidance and other forms of support should be agreed on a case-by-case or pooled basis.
- (9) Independence risks being endangered if a valuation is performed by a person that is employed by or affiliated to any relevant public authority, including the resolution authority, and to the CCP, even in cases where full structural separation has been established within a legal person. It is therefore necessary to ensure that the valuer is not an employee or contractor of any relevant public authority, including the resolution authority, or of the CCP, and does not belong to the same group of companies as the CCP.

⁽²⁾ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

- (10) In order to ensure the availability of a sufficient number of persons that could be readily available to act as valuer when a resolution process starts, the resolution authority should maintain a provisional list of potential valuers and should revise this list on a regular basis.
- (11) Article 24 of Regulation (EU) 2021/23 distinguishes two valuations over the course of a CCP resolution process: an initial valuation assessing whether the conditions for resolution have been met, and a second valuation which forms the basis for the resolution authority's decision to apply one or more resolution tools. For the purpose of the initial valuation, it is appropriate to ensure that when determining whether the conditions for resolution are met, a fair, prudent and realistic valuation of the CCP's assets and liabilities is conducted. For the second valuation, the purpose of which is to inform resolution actions, it is important to ensure that the valuation of the assets and liabilities of the CCP is based on fair, prudent and realistic assumptions.
- (12) In order to accurately reflect the CCP's circumstances and prevailing market conditions, the valuations set out in Regulation (EU) 2021/23 should be performed as close as possible to the resolution decision date.
- (13) In order to effectively and efficiently perform the valuations set out in Regulation (EU) 2021/23, the valuer should have access to any sources of relevant information and expertise, such as the internal records, systems and models of the CCP. The valuer should also rely on information provided directly by the CCP's staff, management and auditors, as well as, where relevant, publicly available information on the market structure.
- (14) Where the CCP belongs to a group, considering that contractual intra-group support arrangements may provide additional financial support to the CCP in resolution and influence the resolution strategy, the valuer should consider the effect of those contracts where it is probable that such arrangements will be put into effect. The valuer should consider other formal or informal support arrangements within the group where it is probable that they will remain in place in stressed financial conditions or in resolution. Similarly, the valuer should carefully consider the risk that the CCP's financial resources could be used to cover for the losses of other group entities, as this could further reduce the value of the CCP's assets.
- (15) Since interoperability arrangements result in financial interdependencies capable of affecting the valuation, where the CCP has entered into interoperability arrangements with other Union CCPs, the valuer should consider all contractual arrangements linked to the interoperability arrangement, including where the service closure of the link may draw liquidity from the CCP.
- (16) Since the valuation process has the objective of supporting the decisions made by the resolution authority before the start of resolution and where implementing the resolution strategy, the valuer should report to the resolution authority. The valuer should therefore summarise the assumptions, methodologies and outcome of the valuation in a report to the resolution authority. The report should include any information that is deemed relevant to assist the resolution authority.
- (17) To ensure a fair, prudent and realistic valuation, the valuer should assess the impact on the valuation of each resolution action that the resolution authority is likely to adopt, and should in case necessary consult with the resolution authority in order to take those into account. The valuer should further be able to consult with the resolution authority to identify the range of resolution actions being considered. If necessary, the valuer should be able to present separate valuations that reflect the impact of a sufficiently diverse range of resolution actions.
- (18) For the same reasons, valuations for the purpose of informing the determination by the competent authority or the resolution authority of whether the conditions for resolution are met should be consistent with the applicable accounting and prudential framework. However, the valuer should be able to depart from the assumptions made by the CCP's management under which the financial statements are prepared to the extent that such departure is consistent with the applicable accounting and prudential framework.

- (19) It is appropriate to have rules that ensure that the valuation for the purpose of informing the choice of resolution actions are fair, prudent and realistic, in order to ensure that all losses are fully recognised at the moment the resolution tools are applied. The choice of the most appropriate measurement basis should be made for the particular resolution actions being considered by the resolution authority.
- (20) Valuations for the purpose of informing the choice and design of resolution actions should assess the economic value of the CCP and not its accounting value. Those valuations should consider the present value of cash flows that the CCP can reasonably expect, even where this requires departing from the accounting or prudential valuation framework. Such valuations should also consider that cash flows could arise from continuing to hold the assets, yet should take into account the potential effects of the resolution on future cash flows. Alternatively, where the CCP lacks the ability to hold the assets or their disposal is considered necessary or appropriate to achieve the resolution objectives, the valuation should reflect that those cash flows could arise from the disposal of assets, liabilities or business lines, assessed over a defined disposal period.
- (21) The disposal value should generally be understood as equivalent to the observable market price that could be obtained on the market for a particular asset or group of assets and might reflect a discount that is appropriate in view of the amount of assets being transferred. However, the valuer should be able, where appropriate, having regards to the actions to be taken under the resolution scheme, to determine the disposal value by applying a discount to such observable market price for a potential accelerated sale. Where the assets do not have a liquid market, the disposal value should be determined by reference to the observable prices on markets where similar assets are traded or to model calculations using observable market parameters with discounts for illiquidity reflected as appropriate. Where the use of the sale of business tool or the bridge CCP tool is contemplated, it should be possible to take into account reasonable expectations for franchise value when determining the disposal value.
- (22) For the purpose of ensuring consistency between the calculation of the estimate of the treatment that each class of shareholders and creditors would have been expected to receive had the institution or entity been wound up under normal insolvency proceedings, required by Article 25(5) of Regulation (EU) 2021/23, and the valuation following resolution pursuant to Article 61 of that Regulation, it is important that the valuer use the criteria set out for the latter valuation where appropriate.
- (23) A provisional valuation pursuant to Article 26 of Regulation (EU) 2021/23 that forms the basis of the decision on the taking of the appropriate resolution action is to include a buffer aimed at approximating the amount of additional losses. That buffer should be based on a fair, prudent and realistic assessment of those additional losses. The decisions and assumptions supporting the calculation of the buffer should be fully explained and substantiated in the valuation report.
- (24) The buffer should not bias the assessment to be made by the resolution authority, including whether the conditions for resolution laid down in Article 22 of Regulation (EU) 2021/23 are met, as well as when making an informed decision on the appropriate resolution actions to be taken.
- (25) The valuation under Article 61 of Regulation (EU) 2021/23 is to be carried out by a valuer meeting the conditions set out in Article 25 of that Regulation as soon as possible after the resolution action or actions have been effected, even though its completion could take some time. That valuation should be based on available information relevant to the date when the decision to resolve a CCP is adopted in order to appropriately reflect specific circumstances, such as distressed market conditions, existing at that resolution decision date. Information obtained after the resolution decision date should only be used where it could reasonably have been known at that date.
- (26) In order to ensure that a comprehensive and credible valuation is carried out, the valuer should have access to any appropriate legal documentation, including a list of all identifiable assets, claims, contingent assets and contingent claims against the entity classified according to their priority under normal insolvency proceedings. The valuer should be allowed to enter into arrangements to obtain specialist advice or expertise as required by the circumstances.

- (27) For the purpose of determining the treatment that shareholders, clearing members and other creditors would have received had the CCP been wound up under normal insolvency proceedings, the valuer should assess the discounted amount of expected cash flows that each shareholder, clearing member and other creditor would have received under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in the CCP's operating rules. The valuer should disregard any provision of extraordinary public financial support to the CCP or central bank liquidity assistance provided under non-standard collateralisation, tenor and interest terms.
- (28) The valuer should also take into account a commercially reasonable estimate of the direct replacement costs incurred by clearing members under normal insolvency proceedings. Such costs should cover the cost incurred when replacing transactions open at the CCP prior to insolvency, including credit, liquidity and transaction costs, as well as operating costs associated with new connections with a different counterparty, and any material cost of funding for the new collateral requirements associated with those transactions.
- (29) The provisions in this Regulation are closely linked to each other, since they deal with the circumstances and methodology for the valuation of assets and liabilities in the context of the resolution of a CCP. To ensure coherence between those provisions, which should enter into force simultaneously, and to facilitate the resolution process, there is a need for CCPs, clearing members, their clients, authorities and market participants, including investors that are non-Union residents, to have a comprehensive view and compact access to their obligations and rights. It is therefore appropriate to include the relevant regulatory technical standards required by Articles 25(6), 26(4) and 61(5) of Regulation (EU) 2021/23 in a single Regulation.
- (30) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority.
- (31) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽³⁾,

HAS ADOPTED THIS REGULATION:

CHAPTER I

General provisions

Article 1

Definitions

For the purposes of this Regulation, the following definitions apply:

1. 'relevant public authority' means:

- (a) the resolution authority designated in accordance with Article 3 of Regulation (EU) 2021/23;
- (b) the competent authority for the central counterparty (CCP) under resolution designated in accordance with Article 22 of Regulation (EU) No 648/2012;
- (c) the members and observers of the resolution college referred to in Article 4(2) and (4) of Regulation (EU) 2021/23;

⁽³⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (d) the members of the college referred to in Article 18(2) of Regulation (EU) No 648/2012;
 - (e) the competent authority for any entity within the same group as the CCP under resolution;
 - (f) the deposit guarantee scheme to which the CCP under resolution is affiliated, where such CCP is also authorised as a credit institution in accordance with Directive 2013/36/EU of the European Parliament and of the Council ^(*);
 - (g) the body in charge of the resolution financing arrangements where the CCP is also authorised as a credit institution in accordance with Directive 2013/36/EU;
 - (h) where applicable, the resolution authority of the group to which the CCP belongs, and the resolution authority of any entity within the same group as the CCP;
 - (i) the competent ministry designated pursuant to Article 3(8) of Regulation (EU) 2021/23;
 - (j) any other public authority involved in the resolution process of a CCP;
2. 'valuer' means a legal or natural person appointed to carry out the valuations referred to in Articles 24, 26(1) and 61 of Regulation (EU) 2021/23;
 3. 'fair value' means the price that would be received for the sale of an asset or paid to transfer a liability in an orderly transaction between market participants at the valuation date, as defined in the relevant accounting framework;
 4. 'hold value' means the present value, discounted at an appropriate rate, of cash flows that the CCP can reasonably expect under fair, prudent and realistic assumptions from retaining particular assets and liabilities, considering factors affecting customer or counterparty behaviour or other valuation parameters in the context of resolution;
 5. 'disposal value' means the value calculated in accordance with Article 17(5);
 6. 'franchise value' means the net present value of cash flows, higher or lower than the value arising from the contractual terms and conditions of assets and liabilities existing at the valuation date, that can reasonably be expected to result from the maintenance and renewal of assets and liabilities or businesses and which includes the impact of any business opportunities, as relevant, including those stemming from the different resolution actions that are assessed by the valuer;
 7. 'equity value' means an estimated market price for transferred or issued shares that results from the application of generally accepted valuation methodologies and that, depending on the nature of the assets or business, could comprise franchise value;
 8. 'measurement basis' means the approach for determining the monetary amounts at which assets or liabilities are presented by the valuer;
 9. 'resolution decision date' means the date of the decision of the resolution authority to take resolution action in relation to a CCP in accordance with Article 71 of Regulation (EU) 2021/23.

CHAPTER II

Independence of valuers

Article 2

Elements of independence

1. The valuer shall be deemed to be independent from any relevant public authority and from the CCP where all the following conditions are met at the time of their appointment and during the valuation of the assets and liabilities of the CCP referred to in Article 24, Article 26(1) and Article 61 of Regulation (EU) 2021/23:

^(*) 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

- (a) the valuer has no material common or conflicting interest within the meaning of Article 3 of this Regulation;
 - (b) the valuer possesses the necessary qualifications, experience, ability, knowledge and resources required under Article 4 of this Regulation to be able to effectively carry out the valuations referred to in Article 24, Article 26(1) and Article 61 of Regulation (EU) 2021/23;
 - (c) the valuer is separate from the relevant public authorities and from the CCP in accordance with Article 5 of this Regulation.
2. The resolution authority shall establish a list of potential valuers that meet the requirements laid down in this Article. That list shall be reviewed on a regular basis.

Article 3

Material common or conflicting interests

1. The valuer shall not have any actual or potential material interest in common or in conflict with any relevant public authority or with the CCP.
2. For the purposes of paragraph 1, the resolution authority shall consider an actual or potential interest to be material where it considers that such interest is likely to influence, or is likely to be perceived by external stakeholders as influencing the valuer's judgement in carrying out the valuations referred to in Article 24, Article 26(1) and Article 61 of Regulation (EU) 2021/23.

For the purposes of the first subparagraph, the resolution authority shall consider the following:

- (a) the past or present provision of services by the applicant valuer to the CCP or a relevant public authority;
 - (b) any personal and financial relationships between the applicant valuer and the CCP or a relevant public authority.
3. For the purposes of paragraph 1, the resolution authority shall consider interests in common or in conflict with the following parties to be relevant:
- (a) the senior management and the members of the management body of the CCP and any group company of the CCP as referred to in Article 2, point (28), of Regulation (EU) 2021/23;
 - (b) the legal or natural persons that control or have a qualifying holding in the CCP;
 - (c) the creditors identified by the resolution authority as being significant on the basis of the information available to the resolution authority;
 - (d) the clearing members of the CCP as defined in Article 2, point (12), of Regulation (EU) 2021/23; clients of the CCP as defined in Article 2, point (18), of that Regulation; and indirect clients of the CCP as defined in Article 2, point (20), of that Regulation;
 - (e) interoperable CCPs as defined in Article 2, point (21), of Regulation (EU) 2021/23.
4. The resolution authority shall deem a valuer to have an actual material interest in common or in conflict with the CCP where:
- (a) in the year preceding the date on which the valuer's eligibility is assessed, the valuer has completed a statutory audit of the CCP pursuant to Directive 2006/43/EC of the European Parliament and of the Council ⁽⁵⁾;
 - (b) the valuer has been employed by the CCP or a relevant public authority during the period of 3 years preceding the assessment of its independence.

⁽⁵⁾ Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (OJ L 157, 9.6.2006, p. 87).

5. A person appointed as a valuer shall:
- (a) maintain, in accordance with any applicable codes of ethics and professional standards, policies and procedures to identify any actual or potential interest which may be considered to constitute a material interest;
 - (b) notify the resolution authority without delay of any actual or potential interest in common or in conflict with any relevant public authority or with the CCP which the valuer considers may, in the assessment of the resolution authority, be considered to amount to a material interest;
 - (c) take appropriate steps to ensure that none of the staff or other persons involved in carrying out the valuation has any material interest in common or in conflict with any relevant public authority or with the CCP;
 - (d) notify the resolution authority of any material investments or other material financial interests and confirm that they are not conflicting with its position as a valuer;
 - (e) where that person is a legal person, provide evidence of efficient structural separation or other arrangements that have been put in place or are to be put in place to address any threats to independence such as self-review, self-interest, advocacy, familiarity, trust or intimidation, including arrangements to differentiate between those staff members who may be involved in the valuation and other staff members;
 - (f) where the person is a statutory auditor, ensure the auditor is duly covered by internal rules to manage any conflict of interest;
 - (g) notify the resolution authority of their activities relevant to the appointment for the period of 3 years preceding the assessment of the valuer's independence;
 - (h) not seek or accept financial or other advantages from any relevant public authority or from the CCP, without prejudice to the payment to the valuer of remuneration and expenses that are reasonable in connection with the conduct of the valuation.

Article 4

Qualifications, experience, ability, knowledge and resources

1. The valuer shall possess the necessary qualifications, experience, ability and knowledge and hold or have access to sufficient human and technical resources to be able to carry out the valuation effectively and to independently assess the valuation without undue reliance on any relevant public authority or on the CCP.
2. The valuer shall be qualified as a statutory auditor or audit firm as defined in Article 2, points (2) and (3) of Directive 2006/43/EC.
3. For the purposes of paragraph 1, a person considered for the position of valuer shall provide evidence or confirmation in writing of the following necessary experience, ability and knowledge:
 - (a) of the valuations made of financial instruments, of valuation in post-trading, and in particular of the instruments cleared by the CCP;
 - (b) of Regulation (EU) 2021/23 and Regulation (EU) No 648/2012;
 - (c) to apply and understand the recovery plans and rulebooks of the CCP;
 - (d) to apply and understand the resolution plan of the CCP and applicable resolution tools under Regulation (EU) 2021/23.
4. The valuer shall be able to apply their competence and experience in an independent manner and shall not need to seek or take any instructions or guidance from any relevant public authority or from the CCP.

5. Paragraph 4 shall not prevent the provision of instructions, guidance, premises, technical equipment or other forms of support where the resolution authority considers that it is necessary and that it does not affect the valuer's judgement in carrying out the valuation referred to in Article 24 of Regulation (EU) 2021/23.

Article 5

Structural separation

1. The valuer shall be legally, structurally, operationally and effectively separate from any relevant public authority and from the CCP.
2. For the purposes of paragraph 1, the following requirements shall apply:
 - (a) where the valuer is a natural person, the valuer shall not be an employee or contractor of any relevant public authority or of the CCP;
 - (b) where the valuer is a legal person, the valuer shall not belong to the same group of companies as the CCP.

CHAPTER III

Methodology for assessing the value of the assets and liabilities of the CCP before and after resolution

Section 1

General provisions applicable to valuations under Article 24 and Article 26(1) of Regulation (EU) 2021/23

Article 6

General criteria

1. When performing the valuations referred to in Article 24 and Article 26(1) of Regulation (EU) 2021/23, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall consider circumstances affecting the expected cash flows of and discount rates applicable to a CCP's assets and liabilities stemming from the failure of the CCP's clearing members or non-default events.

The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall aim to fairly represent the CCP's financial position in the context of the opportunities and risks it deals with.

2. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall disclose and justify the key assumptions used in the valuation.

Any significant deviation in the valuation from the assumptions or rules used by the CCP's management in the preparation of financial statements and in the calculation of the CCP's regulatory capital and capital requirements shall be supported by the best available information.

3. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall provide the best point estimate of the value of a given asset, liability, or combinations thereof.

Where appropriate, the results of the valuation shall also be provided in the form of value ranges.

4. Criteria laid down in this Regulation for the measurement of individual assets and liabilities of a CCP shall also apply to the measurement of portfolios or groups of assets or combined assets and liabilities, businesses, or the CCP considered as a whole, as the circumstances require.

5. The valuation shall subdivide creditors into classes according to their priority ranking under the applicable insolvency law, and shall include the following estimates:

- (a) the value of claims of each class under the applicable insolvency law and, where relevant and feasible, according to the contractual rights conferred on claimants;
- (b) the proceeds each class would receive if the CCP were wound up under normal insolvency proceedings.

When calculating the estimates pursuant to points (a) and (b), the valuer may follow the methodology set out in Article 22 of this Regulation.

6. Where appropriate and feasible, taking into account the timing and credibility of the valuation, the resolution authority may request several valuations. In that case, the resolution authority shall establish the criteria to determine how those valuations shall be used for the objectives set out in Article 24 of Regulation (EU) 2021/23.

Article 7

Valuation date

The valuation date shall be one of the following dates:

- (a) a reference date as determined by the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, and set as close as possible before the expected date of a decision by the resolution authority to take resolution action in relation to the CCP in accordance with Article 71 of Regulation (EU) 2021/23 or to exercise the power to write down or convert instruments of ownership and debt instruments or other unsecured liabilities set out in Article 33 of that Regulation;
- (b) where a definitive valuation required by Article 26(2) of Regulation (EU) 2021/23 is conducted, the resolution decision date;
- (c) in relation to liabilities arising from contracts referred to in Article 29(1) of Regulation (EU) 2021/23, the date on which those contracts are terminated.

Article 8

Sources of information

The valuation shall be based on any information which is available at the valuation date and deemed relevant by the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23. In addition to the CCP's financial statements, valuation reports, related audit reports and regulatory reporting over a period ending as close as possible to the valuation date, that relevant information may include the following:

- (a) the updated financial statements and regulatory reporting prepared by the CCP as close as possible to the valuation date;
- (b) an explanation of the rules, key methodologies, assumptions and judgements used by the CCP to prepare the financial statements and regulatory reporting;
- (c) data contained in the records of the CCP;
- (d) relevant market data;
- (e) conclusions drawn by the valuer from discussions with management and auditors;
- (f) where available, supervisory assessments of the CCP's financial condition, including information acquired pursuant to Article 18(1), point (h), of Regulation (EU) 2021/23;

- (g) industry-wide assessments of asset quality, where relevant to the CCP's assets, as well as stress test results;
- (h) valuations of peers, adjusted where and as appropriate to capture the CCP's specific circumstances;
- (i) historical information, adjusted where and as appropriate to eliminate factors that are no longer relevant, and to incorporate other factors that did not affect the historical information; or
- (j) trend analyses, adjusted where and as appropriate to reflect the CCP's specific circumstances.

Article 9

Impact of group arrangements

1. Where the CCP forms part of a group, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall take into account the impact of the existing contractual intra-group support arrangements on the value of the assets and liabilities where, on the basis of the circumstances, it is probable that those arrangements will be put into effect.
2. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall only take into account the impact of other formal or informal support arrangements within the group where, on the basis of the circumstances, it is probable that those arrangements will remain in place in the context of a group's stressed financial condition or in resolution.
3. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall determine whether the resources of a CCP that is part of a group are available to meet the losses of other group entities.

Article 10

Impact of interoperability arrangements

Where the CCP has entered into interoperability arrangements in accordance with Article 54 of Regulation (EU) No 648/2012, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall take into account the potential impact of such arrangements on the value of the assets and liabilities of the CCP.

Article 11

Valuation report

The valuer shall prepare a valuation report for the resolution authority which shall include the following:

- (a) the information referred to in Article 25(4) of Regulation (EU) 2021/23, except in respect of provisional valuations as referred to in Article 26(1) of that Regulation;
- (b) the information referred to in Article 25(5) of Regulation (EU) 2021/23, except in respect of provisional valuations as referred to in Article 26(1) of that Regulation;
- (c) the valuation of the liabilities arising from contracts referred to in Article 29(1) of Regulation (EU) 2021/23;
- (d) a summary of the valuation including an explanation of best point estimate, value ranges and sources of valuation uncertainty;

- (e) an explanation of the key methodologies and assumptions used by the valuer when performing the valuation, together with an explanation of how sensitive the valuation is to the choices of those methodologies and assumptions, and, where feasible, an explanation of how those methodologies and assumptions differ from those used for other relevant valuations including where relevant any provisional resolution valuations;
- (f) any additional information which in the valuer's opinion would assist the resolution authority or competent authority for the purposes of Article 24(1), (2) and (3) and Article 26(1), (2) and (3) of Regulation (EU) 2021/23.

Section 2

Criteria for the carrying out of valuations for the purposes of Article 24(2) of Regulation (EU) 2021/23

Article 12

General principles

1. The valuations carried out for the purposes referred to in Article 24(2) of Regulation (EU) 2021/23 shall be based on fair, prudent and realistic assumptions and shall seek to ensure that losses under the appropriate scenario are fully recognised.

Where such valuation is available, it shall inform the assessment of the competent authority or of the resolution authority, as appropriate when determining that a CCP is 'failing or likely to fail' as referred to in Article 22(1), point (a), of Regulation (EU) 2021/23.

Based on existing supervisory guidance or other generally recognised sources setting out criteria for the fair and realistic measurement of different types of assets and liabilities, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, may challenge the rules, assumptions, data, methodologies and judgements on which the CCP based the valuations that it used for the fulfilment of its financial reporting obligations or for the calculation of its regulatory capital or of its capital requirements and disregard them for the purposes of their valuation.

2. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall determine the most appropriate valuation methodologies, which may rely on the CCP's internal models and rules where the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, deems it appropriate taking into account the nature of the CCP's risk management framework and the quality of data and information available.

3. The valuations shall be consistent with the applicable accounting and prudential framework.

Article 13

Areas requiring particular attention in the valuation

The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall particularly focus on areas subject to significant valuation uncertainty which have a significant impact on the overall valuation for the purpose of Article 24(2) of Regulation (EU) 2021/23.

For the areas referred to in the first subparagraph, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall provide the results of the valuation in the form of best point estimates and, where appropriate, value ranges, as set out in Article 6(3). Those areas shall include:

- (a) contracts referred to in Article 29(1) of Regulation (EU) 2021/23;
- (b) loans, the expected cash flows of which depend on a counterparty's ability, willingness or incentive to perform its obligations;

- (c) repossessed assets, the cash flows of which are affected by both the asset's fair value at the time the CCP forecloses on the related security or lien, and the expected evolution of such value after foreclosure;
- (d) any other instruments measured at fair value where the determination of that fair value in accordance with accounting or prudential requirements applying to their marking to market or marking to model is no longer applicable or valid taking into account the circumstances;
- (e) goodwill and intangibles, where the impairment test may depend on subjective judgement, including as regards the reasonably attainable cash flow stream, discount rates, and the perimeter of cash-generating units;
- (f) legal disputes and regulatory actions, the expected cash flows of which may be subject to varying degrees of uncertainty relating to their amount or timing;
- (g) items including pension assets and liabilities and deferred tax items.

Article 14

Factors affecting the valuation

1. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall take into account general factors that may affect the key assumptions on which the values of assets and liabilities in the areas referred to in Article 13 are based, including the following factors:

- (a) the economic and industry circumstances affecting the CCP, including default events, or non-default events and relevant market developments;
- (b) the CCP's business model and changes in its strategy;
- (c) the CCP's asset selection criteria;
- (d) circumstances and practices that are likely to lead to payment shocks;
- (e) circumstances affecting capital requirements;
- (f) the impact of the CCP's financial structure on the capacity of the CCP to retain assets and contracts for the expected holding period and the CCP's ability to generate predictable cash flows;
- (g) the CCP's operating rules and loss allocation;
- (h) general or CCP-specific liquidity or funding concerns.

2. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall clearly separate any material unrealised gains identified in the valuation process, to the extent that those gains have not been recognised in the valuation and shall provide appropriate information in the valuation report of the exceptional circumstances that have led to those gains.

Section 3

Criteria for the carrying out of valuations for the purposes of Article 24(3) and Article 26(1), second subparagraph, of Regulation (EU) 2021/23

Article 15

General principles

1. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall assess the impact on the valuation of each resolution action that the resolution authority is likely to adopt to inform the decisions referred to in Article 24(3) of Regulation (EU) 2021/23.

Without prejudice to the valuer's independence, the resolution authority may consult with the valuer in order to identify the range of resolution actions being considered by that authority, including actions contained in the resolution plan or, if different, any proposed resolution scheme.

2. The valuer in consultation with the resolution authority or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23 shall, where appropriate, present separate valuations that reflect the impact of a sufficiently diverse range of resolution actions.

3. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall ensure that, when the resolution tools are applied or when the power to write down or convert instruments of ownership and debt instruments or other unsecured liabilities referred to in Article 32 of Regulation (EU) 2021/23 is exercised, any losses on the assets of the CCP are fully recognised under scenarios that are relevant to the range of resolution actions being considered.

4. Where the values in the valuation performed by the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, diverge significantly from the values presented by the CCP in its financial statements, the valuer, or the resolution authority when conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall use the assumptions of their own valuation to inform the adjustments to the assumptions and the accounting policies necessary for the preparation of the updated balance sheet as required under Article 25(4), point (a), of Regulation (EU) 2021/23, in a way consistent with the applicable accounting framework.

The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall specify the amount of losses that they have identified but which cannot be recognised in the updated balance sheet, describe the reasons underlying the determination of such losses and provide the likelihood and time horizon of their occurrence.

5. Where instruments of ownership and debt instruments or other unsecured liabilities are converted to equity, the valuation shall provide an estimate of the post-conversion equity value of the new shares transferred or issued as consideration to holders of converted capital instruments or other creditors. That estimate shall form the basis for the determination of the conversion rate or rates pursuant to Article 33(7), point (b), of Regulation (EU) 2021/23.

Article 16

Selection of the measurement basis

1. When selecting the most appropriate measurement basis or bases, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall take into account the range of resolution actions assessed in accordance with Article 15(1).

2. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall determine, on the basis of fair, prudent and realistic assumptions, the cash flows that the CCP can expect from its existing assets and liabilities following the adoption of the resolution action or actions identified and discount them at an appropriate rate determined in accordance with paragraph 6.

3. Cash flows shall be determined at the appropriate level of aggregation.

4. Where the resolution actions referred to in Article 15(1) require assets and liabilities to be retained by a CCP that continues to be a going concern entity, the valuer shall use the hold value as the appropriate measurement basis.

The hold value may, if considered fair, prudent and realistic by the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, anticipate a normalisation of market conditions.

The hold value shall not be used as the measurement basis where assets are transferred to a bridge CCP pursuant to Article 42 of Regulation (EU) 2021/23, or where a sale of business tool pursuant to Article 40 of that Regulation is used.

5. Where the resolution actions referred to in Article 15(1) envisage the sale of assets, the expected cash flows shall correspond to the disposal values referred to in Article 17(5) envisaged for the expected disposal horizon.

6. The discount rates shall be determined having regard to the timing of cash flows, to the risk profile, financing costs and market conditions appropriate to the asset or liability being measured, to the disposal strategy considered and to the financial position of the CCP after resolution.

Article 17

Specific factors relating to the estimation and discounting of expected cash flows

1. When estimating cash flows, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall apply their expert judgement in determining key characteristics of the assets or liabilities being measured.

The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall also apply their expert judgement in determining how the continuation, potential renewal or refinancing, run-off or disposal of those assets or liabilities, as envisaged in the resolution action referred to in Article 15(1) affect those cash flows.

2. Where the resolution action referred to in Article 15(1) envisages a CCP holding an asset, maintaining a liability, or continuing a business, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, may take into account the following factors potentially affecting future cash flows:

- (a) changes in assumptions or expectations, as compared to those prevailing as of the valuation date, consistent with long-term historical trends and considered over a reasonable time horizon, consistent with the holding period envisaged for the assets or with the period envisaged for the recovery of the CCP;
- (b) additional or alternative valuation bases or methodologies that are considered appropriate by the valuer and consistent with this Regulation, including in the context of assessing the post-conversion equity value of shares.

3. As regards groups of assets and liabilities or businesses envisaged to be run off, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall take into account workout costs and benefits.

4. Where the situation of a CCP prevents it from holding an asset or continuing a business, or where a sale is otherwise considered necessary by the resolution authority to achieve the resolution objectives, the expected cash flows shall be valued at the disposal values expected within a given disposal period.

5. The disposal value shall be determined by the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, on the basis of the cash flows, net of disposal costs and net of the expected value of any guarantees given, that the CCP can reasonably expect in the prevailing market conditions through an orderly sale or transfer of assets or liabilities.

Where appropriate, having regard to the actions to be taken under the resolution scheme, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, may determine the disposal value by applying a discount for a potential accelerated sale to the observable market price of that sale or transfer.

When determining the disposal value of assets which do not have a liquid market, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall consider observable prices on markets where similar assets are traded or model calculations using observable market parameters, with discounts for illiquidity reflected, as appropriate.

6. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall consider the following factors that might affect disposal values and disposal periods:

- (a) the disposal values and disposal periods observed in similar transactions, appropriately adjusted to take into account differences in the business model and in the financial structure of the parties to those transactions;
- (b) the advantages or disadvantages of a particular transaction that are specific to the parties involved or to a subset of market participants;
- (c) the particular attributes of an asset or business that may only be relevant to a specific potential purchaser, or to a subset of market participants;
- (d) the likely impact of expected sales on the CCP's franchise value.

7. When assessing the value of businesses for purposes of the use of the sale of business or of the bridge CCP tool, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, may take into account reasonable expectations of the franchise value. Such expectations of the franchise value shall include those resulting from a renewal of assets, from a refinancing of an open portfolio, or from a continuation or resumption of business in the context of the resolution actions.

8. A valuer, or a resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, that assesses that there is no realistic prospect for the disposal of an asset or business, shall not be required to determine the disposal value but shall estimate the related cash flows on the basis of the relevant prospects for continuation or run-off.

The first subparagraph shall not apply to the sale of business tool.

9. As regards parts of a group of assets or of a business that are likely to be liquidated under normal insolvency proceedings, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, may consider the disposal values and disposal periods observed in auctions involving assets of a similar nature and condition.

When determining the expected cash flows, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall take into account illiquidity, the absence of reliable inputs for the determination of disposal values, and the resulting need to rely on valuation methodologies based on unobservable inputs.

Article 18

Methodology for calculating and including a buffer for additional losses

1. The valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall include in the valuation a buffer that reflects facts and circumstances supporting the existence of additional losses of uncertain amount or timing.

The assumptions supporting the calculation of the buffer shall be sufficiently explained and substantiated by the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23.

2. When determining the amount of the buffer, the valuer, or the resolution authority where conducting a provisional valuation pursuant to Article 26(1) of Regulation (EU) 2021/23, shall identify factors that could affect expected cash flows as a result of resolution actions likely to be adopted.

CHAPTER IV

Separation of the valuation under resolution and valuation for the application of the 'no creditor worse off' principle and methodology for carrying out the valuation for the application of the 'no creditor worse off' principle

Article 19

General provisions

1. Where determining the treatment of shareholders and creditors under normal insolvency proceedings, the valuation shall only be based on information about facts and circumstances which existed and could reasonably have been known at the resolution decision date which, had they been known by the valuer, would have affected the measurement of the assets and liabilities of the CCP on that date.
2. Where determining the actual treatment of shareholders and creditors in resolution, the valuer shall rely on available information concerning facts and circumstances existing as of the date or dates on which shareholders and creditors receive compensation ('actual treatment date or dates').
3. The reference date of the valuation shall be the resolution decision date which may differ from the actual treatment date.

Where the valuer deems the impact of any discounting of the proceeds to be negligible, the undiscounted proceeds at the date the resolution action is taken may be directly compared with the discounted amount of hypothetical proceeds that shareholders and creditors would have received if the CCP entered into normal insolvency proceedings at the resolution decision date.

Article 20

Inventory of assets and claims

1. The valuer shall establish an inventory of all identifiable and contingent assets owned by the CCP.

That inventory shall include assets for which the existence of associated cash flows is demonstrated or can reasonably be expected.

2. The CCP shall make available to the valuer a list of all claims and contingent claims against the CCP.

That list shall categorise all claims and contingent claims according to their priority under normal insolvency proceedings. The valuer shall be allowed to enter into arrangements for specialist advice or expertise as regards the consistency of the ranking of claims with the applicable insolvency law.

3. The valuer shall separately identify encumbered assets and claims secured by those assets.

Article 21

Steps of the valuation

When determining whether a difference in treatment as referred to in Article 61(2), point (c), of Regulation (EU) 2021/23 exists, the valuer shall assess the following:

- (a) the treatment that shareholders and creditors in respect of which resolution actions have been taken would have received had the CCP entered normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules, at the resolution decision date, disregarding any provision of extraordinary public financial support;
- (b) the value of the restructured claims following the application of resolution powers and tools and the value of other proceeds received by shareholders and creditors as at the actual treatment date or dates, discounted back to the resolution decision date if deemed necessary to enable a fair comparison with the treatment referred to in point (a);
- (c) whether the treatment referred to in point (a) exceeds the treatment referred to in point (b) for each creditor in accordance with their order of priority under normal insolvency proceedings, as identified according to Article 20.

Article 22

Determination of the treatment of shareholders and creditors under normal insolvency proceedings

1. The method for conducting the valuation pursuant to Article 21, point (a), shall consist in determining the discounted amount of expected cash flows under normal insolvency proceedings.
2. Expected cash flows shall be discounted at the rate or rates reflecting, as appropriate, the timing associated with such expected cash flows, prevailing circumstances as of the resolution decision date, risk-free interest rates, risk premiums for similar financial instruments issued by similar entities, market conditions or discount rates applied by potential purchasers and other relevant characteristics of the element or elements being valued.
3. The methodology set out in paragraph 2 for the calculation of the discount rate shall not be used where particular discount rates relevant for the valuation are specified in applicable insolvency law or practice.
4. The valuer shall take the following into account in the determination of the discounted amount of expected cash flows under normal insolvency proceedings:
 - (a) applicable CCP operating rules, contractual arrangements, insolvency law and practice in the relevant jurisdiction which could influence the valuation;
 - (b) reasonably foreseeable administration, transaction, maintenance, disposal and other costs which would have been incurred by an administrator or insolvency practitioner, as well as financing costs;
 - (c) the information on recent insolvency cases of similar entities, where available and relevant;
 - (d) an estimate of the direct replacement costs incurred by clearing members, calculated in accordance with Article 23.
5. For assets traded on an active market, the valuer shall use the observed price, except where specific circumstances hamper the marketability of the assets of the CCP.

For assets not traded on an active market the valuer shall consider the following factors when determining the amount and timing of expected cash flows:

- (a) prices observed on active markets where similar assets are traded;
- (b) prices observed in normal insolvency proceedings or in otherwise distressed transactions involving assets of a similar nature and condition;
- (c) prices observed in transactions involving the sale of business or the transfer to a bridge CCP in a resolution context relating to similar entities;

- (d) the likelihood of an asset generating net cash inflows under normal insolvency proceedings;
 - (e) expected market conditions within a given disposal period, including market depth and the ability of the market to exchange the relevant volume of assets within that period; and
 - (f) the length of a given disposal period that reflects the implications of the applicable insolvency law.
6. The valuer shall consider whether the financial condition of the CCP would have affected the expected cash flows, including through restrictions on the administrator's ability to negotiate terms with potential purchasers.
7. Where possible, and subject to any applicable provision of the relevant insolvency framework, the cash flows shall reflect the contractual, statutory, or other legal rights of creditors or normal insolvency practices.
8. The hypothetical proceeds resulting from the valuation shall be allocated to shareholders and creditors in accordance with their order of priority under the applicable insolvency law, as identified in Article 20.

Article 23

Direct replacement costs incurred by the clearing members under normal insolvency proceedings

1. When calculating the costs referred to in Article 22(4), point (d), the valuer shall take into account a commercially reasonable estimate of the direct replacement costs incurred by clearing members to reopen, within an appropriate period, comparable net positions in the market, as set out in Article 61(3), first subparagraph, point (c), of Regulation (EU) 2021/23.
2. The valuer shall consider the following costs for clearing members:
- (a) the hypothetical credit exposures of the clearing members to the CCP at the time of reopening the comparable net positions, had those positions remained open at the CCP until that date;
 - (b) any liquidity and concentration costs incurred by clearing members when reopening the comparable net positions;
 - (c) any material unavoidable operating costs incurred by clearing members in relation to the new connections or transactions between clearing members and any counterparty or CCP, including membership, trading, clearing, payment, settlement and custody fees;
 - (d) any additional material funding cost stemming from the difference in applicable margin requirements and default fund contributions and associated with the reopening of net positions with any counterparty or CCP.

Article 24

Determination of the actual treatment of shareholders and creditors in resolution

1. The valuer shall identify all claims outstanding after the write-down or conversion of capital instruments and the application of any resolution actions and shall assign those claims to the legal and natural persons who were the CCP's shareholders and creditors at the resolution decision date.

The valuer shall determine the actual treatment of the legal and natural persons who were the CCP's shareholders and creditors at the resolution decision date in accordance with paragraphs 2, 3 and 4, except where those persons receive cash compensation as a result of the resolution.

2. Where the legal and natural persons who were the CCP's shareholders and creditors at the resolution decision date receive equity compensation as a result of the resolution, the valuer shall determine their actual treatment by providing an estimate of the overall value of the shares transferred or issued as consideration to the holders of the capital instruments, debt instruments or other unsecured liabilities that have been converted. That estimate may be based on an assessed market price resulting from generally accepted valuation methodologies.

3. Where the legal and natural persons who were the CCP's shareholders and creditors at the resolution decision date receive debt compensation as a result of the resolution, the valuer shall determine the actual treatment by taking into account the changes in contractual cash flows that result from the write-down or conversion, the application of other resolution actions and the relevant discount rate calculated in accordance with the methodology set out in Article 22(2) of this Regulation.
4. For any outstanding claim, the valuer may take into account, where available and together with the factors described in paragraphs 2 and 3, prices observed in active markets for the same or similar instruments issued by the CCP under resolution or other similar entities.
5. The valuer shall also consider the actual direct replacement costs incurred by clearing members and listed in Article 23(2) when comparing the actual treatment of shareholders and creditors in resolution with the valuation for the application of the 'no creditor worse off' principle.

Article 25

Valuation report

The valuer shall prepare a valuation report for the resolution authority which shall include the following elements:

- (a) a summary of the valuation, including a presentation of valuation ranges and sources of valuation uncertainty;
- (b) an explanation of the key methodologies and assumptions adopted and of how sensitive the valuation is to these choices;
- (c) an explanation, where feasible, of why the valuation differs from other relevant valuations, including the resolution valuations conducted in accordance with Regulation (EU) 2021/23 or other prudential or accounting valuations.

Article 26

Entry into force

This Regulation shall enter into force on the twentieth 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, 3 May 2023.

For the Commission
The President
Ursula VON DER LEYEN

COMMISSION IMPLEMENTING REGULATION (EU) 2023/1617**of 8 August 2023****amending Commission Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China**

THE EUROPEAN COMMISSION,

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

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⁾ ('the basic Regulation'), and in particular Article 12 thereof,

Whereas:

1. PROCEDURE**1.1. Measures in force**

- (1) On 17 November 2021, the Commission adopted Implementing Regulation (EU) 2021/2011 ⁽²⁾ ('the original Regulation') imposing a definitive anti-dumping duty on imports of optical fibre cables ('OFC', 'the product under investigation') originating in the People's Republic of China ('China' or 'the country concerned'). The definitive anti-dumping duty imposed initially was ranging from 19,7 % to 44 % ('the duty imposed initially').
- (2) The product under investigation is also subject to a definitive countervailing duty ranging from 5,1 % to 10,3 %, imposed by the Commission Implementing Regulation (EU) 2022/72 ⁽³⁾, as corrected by the Commission Implementing Regulation (EU) 2022/469 ⁽⁴⁾. However, the countervailing duty is not subject to this reinvestigation. Following the imposition of the definitive countervailing duty on the product under investigation, in order to avoid offsetting the effects of subsidisation twice, the definitive anti-dumping duty was reduced to a range of 14,6 % to 33,7 %.

1.2. Request for an absorption reinvestigation

- (3) The Commission received a request for an absorption reinvestigation of the anti-dumping measures in force with respect to imports of the product under investigation, pursuant to Article 12 of the basic Regulation.

⁽¹⁾ OJ L 176, 30.6.2016, p. 21.

⁽²⁾ Commission Implementing Regulation (EU) 2021/2011 of 17 November 2021 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China (OJ L 410, 18.11.2021, p. 51).

⁽³⁾ Commission Implementing Regulation (EU) 2022/72 of 18 January 2022 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China (OJ L 12, 19.1.2022, p. 34).

⁽⁴⁾ Commission Implementing Regulation (EU) 2022/469 of 23 March 2022 correcting Implementing Regulation (EU) 2022/72 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China (OJ L 96, 24.3.2022, p. 36).

- (4) The request was lodged on 28 October 2022 by Europacable ('the applicant') on behalf of the Union producers. The applicant represents more than 25 % of the total Union production of OFC.
- (5) The applicant has submitted sufficient evidence showing that after the original investigation period, Chinese export prices have decreased and that the decrease in Chinese export prices impeded the intended remedial effects of the measures in force. The evidence contained in the request indicated that the decrease in export prices cannot be explained by a decrease of the price of the major raw material or other costs or by a change in the product mix.

1.3. Reopening of the anti-dumping investigation

- (6) On 8 December 2022, the Commission reopened the anti-dumping investigation by a notice published in the *Official Journal of the European Union* ('the Notice of Reopening') ⁽⁹⁾.
- (7) The reinvestigation concerned the current anti-dumping duties imposed, as set out in Article 1(2) of the original Regulation, as amended and corrected.

1.4. Interested parties

- (8) In the Notice of Reopening, the Commission invited interested parties to contact it to participate in the reinvestigation. In addition, the Commission specifically informed the applicant, exporting producers and importers known to be concerned and the authorities of the country concerned about the reinvestigation and invited them to participate.
- (9) 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.

1.5. Sampling of exporting producers in the People's Republic of China

- (10) To decide whether sampling was necessary and, if so, to select a sample, the Commission asked all exporting producers in China to provide the Commission with the information requested in the Notice of Reopening. In addition, the Commission requested the Mission of the People's Republic of China to the European Union to identify and/or contact other producers, if any, that could be interested in participating in the reinvestigation.
- (11) Eleven exporting producers in China provided the requested information and agreed to be included in the sample. In accordance with Article 17(1) of the basic Regulation, the Commission selected a sample of two groups of exporting producers based on the largest representative volume of exports to the Union which could reasonably be investigated within the time available. The sampled groups of exporting producers were FiberHome Telecommunication Technologies Co., Ltd. and related companies ('the FTT Group') and Jiangsu Zhongtian Technology Co., Ltd. and related companies ('the ZTT Group'). The sampled exporting producers represented 58 % of the total estimated export volume of OFC from China to the Union during the absorption investigation period (from 1 October 2021 to 30 September 2022). The sample selected was identical to the sample in the investigation that led to the imposition of the duty imposed initially ('the original investigation').
- (12) In accordance with Article 17(2) of the basic Regulation, all known exporting producers concerned, and the authorities of the country concerned were consulted on the selection of the sample. No comments were received and thus the sample was confirmed.

⁽⁹⁾ Notice of reopening the anti-dumping investigation concerning imports of optical fibre cables originating in the People's Republic of China (OJ C 467, 8.12.2022, p. 36).

1.6. Sampling of unrelated importers

- (13) To decide whether sampling was necessary and, if so, to select a sample, the Commission asked unrelated importers to provide the information specified in the Notice of Reopening.
- (14) Two companies (Cable 77 Danmark Aps and Connect Com GmbH) provided the requested information and agreed to be included in the sample. After analysing the sampling information supplied by them, the Commission decided that sampling was not necessary and asked both cooperating companies to submit their replies to the questionnaire for unrelated importers.

1.7. Replies to the questionnaires and verifications

- (15) The Commission sent questionnaires to the sampled groups of exporting producers and to the companies which provided information requested from unrelated importers. The questionnaires were also made available online on the day of the initiation ⁽⁶⁾.
- (16) One of these companies, Cable 77 Danmark Aps (Denmark), an unrelated importer, submitted an incomplete questionnaire reply. The Commission sent a deficiency letter requesting additional information. However, the company did not reply. The second company, Connect Com GmbH (Germany), informed the Commission that during the absorption investigation period, it did not import the product under investigation from China but purchased it from companies located in the Union. Therefore, the Commission did not consider this company as an unrelated importer in the sense of the basic Regulation in the context of the current reinvestigation. Therefore, the Commission did not verify the information provided by these two companies and did not use this information in the present reinvestigation.
- (17) The Commission sought and verified or cross-checked all the information deemed necessary for the purpose of this reinvestigation provided by the sampled exporting producers. In view of the outbreak of COVID-19, the Commission could not carry out verification visits pursuant to Article 16 of the basic Regulation at the premises of FiberHome Telecommunication Technologies Co., Ltd and Nanjing Wasin Fujikura Optical Communication Ltd. (both belonging to the FTT Group) as well as at the premises of Jiangsu Zhongtian Technology Co., Ltd., Zhongtian Power Optical Cable Co., Ltd., ZTT International Limited and ZTT Europe GmbH (all belonging to the ZTT Group). Instead, the Commission cross-checked remotely via videoconference the information provided by these companies, in line with its Notice on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations ⁽⁷⁾.
- (18) In addition, the Commission carried out verification visits pursuant to Article 16 of the basic Regulation at the premises of the following related importers in the Union belonging to the FTT Group:
- FiberHome International Germany GmbH, Germany;
 - FiberHome International Poland Sp. z o.o., Poland.

1.8. Period covered by the absorption reinvestigation

- (19) The absorption investigation period ('AIP') was from 1 October 2021 to 30 September 2022. The original investigation period ('OIP') was from 1 July 2019 to 30 June 2020.

1.9. Comments on the request and the initiation

- (20) The Commission received comments on the request and the initiation from Connect Com GmbH ('Connect Com'), an unrelated importer that cooperated in the original investigation.

⁽⁶⁾ Available at <https://tron.trade.ec.europa.eu/investigations/case-view?caselid=2642>

⁽⁷⁾ Notice on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations (OJ C 86, 16.3.2020, p. 6).

- (21) Connect Com claimed that the use of average price per cable-km was not a meaningful indicator to check whether the anti-dumping duties have been absorbed because cables with high number of fibres were more expensive per cable-km than cables with low number of fibres. Connect Com argued that the fall of average price per cable-km was caused by the change of product mix sold before and after the imposition of anti-dumping duties.
- (22) The Commission recalled that the applicant relied on import prices from the TARIC database of Eurostat for the product under investigation, which is the usual practice because the statistical data is gathered based on the product description as a whole, rather than individual product types. The Commission considered it sufficient to reopen the reinvestigation on this basis. Furthermore, it was noted that Connect Com did not submit any evidence showing that the decrease in import price was due to a change in product mix. During the reinvestigation, the Commission collected more detailed data at product type level based on product control numbers ('PCNs') and was able to compare prices of the same product types as explained in recital (40). The claim was therefore rejected.
- (23) Connect Com also stated that the unit of measurement 'kg' or 'tonnes' was not common in the cable business. The usual units of measurement for cables were meters or kilometres.
- (24) The Commission observed that, like for all other products in the TARIC database of Eurostat, import volumes of the product under investigation are also available in tonnes/kg, in addition to cable-km. The applicant's request indicated the (relevant) import volumes in both units with the relevant price per each unit. The claim was therefore rejected.
- (25) Connect Com claimed that the consideration of prices only until the end of the first half of 2022, as indicated in the request, led to a distorted result because the prices rose again in June 2022 and were expected to continue to rise in the second half of 2022.
- (26) The Commission recalled that, given the lodging date of the request, the period used in the request to show trends ending on 30 June 2022 was the most recent period with a full set of data available to the applicants at the time of the request. In addition, during the reinvestigation the Commission assessed prices until the end of the AIP, i.e., 30 September 2022. It follows that the period during which, according to Connect Com, the prices rose was partially included in the AIP. Therefore, the claim was rejected.
- (27) Connect Com also disputed the causality between the allegedly fallen prices and the imposition of the duties. It claimed that an extreme price decrease already occurred from August 2021 to September 2021, before the duties were imposed and that the subsequent price drop from EUR 10 in December 2021 to EUR 7 in June 2022 was not significant anymore and not linked to the imposition of the measures.
- (28) According to Article 12 of the basic Regulation, when there is sufficient evidence of duties being absorbed, the original investigation might be re-opened at the request of any interested party. The Commission assessed the evidence submitted by the applicant showing that after the original investigation period, Chinese export prices had decreased. In view of this information, the Commission decided to open the absorption reinvestigation. Furthermore, Article 12(2) of the basic Regulation does allow the Commission to consider evidence of price decreases occurring after the OIP and before the imposition of duties, such as the ones discussed by Connect Com. The claim put forward by Connect Com was therefore rejected.

1.10. Disclosure

- (29) On 1 June 2023, the Commission disclosed the essential facts and considerations on the basis of which it intended to amend the definitive anti-dumping duty on imports of OFC originating in China. All parties were granted a period within which they could make comments on the disclosure. The Commission received comments from FTT Group, ZTT Group and Twentsche (Nanjing) Fibre Optics Ltd ('TFO').

- (30) TFO, a non-sampled cooperating exporting producer, claimed that its request for individual examination was ignored. Furthermore, TFO claimed that it was 100 % owned by the Dutch company TKH Group NV and that it sells OFC under normal condition of competition to its subsidiary in the Union. They also claimed that the pricing did not change between the OIP and the AIP. They finally disagreed with the Commission assessment regarding the dumping duty applicable to them as a result of the anti-absorption investigation.
- (31) The Commission notes that TFO applied for individual examination in the original investigation. During the original investigation, its request for individual examination was rejected as explained in recital (40) of the original Regulation. Therefore, the duty applicable to TFO was the duty of the cooperating non-sampled companies as explained in recitals (397) and (565) of the original Regulation. In the current investigation, the Commission calculated the dumping margin of the cooperating non-sampled companies during the AIP as explained in recital (85) of this Regulation. The duty applicable to the cooperating non-sampled companies of the original investigation was increased as explained in recital (99) of this Regulation.
- (32) Regarding the shareholding of TFO, the Commission noted that TFO is an exporting producer based in China which exports to the Union and is subject to the anti-dumping duty for cooperating non-sampled companies. The fact that TFO is owned by another company established in the Union has no bearing on this finding or the applicability of the relevant duty rate. Therefore, these claims were rejected.
- (33) Following final disclosure, interested parties were granted an opportunity to be heard. No hearings were requested.
- (34) On 26 June 2023, the Commission provided interested parties with an additional final disclosure on the basis of which it intended to amend the definitive anti-dumping duty on imports of OFC originating in China. All parties were granted a period within which they could make comments on the additional disclosure. The Commission received comments from the FTT Group and the ZTT Group.

2. PRODUCT UNDER INVESTIGATION

- (35) The product under investigation is single mode optical fibre cables, made up of one or more individually sheathed fibres, with protective casing, whether containing electric conductors, originating in China, currently falling under CN code ex 8544 70 00 (TARIC code 8544 70 00 10).
- (36) The following products are excluded:
- i. cables in which all the optical fibres are individually fitted with operational connectors at one or both extremities; and
 - ii. cables for submarine use. Cables for submarine use are plastic insulated optical fibre cables, containing a copper or aluminium conductor, in which fibres are contained in metal module(s).
- (37) The optical fibre cables are used as an optical transmission medium in telecommunication networks in long haul, metro, and access networks.

3. FINDINGS OF THE ABSORPTION REINVESTIGATION

- (38) The absorption reinvestigation pursuant to Article 12 of the basic Regulation aims at establishing whether export prices have decreased or whether there has been no movement, or insufficient movement, in resale prices or subsequent selling prices in the Union of the product under investigation after the OIP. As a second step, if it is concluded that the measure should have led to movements in such prices, then, to remove the injury previously established in accordance with Article 3 of the basic Regulation, export prices shall be reassessed in accordance with Article 2 of the basic Regulation and dumping margins shall be recalculated to take account of the reassessed export prices.

3.1. Change of export prices

- (39) To determine whether export prices have decreased, the Commission first established for each sampled exporting producer its cost, insurance, and freight ('CIF') export prices at the Union customs border during the AIP and compared these prices to the corresponding CIF export prices determined during the original investigation for the OIP.
- (40) The Commission then compared for each sampled exporting producer the prices of the product types sold in the AIP with the prices of the same product types sold in the OIP and calculated for them the weighted average price difference. Not all product types sold in the AIP were also sold in the OIP. To ensure sufficient comparability level, the Commission compared the prices of the most sold 'unmatched' product types in the AIP with the prices of the most closely resembling product types sold in the OIP, where available.
- (41) The above comparison made for the two sampled groups of exporting producers resulted in the weighted average export price decrease of 50,5 % for the FTT Group and the weighted average export price decrease of 13,2 % for the ZTT Group.
- (42) Regarding the claim made by Connect Com as stated in recital (21), the investigation revealed that one sampled group of exporting producers exported the same PCNs in the AIP as in the OIP, while the other sampled exporting producer sold also other PCNs in the AIP as compared to OIP. The investigation revealed that the prices decreased for the matching PCNs. Therefore, the claim was rejected.
- (43) Since there was a fall in export prices, as required under Article 12(2) of the basic Regulation, the Commission recalculated dumping margins of the sampled exporting producers, in accordance with Article 2 of the basic Regulation.
- (44) The ZTT Group submitted that ZTT Europe GmbH ('ZTT Europe'), its related importer in the Union, purchased all product under investigation resold during the AIP before the imposition of the anti-dumping duty (that is all ZTT Europe's resales of the product under investigation during the AIP were free from anti-dumping duty) and therefore the Commission should disregard ZTT Europe's sales from its assessment in this reinvestigation.
- (45) The Commission observed that according to Article 12(2) of the basic Regulation it should assess the change of prices which had occurred after the OIP and prior to or following the imposition of measures. Therefore, the claim was rejected, except for sales made by ZTT Europe of the product under investigation purchased before or during the OIP, which the Commission indeed disregarded in its assessment.
- (46) Connect Com stated that no comprehensible justification was given as to why individual importers should have reported their imports in fibre-km instead of cable-km.
- (47) In the questionnaires the Commission requested both the exporting producers and the importers to report the data in cable-km and fibre-km as it was requested in the original investigation. However, all the calculations have been carried out in cable-km.
- (48) In their comments on the final disclosure, ZTT Group claimed that when determining whether the export prices have decreased, the Commission should only take into consideration those product types that were also sold in the OIP. ZTT Group argued that the Commission's methodology to compare the price level of most closely resembling product types would be distortive as a minor change in the technical specifications of the PCN structure could lead to considerable cost and price variances.
- (49) The Commission considered it more appropriate to establish export price comparisons for the majority of the product types sold during the AIP, to give a more accurate picture of price developments between the OIP and the AIP. The Commission noted, however, that even if the comparison would have been based only on the matching PCNs, there would still be a price decrease of 20,6 %. This claim was therefore rejected.

- (50) In their comments on disclosure, the ZTT Group claimed that the Commission did not adequately explain the methodology used to identify the most closely resembling product types or why they were considered to resemble the non-matching product types sold in the AIP, in the absence of which the Commission could have compared prices of very different product types, which would not accurately reflect the price development. This claim was reiterated by ZTT in the comments on additional final disclosure.
- (51) The Commission noted that the final disclosure provided to ZTT already identified the most closely resembling PCNs used by the Commission. On the basis of such disclosure, ZTT could have explained why the choice of each closely resembling PCN would be inappropriate in view of the physical characteristics or other elements and thus lead to distorting results. However, ZTT did not provide any evidence or specific arguments to substantiate its claim that the methodology used by the Commission would lead to distortive outcomes for the purpose of price comparability. Accordingly, the claim was rejected.
- (52) Furthermore, ZTT Group claimed that when determining whether the export prices have decreased, the Commission disregarded the effect of the difference in the product mix sold in terms of price and quantity in the AIP as compared to the one sold in the OIP. ZTT Group claimed that, in order to take into account the product mix, the Commission should either: (1) calculate for each product type its weight in the total export value in the AIP and then multiply this weight with the price difference ratio; or (2) multiply the price difference per each product type with the quantity sold in the AIP of that product type. In this case, ZTT Group claimed that there would have been an increase in the export price overall. ZTT Group also claimed that during the AIP it sold more cables with a lower number of fibres which were cheaper than cables with a higher number of fibres. ZTT Group did not however specify what would constitute a cable with 'lower number of fibres' and a cable with 'higher number of fibres'. ZTT Group concluded on this basis that the majority of the product types sold in the AIP were low priced products whereas more of higher priced products were sold in the OIP, and that therefore a simple comparison of the weighted average price level per product type in each period would result in a distorted picture.
- (53) The Commission noted that the weight of the cables with lower number of fibres (i.e. up to 6 fibres) represented [45 % – 56 %] of the total volume of sales in the OIP as compared to [43 % – 54 %] in the AIP. Therefore, these cables represented lesser portion of sales in the AIP as compared to the OIP, contrary to what ZTT Group claimed. By taking into account cables with up to 8 fibres, these cables represented [47 % – 60 %] in the OIP as compared to [48 % – 61 %] in the AIP, which is a rather similar percentages with marginal impact on the average price of these product types.
- (54) Furthermore, contrary to what the ZTT Group claimed, the two methods suggested by the ZTT Group for taking into account the difference in the product mix in terms of value and volume between OIP and AIP do not actually address the difference in the product mix between OIP and AIP, as in both methods only the product mix in the AIP is taken into account. Moreover, the first method weighs relative price changes by the proportion of the sales value of each PCN in the total sales in the AIP, while the second method weighs absolute price differences by the volume of sales of each PCN in the AIP. The ZTT Group does not explain why one method is based on absolute numbers while the other one is based on relative numbers (percentages). This shows that the methods suggested by the ZTT Group were arbitrary and inconsistent.
- (55) In any event, the Commission noted that as stated in recital (38), pursuant to Article 12 of the basic Regulation the absorption investigation aims at establishing, as a first step, whether export prices have decreased or whether there has been no movement, or insufficient movement, in resale prices or subsequent selling prices in the Union of the product under investigation after the OIP (per product type), which would warrant a redetermination of the dumping margin in a second step. In relation to the first step, the Commission examined whether the export prices in AIP decreased compared to the export prices in OIP. This examination was conducted per product type. When calculating the price difference per product type, the Commission noted that, for many product types, the export prices actually decreased. On that basis, it can already be concluded that prices decreased within the meaning of Article 12 of the basic Regulation. As already noted in recital (41), the weighted average export price for the ZTT Group decreased by 13,2 %. Therefore, the claim was rejected.

- (56) In their comments to the additional final disclosure the ZTT Group claimed that the methodology of 'constructed CIF' price used by the Commission to establish the export price change is flawed as for the sales made through related importer the Commission should have compared the resale price of the related importer rather than the 'constructed CIF' price as allegedly required by Article 12 of the basic Regulation or, absent that, the Commission should have used a more appropriate profit margin of an unrelated EU importer than the one it used to construct the CIF price.
- (57) The Commission disregarded the allegations made about the inappropriate use of the CIF prices, as they were provided outside the deadline set for comments on the final disclosure. Moreover, no explanation was given as to why the export price should not be adjusted during the AIP, unlike in the OIP. As regards the level of the profit, the Commission referred to recital (70), where this issue was already addressed. No new evidence was provided.
- (58) On the basis of the above, the Commission concluded that the export prices have decreased pursuant to Article 12 of the basic Regulation.

3.2. Dumping

3.2.1. Export price

- (59) The export prices for the AIP, collected and verified or cross-checked in the framework of this reinvestigation were used, pursuant to Article 12(2) basic Regulation.
- (60) The sampled groups of exporting producers exported to the Union either directly to independent customers or through related companies acting either as an agent, trader, or an importer.
- (61) The export price for sales made directly to independent customers in the Union and through related trading companies was the price actually paid or payable for the product under investigation when sold for export to the Union, in accordance with Article 2(8) of the basic Regulation.
- (62) The export price for sales made through related importers was established based on 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. In this case, adjustments to the price were made for all costs incurred between importation and resale, including selling, general & administrative ('SG&A') expenses of the related importers and reasonable profit. The related importers are ZTT Europe GmbH for the ZTT Group, and FiberHome International Poland Sp. z o.o., and FiberHome International Germany GmbH for the FTT Group.
- (63) In their comments to the final disclosure, the ZTT Group claimed that when calculating the export price, the Commission double counted the package expenses for ZTT's sales made via certain related companies in the AIP.
- (64) This claim was found to be justified and the export price was adjusted accordingly.
- (65) The ZTT Group further claimed that when calculating the export price of ZTT's sales via one of its related companies in the AIP, the Commission wrongly used as a proxy, a unit allowance based on data of the OIP in order to establish the allowances to ZTT's sales to one of its related companies. The ZTT Group argued that this proxy was not accurate as it related to a different period than the AIP and it was calculated based on only one transaction in the OIP with a low quantity which was not representative. The ZTT Group suggested that the Commission should use instead the unit allowance between two of its related companies in the AIP.
- (66) This claim was found to be justified and the export price was adjusted accordingly.

- (67) The ZTT Group also claimed that the sales of the product concerned were usually made by project and that there was a relatively long lead time between the conclusion of the price negotiations and the delivery of all products covered by the projects. In certain cases, in particular when sales were made through a specific sales process, sales prices could no longer be modified to take into account freight cost. Therefore, the ZTT Group had to cover the higher ocean freight costs allegedly incurred in the AIP as compared to OIP. The ZTT Group claimed further that the exceptionally high ocean freight costs in the AIP had a significant impact on the calculation of the export price established at ex-works level and that thus, the high dumping margin established during the AIP was largely due to the deduction of these abnormally high freight costs in the AIP but did not reflect the normal course of trade. As a result, the ZTT Group requested the Commission to adjust downward these costs in proportion to their increase from the OIP to the AIP.
- (68) The Commission noted that no supporting evidence was submitted by ZTT Group regarding the alleged long lead time between the conclusion of price negotiations and the delivery of all products. Furthermore, during the remote cross checks, the companies within the ZTT Group confirmed that they did not sell OFC through the particular sales process ZTT Group referred to in its claim. This fact was recorded in the mission reports that were disclosed to the ZTT Group and the ZTT Group did not indicate that this factual finding was incorrect. Moreover, this claim was only made after the final disclosure and the Commission was able to verify it only based on the information available in the file which showed that there was a time lag of only two to four months between the date of the purchase order and the shipping date, which is not exceptionally long. Therefore, this claim was rejected.
- (69) Furthermore, the ZTT Group claimed that the profit margin of the unrelated importer referred to in recital (62) was established in the OIP and therefore it was overstated for the AIP, considering the high freight costs, the economic downturn amid the high inflation in Europe as well as the anti-dumping duties in place in the AIP. Therefore, the ZTT Group asked the Commission to establish a reasonable profit level of an unrelated importer in the AIP.
- (70) The Commission noted that the ZTT Group contradicted itself as concerns the freight costs. On the one hand it claimed that the high freight costs in the AIP were borne by the ZTT Group as explained in recital (67), while on the other hand the same high freight costs affected the profitability of an importer in the Union. Furthermore, as explained in recital (16) no unrelated importer cooperated in the investigation. As a result, there was no relevant information made available to the Commission specific to the AIP. The Commission also noted that the ZTT Group did not specify what the level of a reasonable profit margin of an unrelated importer was in the AIP. Therefore, the claim was rejected.
- (71) In their comments to the final disclosure, the FTT Group claimed that when calculating the export price for direct sales of FiberHome Telecommunication Technologies Co., Ltd (‘FTT’) and Nanjing Wasin Fujikura Optical Communication Ltd.’s sales via FTT, the Commission deducted twice the agent fee of Wuhan FiberHome International Technologies (‘WFIT’).
- (72) The Commission disagreed with this claim. As it was explained in the company specific confidential disclosure to the FTT Group, the amount of the agent fee reported under ‘other allowances’ was deducted from the total amount of the agent fee calculated based on the percentages of agent fees stipulated in the Agency agreements with WFIT for 2021 and 2022. This methodology was also visible in the company specific calculation files provided to the FTT Group. Therefore, this claim was rejected.
- (73) FTT Group also claimed that the Commission deducted twice the inland freight fee, once as an allowance in the transaction listing file and another time in the calculation of the SG&A of FTT.
- (74) The Commission found this claim to be justified and revised the export price accordingly.

3.2.2. *Normal value*

- (75) Normal value as established in the original investigation is used for the calculation of dumping margins during the AIP, unless revision of the normal value taking into account changes in the AIP is requested and substantiated under Article 12(5) of the basic Regulation.
- (76) In the present case, the sampled groups of exporting producers did not request revision of the normal value. Therefore, the normal value established in the original investigation was used to recalculate the dumping margins.
- (77) Some of the product types sold by the sampled groups of exporting producers in the AIP were not sold by them in the OIP. In this case the normal value for the most closely resembling product types sold by the respective producers in the original investigation was used.
- (78) In their comments to the final disclosure, the FTT Group claimed that the Commission, when identifying closely resembling product types, considered only the four PCN parameters, i.e. type of single mode optical fibres in the cable, coated optical fibre diameter, number of fibres in the cable and number of fibres per module. FTT argued that on this basis, several closely matching PCNs would have been available, and not just one, and that the Commission should have used the average normal value of all closely matching PCNs. In their comments to the additional final disclosure, the FTT Group further claimed that the method chosen by the Commission to identify closely resembling product types was inconsistent as certain PCNs were only matched by two and not by four PCN parameters.
- (79) Contrary to the claim, the Commission did not consider only four PCN parameters but took into account all of the parameters defined in the PCN. In case where there were more than one closely matching PCNs, the Commission chose the one with the least number of differences compared with the original PCN. More details were provided to the FTT Group in the company specific disclosure as it included confidential information. Therefore, the claim was rejected.

3.2.3. *Comparison*

- (80) The Commission compared the normal value and the export price of the sampled exporting producers on an ex-works basis.
- (81) 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. Adjustments were made for transport, insurance, handling and loading, EU customs duty, packing expenses, credit cost, bank charges and agent fee.
- (82) An adjustment under Article 2(10)(i) was made for sales through the ZTT related trading company, ZTT International Limited. Adjustments under Article 2(10)(i) were also made in the case of sales of products manufactured by Zhongtian Power Optical Cable Co., Ltd which were sold by Jiangsu Zhongtian Technology Co., Ltd, and in the case of sales of products manufactured by Nanjing Wasin Fujikura Optical Communication Ltd which were sold by FiberHome Telecommunication Technologies Co., Ltd. These adjustments were made in the original investigation and the Commission found that the conditions for making these adjustments were present in the AIP.
- (83) The adjustments consisted of the SG&A of the trading companies and 10 % profit (as established in the original investigation).

3.2.4. *Dumping margin*

- (84) To establish the dumping margin for the two cooperating 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 under investigation, on an ex-works basis, in accordance with Article 2(11) and (12) of the basic Regulation.

- (85) For the non-sampled cooperating exporting producers, the Commission established the dumping margin at the level of the weighted average dumping margin of the sampled exporting producers, in accordance with Article 9(6) of the basic Regulation.
- (86) To establish the margin for all other exporting producers in China, the Commission determined the level of cooperation of the exporting producers, considering the volume of exports of the cooperating exporting producers to the Union and the estimated total export volume from China.
- (87) The level of cooperation in this case was high. Therefore, the Commission considered it appropriate to base the residual dumping margin at the level of the sampled company with the highest dumping margin.
- (88) On this basis, the dumping margins expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

Company name	Dumping margin in the OIP	Dumping margin in the AIP	Increase of dumping margin (p.p.)
FTT Group:			
— FiberHome Telecommunication Technologies Co., Ltd.	44,0 %	116,6 %	72,6
— Nanjing Wasin Fujikura Optical Communication Ltd.			
ZTT Group:			
— Jiangsu Zhongtian Technology Co., Ltd.	19,7 %	67,3 %	47,6
— Zhongtian Power Optical Cable Co., Ltd.			
Other cooperating companies	31,2 %	109,2 %	78,0
All other companies	44,0 %	116,6 %	72,6

- (89) As shown in the table above, in all cases the dumping margin in the AIP was higher than the one in the OIP.

3.3. Injury elimination level

- (90) In order to determine the level of applicable anti-dumping duty, the Commission checked whether dumping margins would still be below the injury margins based on the export prices in the AIP.
- (91) The Commission determined the injury elimination level based on a comparison of the weighted average export price of the sampled exporting producers established in the AIP with the weighted average non-injurious price of the like product sold by the sampled Union producers on the Union market as established during the OIP. Any difference resulting from this comparison was expressed as a percentage of the weighted average import CIF value.
- (92) Not all product types sold by the cooperating exporting producers in the AIP were sold by the sampled Union producers in the OIP. To ensure sufficient comparability level, whenever possible, the Commission compared the prices of the 'unmatched' product types (the ones with the highest import quantity in the AIP) with the non-injurious prices of the most closely resembling product types sold by the Union producers as established during the OIP.
- (93) The injury elimination level for 'other cooperating companies' and for 'all other companies' was defined in the same manner as the dumping margins for these companies.

(94) The following injury margins were found:

Company name	Injury elimination level in the AIP
FTT Group:	
— FiberHome Telecommunication Technologies Co., Ltd.	131,5 %
— Nanjing Wasin Fujikura Optical Communication Ltd.	
ZTT Group:	
— Jiangsu Zhongtian Technology Co., Ltd.	99,1 %
— Zhongtian Power Optical Cable Co., Ltd.	
Other cooperating companies	128,7 %
All other companies	131,5 %

4. CONCLUSION

- (95) The dumping margins of the sampled groups of exporting producers calculated for the AIP increased compared to the ones established in the OIP.
- (96) In the anti-subsidy investigation (see recital (2)), the Commission reduced the dumping margin found in the original investigation with the entire amount of subsidisation to avoid 'double-counting' in accordance with Article 24(1) of the basic anti-subsidy Regulation ⁽⁸⁾. Accordingly, as the anti-subsidy investigation remains unaffected by the present investigation, the subsidisation rate originally established needs to be deducted from the dumping margins established in the AIP.
- (97) The dumping margins in the AIP, established as explained in recital (96), are lower than the injury elimination level established in the AIP. Therefore, in accordance with Article 9(4), second subparagraph, of the basic Regulation, the new dumping margins serve the basis for the anti-dumping duties.
- (98) The revised anti-dumping duty rate cannot exceed twice the amount of the anti-dumping duty initially imposed, in accordance with Article 12(3) of the basic Regulation.
- (99) Consequently, the revised rates of anti-dumping duty applicable, before duty, to the net free-at-Union-frontier price will be as follows:

Company name	Dumping margin in the AIP	Counter-vailing duty in the OIP	Injury elimination level in the AIP	Anti-dumping duty resulting from the AIP	Duty capped by Art. 12(3) BR (see recital (98))	Revised anti-dumping duty
FTT Group:						
FiberHome Telecommunication Technologies Co., Ltd.						
Nanjing Wasin Fujikura Optical Communication Ltd.	116,6 %	10,3 %	131,5 %	106,3 %	88,0 %	88,0 %
Hubei Fiberhome Boxin Electronic Co., Ltd ⁽¹⁾						

⁽⁸⁾ Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ L 176, 30.6.2016, p. 55).

ZTT Group: Jiangsu Zhongtian Technology Co., Ltd. Zhongtian Power Optical Cable Co., Ltd.	67,3 %	5,1 %	99,1 %	62,2 %	39,4 %	39,4 %
Other companies cooperating in both anti-subsidy and anti-dumping investigation	109,2 %	7,8 %	128,7 %	101,4 %	62,4 %	62,4 %
Other companies cooperating in anti-dumping investigation and not in the anti-subsidy investigation	109,2 %	10,3 %	128,7 %	98,9 %	62,4 %	62,4 %
All other companies	116,6 %	10,3 %	131,5 %	106,3 %	88,0 %	88,0 %

(¹) The FTT Group did not export to the EU the product under investigation made by Hubei Fiberhome Boxin Electronic Co., Ltd during the AIP but exported it during the OIP.

- (100) In their comments to the final disclosure, reiterated in the comments to the additional final disclosure, the ZTT Group claimed that as the revised anti-dumping duty rate should not exceed twice the amount of the anti-dumping duty initially imposed and the initial anti-dumping duty imposed on ZTT Group was 14,6 % the revised anti-dumping duty rate for ZTT Group should not exceed 29,2 %. Therefore, the anti-dumping duty rate cannot be 39,4 % as calculated by the Commission.
- (101) The Commission noted that the initial anti-dumping duty imposed on ZTT Group was 19,7 % pursuant to the original Regulation. The anti-dumping duty of 14,6 % that the ZTT Group refers to in recital (100), was the anti-dumping duty after the imposition of the countervailing duty which reduced the anti-dumping duty in force in order to avoid double counting as explained in recital (765) of Implementing Regulation (EU) 2022/72 and recital (2) of this Regulation. Therefore, the claim was rejected.
- (102) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 15(1) of the basic Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Implementing Regulation (EU) 2021/2011 is amended as follows:

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

‘2. The rates of the definitive anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, of the product described in paragraph 1 and produced by the companies listed below shall be as follows:

Company	Definitive anti-dumping duty	TARIC additional code
FTT Group: FiberHome Telecommunication Technologies Co., Ltd. Nanjing Wasin Fujikura Optical Communication Ltd. Hubei Fiberhome Boxin Electronic Co., Ltd	88,0 %	C696

ZTT Group: Jiangsu Zhongtian Technology Co., Ltd. Zhongtian Power Optical Cable Co., Ltd.	39,4 %	C697
Other companies cooperating in both anti-subsidy and anti-dumping investigation listed in the Annex I of Implementing Regulation (EU) 2022/72	62,4 %	See Annex I
Other companies cooperating in anti-dumping investigation but not in anti-subsidy investigation listed in the Annex II of Implementing Regulation (EU) 2022/72	62,4 %	See Annex II
All other companies	88,0 %	C999'

(2) Article 2 is replaced by the following:

'Article 2

Where a new exporting producer from the People's Republic of China provides sufficient evidence to the Commission, the Annex of Implementing Regulation (EU) 2021/2011 may be amended by adding that new exporting producer to the list of cooperating companies not included in the sample and thus subject to the appropriate weighted average anti-dumping duty rate, namely 62,4 %. A new exporting producer shall provide evidence that:

- (a) it did not export the goods described in Article 1(1) of Implementing Regulation (EU) 2021/2011 originating in the People's Republic of China during the period of investigation (1 July 2019–30 June 2020);
- (b) it is not related to an exporter or producer subject to the measures imposed by this Regulation; and
- (c) it has either actually exported the goods described in Article 1(1) originating in the People's Republic of China or has entered into an irrevocable contractual obligation to export a significant quantity to the Union after the end of the period of investigation.'

Article 2

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, 8 August 2023.

For the Commission
The President
Ursula VON DER LEYEN

COMMISSION IMPLEMENTING REGULATION (EU) 2023/1618**of 8 August 2023****imposing a definitive anti-dumping duty on imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council**

THE EUROPEAN COMMISSION,

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

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⁾ ('the basic Regulation'), and in particular Article 11(2) thereof,

Whereas:

1. PROCEDURE**1.1. Previous investigations and measures in force**

- (1) By Council Regulation (EEC) No 2737/90 ⁽²⁾, the Council imposed a definitive anti-dumping duty of 33% on imports of tungsten carbide and fused tungsten carbide, originating in the People's Republic of China ('PRC', 'China' or 'the country concerned') ('the original measures'). The investigation that led to the imposition of the original measures will hereinafter be referred to as 'the original investigation'. By Commission Decision 90/480/EEC ⁽³⁾, the European Commission ('the Commission') accepted undertakings given by two major exporters concerning the product subject to measures.
- (2) Following the withdrawal of the undertakings by the two Chinese exporters concerned, the Council, by Council Regulation (EC) No 610/95 ⁽⁴⁾, amended Regulation (EEC) No 2737/90 so that the definitive duty of 33% became applicable also on tungsten carbide and fused tungsten carbide exported to the Union by them.
- (3) By Council Regulation (EC) No 771/98 ⁽⁵⁾, following an expiry review, the original measures were extended for another five-year period.
- (4) By Council Regulation (EC) No 2268/2004 ⁽⁶⁾, following an expiry review, the Council extended the original measures for another five-year period.

⁽¹⁾ OJ L 176, 30.6.2016, p. 21.

⁽²⁾ Council Regulation (EEC) No 2737/90 of 24 September 1990 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and definitively collecting the provisional duty (OJ L 264, 27.9.1990, p. 7).

⁽³⁾ Commission Decision 90/480/EEC of 24 September 1990 accepting undertakings given by certain exporters in connection with the anti-dumping proceeding concerning imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the investigation with regard to the exporters in question (OJ L 264, 27.9.1990, p. 59).

⁽⁴⁾ Council Regulation (EC) No 610/95 of 20 March 1995 amending Regulations (EEC) No 2735/90, (EEC) No 2736/90 and (EEC) No 2737/90 imposing a definitive anti-dumping duty on imports of tungsten ores and concentrates, tungstic oxide, tungstic acid, tungsten carbide and fused tungsten carbide originating in the People's Republic of China, and definitively collecting the amounts secured by way of the provisional anti-dumping duty imposed by Commission Regulation (EC) No 2286/94 (OJ L 64, 22.3.1995, p. 1).

⁽⁵⁾ Council Regulation (EC) No 771/98 of 7 April 1998 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China (OJ L 111, 9.4.1998, p. 1).

⁽⁶⁾ Council Regulation (EC) No 2268/2004 of 22 December 2004 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China (OJ L 395, 31.12.2004, p. 56).

- (5) By Council Regulation (EC) No 1275/2005 ⁽⁷⁾, the Council amended the definition of the product scope to also cover tungsten carbide simply mixed with metallic powder.
- (6) By Council Implementing Regulation (EU) No 287/2011 ⁽⁸⁾, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009 ⁽⁹⁾, the Council extended the measures for another five-year period.
- (7) By Commission Implementing Regulation (EU) 2017/942 ⁽¹⁰⁾, the Commission extended the anti-dumping measures on imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder originating in the PRC for another five-year period, following an expiry review pursuant to Article 11(2) of the basic Regulation ('the previous expiry review').

1.2. Request for an expiry review

- (8) Following the publication of a notice of impending expiry ⁽¹¹⁾, the Commission received a request for a review ('the request') pursuant to Article 11(2) of the basic Regulation.
- (9) The request for review was submitted on 25 February 2022 by Global Tungsten & Powders spol. s.r.o., H.C. Starck Tungsten GmbH, Tikomet Oy, Treibacher Industrie AG, Umicore Specialty Powders France and Wolfram Bergbau und Hütten AG ('the applicants') on behalf of the Union industry of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder, in the sense of Article 5(4) of the basic Regulation. The request was based on the grounds that the expiry of the measures would be likely to result in continuation or recurrence of dumping and recurrence of injury to the Union industry.

1.3. Initiation of an expiry review

- (10) Having determined, after consulting the Committee established by Article 15(1) of the basic Regulation, that sufficient evidence existed for the initiation of an expiry review, on 1 June 2022, the Commission initiated an expiry review with regard to imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder originating in the PRC on the basis of Article 11(2) of the basic Regulation. It published a Notice of Initiation in the *Official Journal of the European Union* ⁽¹²⁾ ('the Notice of Initiation').

1.4. Review investigation period and period considered

- (11) The investigation of continuation or recurrence of dumping covered the period from 1 January 2021 to 31 December 2021 ('review investigation period'). The examination of trends relevant for the assessment of the likelihood of a recurrence of injury covered the period from 1 January 2018 to the end of the review investigation period ('the period considered').

⁽⁷⁾ Council Regulation (EC) No 1275/2005 of 26 July 2005 amending Regulation (EC) No 2268/2004 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China (OJ L 202, 3.8.2005, p. 1).

⁽⁸⁾ Council Implementing Regulation (EU) No 287/2011 of 21 March 2011 imposing a definitive anti-dumping duty on imports of tungsten carbide, tungsten carbide simply mixed with metallic powder and fused tungsten carbide originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009 (OJ L 78, 24.3.2011, p. 1).

⁽⁹⁾ Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ L 343, 22.12.2009, p. 51). This Regulation has been codified by the basic Regulation.

⁽¹⁰⁾ Commission Implementing Regulation (EU) 2017/942 of 1 June 2017 imposing a definitive anti-dumping duty on imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ L 142, 2.6.2017, p. 53).

⁽¹¹⁾ Notice of the impending expiry of certain anti-dumping measures (OJ C 354, 3.9.2021, p. 2).

⁽¹²⁾ Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder originating in the People's Republic of China (OJ C 217, 1.6.2022, p. 17).

1.5. Interested parties

- (12) In the Notice of Initiation, interested parties were invited to contact the Commission in order to participate in the investigation. In addition, the Commission specifically informed the applicants, other known Union producers, the known producers in the PRC and the authorities of the PRC, known importers, users, as well as associations known to be concerned, about the initiation of the expiry and invited them to participate.
- (13) Interested parties had an opportunity to comment on the initiation of the expiry review and to request a hearing with the Commission and/or the Hearing Officer in trade proceedings.
- (14) One hearing was held with a user.

1.6. Comments on initiation

- (15) Comments were received from three Chinese producers, namely Chongyi Zhangyuan Tungsten Co., Ltd. ('Zhangyuan Tungsten'), Guangdong Xianglu Tungsten Co., Ltd. ('Xianglu Tungsten'), Xiamen Golden Egret Special Alloy (H.C.) Co., Ltd. ('Golden Egret'). The applicants also reacted to the claims raised by the three Chinese producers.
- (16) The Commission noted that these Chinese producers submitted their claims almost three months after the deadline for parties to submit comments on the request without any justification (i.e. on 26 September 2022). Nevertheless, to the extent possible, the Commission exceptionally addressed these claims.
- (17) Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret claimed that the request lacked evidence that supported the likelihood of recurrence of dumping.
- (18) The Commission disagreed with this assessment and considered that the requirements for initiation of an investigation were met. The analysis of the request has shown that there was sufficient evidence at initiation stage pointing to a likelihood of continuation or recurrence of dumping should the anti-dumping measures applicable to imports from the PRC be allowed to lapse. The applicants submitted evidence that even though the imports from PRC had decreased since 2018, they still held a significant share of the total imports, as well as of the Union market. The applicants based their analysis not only on the spare capacity in the PRC, but also on the unfair pricing behaviour of the PRC on other markets. For the export price, the expiry review request used three methods, i.e., the average Chinese import price at TARIC level, average export price of an equivalent Chinese product as published in the publicly available Argus Metal Report and the average Chinese export price to all third countries. These three methods were found to be sufficiently substantiated to comply with the legal standard at initiation stage. Therefore, the claims that the request did not provide sufficient evidence were rejected.
- (19) Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret claimed that the request lacked evidence concerning overall distortion of the tungsten sector and input prices in China. According to these three exporting producers, State ownership *per se* did not automatically lead to market distortions. Furthermore, the three Chinese producers claimed that the allegation in the request concerning State presence, control, restrictions, government intervention, which allegedly result in price distortion, were speculative. Furthermore, the three Chinese exporting producers claimed that the request did not include sufficient evidence to prove that raw material prices were distorted by government intervention. They also argued that the following two claims in the request were contradictory: (i) that China controlled over 60% of the world's tungsten ore reserves, produced 80% of the world output, imposed export restrictions and granted licenses to state-owned enterprises; and (ii) that, despite this, China still participated in the bidding process on the Union scrap metal markets to drive up the scrap metal prices to or above the Chinese Ammonium Paratungstate ('APT') prices. Finally, the three Chinese exporting producers further argued that China enjoyed a natural competitive advantage in terms of tungsten reserves and that (i) export restrictions and licences granted to State-owned enterprises worked in favour of the supply to the Union market because they protect the stability and availability of supply, (ii) they were intended to protect and secure mineral resources in China, and (iii) export licenses were granted irrespectively of the fact that the beneficiary companies were State-owned or not.

- (20) In this respect, the Commission noted that Article 2(6a)(d) of the basic Regulation sets out that when filing a request for a review in accordance with Article 11 of the basic Regulation, the Union industry may rely on the evidence of the Commission Staff Working Document on significant distortions in the economy of the PRC for the purpose of trade defence investigations, when meeting the standard of evidence in Article 5(9) of the basic Regulation, in order to justify the calculation of the normal value. The applicants also submitted evidence that the Government of China ('GOC') intervenes in the tungsten carbide sector and that these interventions lead to significant distortions in general and regarding specific production factors and costs of tungsten carbide producers. None of the three Chinese exporting producers provided any information that would have questioned this evidence. Furthermore, these parties did not further explain in what way the two statements mentioned in recital (19) were contradictory. The Commission considered thus that the applicants provided sufficient evidence in the request on the distortions of the tungsten sector and raw material prices justifying the initiation of the current review. Those claims were therefore rejected.
- (21) Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret argued also that the request included insufficient evidence to prove the existence of circumvention and that the applicants' allegation of circumvention by imports of slightly modified products was not substantiated.
- (22) While no circumvention practices from Chinese exporting producers within the meaning of Article 13 of the basic Regulation have been established by the Commission, this has not been a substantial consideration based on which the current expiry review has been initiated. The Commission carried out the examination of the request based to the product scope as defined in the measures already in force and this claim was therefore rejected.
- (23) Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret claimed that there was no evidence in the request to support the claim that China's spare capacity was of 18 000 tonnes.
- (24) The Commission noted that the request included information regarding the production capacity in China of 80 000 tonnes based on the Report on the Development of China's Tungsten Industry 2020 published by the China Tungsten Industry Association ⁽¹³⁾. The applicants also estimated the demand in China to 30 000 tonnes based on the market knowledge of the Union industry. By deducting from the production capacity the volume of demand in China and the total volume of Chinese exports, the applicants obtained the spare capacity in China. The Commission also analysed the spare capacity in the course of the investigation (see Section 4.1), resulting in higher volumes than originally calculated by the applicants in the request. The potential underestimation of spare capacity in the application did not imply that the Commission did not have sufficient evidence of likely injury, as this was only one among other elements that the Commission assessed.
- (25) On 4 May 2023 the applicants provided a correction for the calculation of the spare capacity in China reported in the request for review. It was explained that due to a clerical error (in the calculation of spare capacity the applicants inadvertently used the price data instead of the volume data) the applicants underestimated the spare capacity in China by initially estimating the spare capacity at 18 102 tonnes instead of 41 348 tonnes.
- (26) On 7 June 2023, Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret claimed that the Union industry allegedly submitted revised data regarding export volume from China of tungsten carbide. It was stated that in the revision of the data the applicants did not specify the source of information and whether the HS codes used included also other types of related products. The company further asserted that the revised data understated the export volume data and overstated the domestic demand and that the revised data misled the Commission and other interested parties regarding the high spare capacity in China.
- (27) The Commission noted that the applicants did not change the data reported in the request for review for Chinese exports of tungsten carbide, but only corrected a clerical error. Therefore, the claim stated in recital (26) is factually wrong and therefore it was rejected.

⁽¹³⁾ <http://www.ctia.com.cn/en/news/31091.html>

- (28) In the same submission of 7 June 2023 Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret questioned the authenticity and the reliability of the data used by the applicants for the calculation of the spare capacity in the request for review. In particular, it was stated that the request for review did not indicate an official source for the Chinese demand amounting to 30 000 tonnes. Furthermore, it was stated that the source for the production capacity in China used by the applicants in the request for review was not authentic and reliable as it came from a company and not an industry association and therefore the Commission should disregard it. Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret asked the Commission to use instead the data allegedly reported by the China Tungsten Industry Association regarding consumption in China of tungsten carbide which they included in a table in their submission.
- (29) The Commission noted that Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret raised the claim regarding the source of the data for the Chinese demand and the production capacity in China of tungsten carbide in the request for review 10 months after the deadline for parties to submit comments on the request. Furthermore, while the source of the information provided on 7 June 2023 regarding the consumption of tungsten carbide in China was allegedly the China Tungsten Industry Association, in their submission Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret did not provide any supporting evidence in this regard. Therefore, the claim was rejected.
- (30) The three Chinese exporting producers claimed further that there was evidence, which they provided in their submission, showing that the main export destinations for Chinese tungsten producers were Japan and South Korea, which accounted for more than 60% of the Chinese exports of tungsten carbide (with the exception of 2020 which was impacted by restrictions related to Covid-19). Moreover, export volumes to Japan and South Korea increased again substantially after 2020. Therefore, the three exporting producers argued that it was reasonable to foresee that China's exports of tungsten carbide to Japan and South Korea will continue to maintain a strong growth trend in addition to the increase of Chinese domestic market. The Chinese exporting producers also argued that this formed a sharp contrast between imports from China to the Union, as the Union market represented only a share of Chinese exports when compared to other Chinese export markets.
- (31) The Commission noted that the arguments provided by the three Chinese exporting producers concerning future export trends to Japan and South Korea were not supported by any evidence and were therefore purely speculative. The Commission considered that the applicants provided sufficient evidence regarding exports to other third country markets. These arguments were therefore rejected. The same exporting producers claimed that the request did not include sufficient evidence of likelihood of recurrence of injury. In particular, they stated that there was no supporting evidence in the request for the applicants' claims that without the measures, the development of the secondary raw materials (i.e. scrap) and of the creation of different business models (normal agreements or outright business vs. tolling agreements or conversion business) would not have been possible.
- (32) The applicants in their request described two main different business models of the Union industry, that is, the normal agreements or outright business (the Union industry purchases the raw material), and tolling agreements or conversion business (the customer of tungsten carbide remains the owner of the raw material and pays a processing fee to the Union producers for the conversion of the raw material into tungsten carbide). Furthermore, the applicants provided sufficient evidence regarding the profitability of both business models. Even though the profitability of the outright business model was positive during the period covered by the request, it decreased significantly between 2018 and 2020, whereas the profitability of the conversion business model improved even though it remained negative throughout the whole period covered by the request. The applicants also provided evidence that the Union industry's sales on the Union market of tungsten carbide produced from scrap represented a significant share in total sales volume in the Union, intending to reduce dependence on imports of raw materials from China and to contribute to the EU's green agenda through recycling activities.

- (33) Furthermore, according to the evidence provided in the request, the volumes of the product concerned from the PRC that would penetrate the EU market in the absence of measures are likely to increase due to the existence of unused capacity in the country concerned. The applicants provided sufficient evidence that the production capacity in the PRC has increased by more than 50% since the latest expiry review and that it could fulfil its domestic supply of tungsten carbide more than twice. If the measures were allowed to expire, Chinese import prices could undercut the Union industry's prices and would result in recurrence of injury to the Union industry.
- (34) The Commission therefore considered the evidence in the request concerning the likelihood of recurrence of injury as sufficient evidence at the stage of the request, which was reasonably available to the applicants. Thus, the claim was rejected.
- (35) The three exporting producers further argued that anti-dumping measures would have achieved their intended effects. In particular, they stated that compared to the previous expiry review, imports from China decreased, whereas sale volumes and market shares of the Union industry and imports from other third countries increased. There was therefore no continuation of injury. The recurrence of injury was also not likely, because imports from China remained too low and, as shown in the sampling replies, the Union market was not an important export market for Chinese exporting producers. In their opinion, the fact that the Union industry claimed a deterioration of its competitive situation could not reconcile with the effectiveness of the measures.
- (36) In respect to these claims, the Commission noted that the purpose of anti-dumping measures is to eliminate the trade distorting effects of injurious dumping and to restore effective competition by having a positive effect on the state of the Union industry. The fact that the Union industry did not suffer material injury in the period covered by the request does not exclude that such injury may recur should measures be allowed to lapse. In addition, when assessing material injury, not all injury factors must show a deteriorating trend, but the state of the Union industry as a whole has to be considered. Thus, the fact that the Union industry's market share increased on its own does not allow the conclusion that it did not suffer material injury. In addition, the Notice of Initiation clarifies in point 4.2. that the applicants alleged the likelihood of recurrence of injury from the PRC, and not its continuation. In this respect the applicants have provided sufficient evidence that, should measures be allowed to lapse, the current import level of the product under review from the country concerned to the Union was likely to increase due to the existence of unused production capacity in the PRC.
- (37) Furthermore, the applicants submitted evidence that even though the imports from the PRC had decreased during the period of the request, the Union market remained the fourth main exporting destination of the product concerned for the PRC even with measures in place. Moreover, according to the evidence provided in the request and analysed by the Commission, the volumes of the product concerned from the PRC that would penetrate the Union market in the absence of measures were likely to increase due to the existence of unused capacity in the country concerned. As stated, the Commission considered the evidence present in the request concerning the likelihood of recurrence of injury as sufficient evidence at the stage of the request, which was reasonably available to the applicants. Therefore, this claim was rejected.
- (38) The three exporting producers argued that the deterioration experienced by the Union industry could not be attributed to the Chinese exports. In particular, they claimed that (i) production, capacity utilization and sale price of the Union industry moved in line with consumption; (ii) the overall decrease in sale price was linked to a certain extent to the decrease in cost of production and not to price pressure from Chinese exports; (iii) the performance of the conversion business was not influenced by Chinese imports; and (iv) the profitability of the Union industry witnessed an increase when imports from China were at their lowest level.
- (39) The Commission recalled that the evidence of the applicants in the request did not point to material injury but to the likelihood of recurrence of injury should measures be allowed to lapse. Therefore, the examination of causation during the RIP is not necessary in this case. The Commission also considered that as explained in recital (37), there was sufficient evidence in the request showing the likelihood of recurrence of injury from exports from China should measures be allowed to lapse. Therefore, these claims were misplaced and were rejected.

1.7. Sampling

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

1.7.1. Sampling of Union producers

- (41) In the Notice of Initiation, the Commission stated that it had provisionally selected a sample of Union producers. The Commission selected the sample on the basis of representability in terms of size of the production and sales volume on the free market in the Union in the review investigation period and geographic location. This sample consisted of three Union producers. The sampled Union producers accounted for more than 69% of the estimated total volume of Union production and more than 59% of the estimated total volume of sales in the Union and they also ensured a geographical spread. In accordance with Article 17(2) of the basic Regulation, the Commission invited interested parties to comment on the provisional sample. No comments were received. Therefore, the provisional sample was confirmed. The sample is representative of the Union industry.

1.7.2. Sampling of importers

- (42) To decide whether sampling was necessary and, if so, to select a sample, the Commission asked unrelated importers to provide the information specified in the Notice of Initiation.
- (43) Six companies provided the requested information and agreed to be included in the sample. However, all of them were users and were thus requested to complete the users' questionnaire. Therefore, the Commission decided that sampling of unrelated importers was not necessary.

1.7.3. Sampling of exporting producers in the PRC

- (44) To decide whether sampling was necessary and, if so, to select a sample, the Commission asked all exporting producers in the PRC to provide the information specified in the Notice of Initiation. In addition, the Commission asked the Mission of the PRC to the European Union to identify and/or contact other producers, if any, that could be interested in participating in the investigation.
- (45) Three exporting producers in the country concerned provided the requested information and agreed to be included in the sample. In view of the limited number of exporting producers, the Commission decided that sampling was not necessary. No comments were made.

1.8. Replies to the questionnaire

- (46) The Commission sent a questionnaire concerning the existence of significant distortions in the PRC within the meaning of Article 2(6a)(b) of the basic Regulation to the GOC.
- (47) The Commission invited the three exporting producers replying to the sample, the three sampled Union producers and known users to complete the relevant questionnaires. The same questionnaires, together with the questionnaire for unrelated importers, had also been made available online ⁽¹⁴⁾ on the day of initiation. In addition, the Commission sent a questionnaire to the applicants.
- (48) Questionnaire replies were received from the applicants, the three sampled Union producers and seven users. None of the three Chinese exporting producers that provided information for the selection of a sample replied to the questionnaire. Likewise, the GOC did not reply to the questionnaire.

⁽¹⁴⁾ <https://tron.trade.ec.europa.eu/investigations/case-view?caseId=2604>

1.9. Verification

- (49) The Commission sought and verified all the information deemed necessary for the determination of likelihood of continuation or recurrence of dumping and injury, and of the Union interest. The Commission carried out verification visits pursuant to Article 16 of the basic Regulation ⁽¹⁵⁾:

Union producers

- Tikomet Oy, Jyväskylä, Finland
- H.C. Starck Tungsten GmbH, Goslar, Germany
- Wolfram Bergbau und Hütten AG, Mittersill and Sankt Martin im Sulmtal, Austria

Users

- Betek GmbH & Co. KG, Aichhalden, Germany.

1.10. Subsequent procedure

- (50) On 7 June 2023, the Commission informed all interested parties of the essential facts and considerations on the basis of which it intended to impose a definitive anti-dumping duty on imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder originating in the PRC ('final disclosure'). All parties were granted a period within which they could make comments on the final disclosure. Comments were received from Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret, as well as Betek GmbH & Co. KG ('Betek'). The applicants also reacted to the comments made by Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret and by Betek.
- (51) On the day of the final disclosure, i.e. on 7 June 2023, Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret also submitted additional comments on the request for review. These comments are also addressed in this Regulation.
- (52) Following final disclosure, interested parties were granted an opportunity to be heard as provided for in point 5.8 of the Notice of Initiation. A hearing on final disclosure took place with Betek and the Union industry.
- (53) Based on the comments on final disclosure received, the Commission decided not to implement in the context of this investigation a restructuring of the TARIC codes and descriptions within CN code 3824 30 00, initially proposed in the final disclosure. Due to the complexity and the technical nature of the issue, the matter required further analysis which could not be dealt with within the statutory time limit of the expiry review investigation. On 30 June 2023, the Commission informed all interested parties of this decision by a Note for the File.

2. PRODUCT UNDER REVIEW, PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product under review

- (54) The product under review is the same as in the previous expiry review, namely tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder, currently falling under CN codes 2849 90 30 and ex 3824 30 00 (TARIC code 3824 30 00 10) ('the product under review').
- (55) Tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder are compounds of carbon and tungsten produced by heat treatment. The product under review is an intermediate product, used as input material in the manufacture of hard metal components such as cemented carbide cutting tools and high-wear components, in abrasion-resistant coatings, in bits for oil drilling and mining tools as well as in dies and tips for the drawing and forging of metals.

⁽¹⁵⁾ The Commission also verified the macro-economic data in the premises of the legal representative of the applicants.

- (56) During the period considered, the product under review was manufactured in the Union either from 'virgin' or 'primary' raw materials (which are, from upstream to downstream: ore, tungsten concentrate, and other intermediate compounds, namely APT and tungsten oxide – 'WO₃') under a process called 'virgin production', or from 'secondary' raw materials, namely scrap, under a process called 'recycling production'. The hard metal scrap is generated in the production process of hard metal companies, in the production process of tools and at end users of hard metal products. In the tungsten industry, the scrap can be recycled by using either the chemical recycling or the zinc reclamation process.
- (57) The virgin production and the chemical recycling share the same production process. The only difference lies in the starting point of the process: while the virgin production can start at any level of the production process (i.e. from the ore, which is the initial upstream products, or from downstream intermediate products, which are tungsten concentrate, APT and WO₃), the chemical recycling in its first step transforms the scrap always in APT.
- (58) Instead, the zinc reclamation process is based on the reaction of zinc with the minor quantity of cobalt present in the scrap in a furnace. In the zinc reclamation process, the quality of the input (i.e., the scrap used) determines the quality of the output (i.e., the tungsten carbide). However, as ascertained in the previous expiry review ⁽¹⁶⁾, tungsten carbide obtained from the zinc reclamation process, has similar physical and chemical characteristics and similar applications as tungsten carbide manufactured through virgin production or from scrap through the chemical recycling process.
- (59) The type of tungsten carbide purchased and sold in commercial transactions is identified based on its 'grade', i.e., based on the dimensions of its grains, from coarse grade to ultrafine and nano grades.

2.2. Product concerned

- (60) Product concerned by this investigation is the product under review originating in the PRC ('the product concerned').

2.3. Like product

- (61) As established in the previous expiry review, this expiry review investigation confirmed that the following products have the same basic physical and chemical characteristics as well as the same basic uses:
- the product concerned when exported to the Union;
 - the product under review produced and sold on the domestic market of the PRC; and
 - the product under review produced and sold in the Union by the Union industry.
- (62) These products are therefore considered to be like products within the meaning of Article 1(4) of the basic Regulation.

2.4. Claims regarding product scope

- (63) Technogenia S.A.S. ('Technogenia'), a user which came forward within the time limits granted but did not provide a questionnaire reply, claimed that the only known producer of fused tungsten carbide in the Union stopped its production in 2022 and that, therefore, fused tungsten carbide was not produced in the Union anymore. Since the purchase of fused tungsten carbide represented a considerable percentage of its turnover and there were no alternative raw materials, this user requested the Commission to repeal the anti-dumping measures on fused tungsten carbide from China. China is still producing fused tungsten carbide.

⁽¹⁶⁾ Commission Implementing Regulation (EU) 2017/942, recital (37).

- (64) The Commission recalled that in an expiry review in accordance with Article 11(2) of the basic Regulation, the investigation is limited to the determination as to whether measures should be extended or not based on the conditions set out in this Article, while any amendment of measures in place, including their scope, can only be investigated in the framework of an interim review in accordance with Article 11(3) of the basic Regulation.
- (65) The Commission recalled however, that fused tungsten carbide is part of the product scope of the anti-dumping measures since the original investigation and was also subject to the original measures. The need for the continued inclusion in the product scope of fused tungsten carbide was assessed a number of times by the Commission in several expiry review investigations ⁽¹⁷⁾.
- (66) In the context of the current investigation, the Union industry confirmed that, at the time of the investigation, there was no production of fused tungsten carbide in the Union anymore. However, the current investigation also confirmed that tungsten carbide and fused tungsten carbide are partially interchangeable (tungsten carbide and fused tungsten carbide are interchangeable in surface hardening and coating but not interchangeable in the production of cemented carbide, where only tungsten carbide is used) and therefore fused tungsten carbide cannot be excluded from the product scope even if an expiry review investigation would legally allow such exclusion. Therefore, the Commission rejected this claim.

3. DUMPING

3.1. Preliminary remarks

- (67) As mentioned in recital (48), none of the exporters/producers from the PRC cooperated in the investigation. Therefore, on 12 August 2022 the Commission informed the authorities of the PRC that due to the absence of cooperation, the Commission might apply Article 18 of the basic Regulation concerning the findings with regard to the PRC. The Commission did not receive any comments or requests for an intervention of the Hearing Officer in this regard.
- (68) Consequently, in accordance with Article 18 of the basic Regulation, the findings in relation to the likelihood of continuation or recurrence of dumping were based on facts available, in particular the information received in the request, the information received from the Union producers, and from available statistics, namely those from the 14(6) and the Global Trade Atlas ('GTA') ⁽¹⁸⁾ databases.
- (69) During the review investigation period, imports of tungsten carbide from the PRC continued. According to Eurostat, imports of tungsten carbide from the PRC accounted for about 2,2% of the Union market in the review investigation period compared to 5,3% market share during the original investigation period and 8,9% during the previous expiry review. In absolute terms the level of imports decreased since the previous review but nonetheless remained at substantial levels above the *de minimis* threshold defined in Article 5(7) of the basic Regulation. The Commission concluded that such volume of imports was sufficiently representative to examine whether dumping continued during the review investigation period.

3.2. Procedure for the determination of the normal value under Article 2(6a) of the basic Regulation for the imports of the product under review originating in the PRC

- (70) Given the sufficient evidence available at the initiation of the investigation tending to show, with regard to the PRC, the existence of significant distortions within the meaning of point (b) of Article 2(6a) of the basic Regulation, the Commission initiated the investigation on the basis of Article 2(6a) of the basic Regulation.

⁽¹⁷⁾ Council Regulation (EC) No 771/98, recital (11); Council Regulation (EC) No 2268/2004, recitals (17)-(19); and Commission Implementing Regulation (EU) 2017/942, recital (196).

⁽¹⁸⁾ <http://www.gtis.com/gta/secure/default.cfm>

- (71) In order to obtain information it deemed necessary for its investigation with regard to the alleged significant distortions, the Commission sent a questionnaire to the GOC. In addition, in point 5.3.2 of the Notice of Initiation, the Commission invited all interested parties to make their views known, submit information and provide supporting evidence regarding the application of Article 2(6a) of the basic Regulation within 37 days of the date of publication of the Notice of Initiation in the *Official Journal of the European Union*. No questionnaire reply was received from the GOC and no submission on the application of Article 2(6a) of the basic Regulation was received within the deadline. Subsequently, on 12 August 2022 the Commission informed the GOC that it would use facts available within the meaning of Article 18 of the basic Regulation for the determination of the existence of the significant distortions in the PRC.
- (72) In point 5.3.2 of the Notice of Initiation, the Commission also specified that, in view of the evidence available, it might need to select an appropriate representative country pursuant to Article 2(6a)(a) of the basic Regulation for the purpose of determining the normal value based on undistorted prices or benchmarks and suggested Türkiye and Russia in that regard based on the information of the request. The Commission further stated that it would examine other possibly appropriate countries in accordance with the criteria set out in first indent of Article 2(6a) of the basic Regulation.
- (73) On 9 March 2023, the Commission informed interested parties on the relevant sources it intended to use for the determination of the normal value in a Note to the file ('the Note'), with Türkiye as a representative country. It also informed interested parties that, given that it could not identify any producers of tungsten carbide with readily available financial data in appropriate representative countries, it would establish selling, general and administrative costs ('SG&A') and profits based on data of companies active in the industry sector of basic precious and other non-ferrous metals that was published by the Turkish Central Bank, as per the request for review. The sector of basic precious and other non-ferrous metals was considered as the general category as the product under review.
- (74) In their comments to the Note, the applicants claimed that the Commission should take into account the benchmark of Fastmarkets or Argus data prices in Europe instead of the Argus Metal data obtained from the National Minerals Information Center of the U.S. Geological Survey. They further requested to consider depreciation, spare parts, and others (i.e., consumables such as acids, liquors or gases, as well as maintenance costs and costs for waste) in the calculation of consumables. With regards to direct and indirect labour, the applicants requested to calculate the cost for each category of personnel. These comments have been addressed in recitals (124) to (125), (128) to (129) and (134).
- (75) In the Note, the Commission presented the main factors of production. In the absence of cooperation from the Chinese exporting producers, the Commission identified the main factors of production based on the information contained in the request.

3.3. Normal value

- (76) According to Article 2(1) of the basic Regulation, *'the normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country'*.
- (77) However, according to Article 2(6a)(a) of the basic Regulation, *'in case it is determined [...] that it is not appropriate to use domestic prices and costs in the exporting country due to the existence in that country of significant distortions within the meaning of point (b), the normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks'*, and *'shall include an undistorted and reasonable amount of administrative, selling and general costs and for profits'*.
- (78) As further explained below, the Commission concluded in the present investigation that, based on the evidence available, and in view of the lack of cooperation of the GOC and the exporting producers, the application of Article 2(6a) of the basic Regulation was appropriate.

3.3.1. Existence of significant distortions

- (79) In a recent investigation concerning the tungsten sector in the PRC ⁽¹⁹⁾, the Commission found that significant distortions in the sense of Article 2(6a)(b) of the basic Regulation were present.
- (80) In that investigation, the Commission found that there is substantial government intervention in the PRC resulting in a distortion of the effective allocation of resources in line with market principles ⁽²⁰⁾. In particular, the Commission concluded that in the tungsten sector not only does a substantial degree of ownership by the GOC persist in the sense of Article 2(6a)(b), first indent of the basic Regulation ⁽²¹⁾, but the GOC is also in a position to interfere with prices and costs through State presence in firms in the sense of Article 2(6a)(b), second indent of the basic Regulation ⁽²²⁾. The Commission further found that the State's presence and intervention in the financial markets, as well as in the provision of raw materials and inputs have an additional distorting effect on the market. Indeed, overall, the system of planning in the PRC results in resources being concentrated in sectors designated as strategic or otherwise politically important by the GOC, rather than being allocated in line with market forces ⁽²³⁾. Moreover, the Commission concluded that the Chinese bankruptcy and property laws do not work properly in the sense of Article 2(6a)(b), fourth indent of the basic Regulation, thus generating distortions in particular when maintaining insolvent firms afloat and when allocating land use rights in the PRC ⁽²⁴⁾. In the same vein, the Commission found distortions of wage costs in the tungsten sector in the sense of Article 2(6a)(b), fifth indent of the basic Regulation ⁽²⁵⁾, as well as distortions in the financial markets in the sense of Article 2(6a)(b), sixth indent of the basic Regulation, in particular concerning access to capital for corporate actors in the PRC ⁽²⁶⁾.
- (81) Like in the previous investigation concerning the tungsten sector in the PRC, the Commission examined in the present investigation whether it was appropriate or not to use domestic prices and costs in the PRC, due to the existence of significant distortions within the meaning of point (b) of Article 2(6a) of the basic Regulation. The Commission did so on the basis of the evidence available on the file, including the evidence contained in the request, as well as the Commission Staff Working Document on Significant Distortions in the Economy of the PRC for the Purposes of Trade Defence Investigations ⁽²⁷⁾ ('Report'), which relies on publicly available sources. That analysis covered the examination of the substantial government interventions in the PRC's economy in general, but also the specific market situation in the relevant sector including tungsten carbide. The Commission further supplemented these evidentiary elements with its own research on the various criteria relevant to confirm the existence of significant distortions in the PRC, as also found by its previous investigations in this respect.
- (82) The request ⁽²⁸⁾ alleged that the Chinese economy, as a whole, is widely influenced and affected by various all-encompassing interventions by the GOC or other public authorities on various levels of government and the market, in view of which domestic prices and costs of the Chinese tungsten industry cannot be used in the present investigation.
- (83) The request provided examples of elements pointing to existence of distortions, as listed in the first to sixth dash of Article 2(6a)(b) of the basic Regulation. Referring to previous Commission investigation in the tungsten sector ⁽²⁹⁾, to the Report, as well as to additional sources, the applicants submitted that: (1) the Chinese State engages in an interventionist economic policy in pursuance of goals that coincide with the political agenda set by the Chinese

⁽¹⁹⁾ Commission Implementing Regulation (EU) 2019/1267 of 26 July 2019 imposing a definitive anti-dumping duty on imports of tungsten electrodes originating in the People's Republic of China following an expiry review under Article 11.

⁽²⁰⁾ Commission Implementing Regulation (EU) 2019/1267, recital (49).

⁽²¹⁾ Commission Implementing Regulation (EU) 2019/1267, recitals (56)-(60).

⁽²²⁾ Commission Implementing Regulation (EU) 2019/1267, recitals (61)-(64).

⁽²³⁾ Commission Implementing Regulation (EU) 2019/1267, recitals (65)-(73).

⁽²⁴⁾ Commission Implementing Regulation (EU) 2019/1267, recitals (74)-(77).

⁽²⁵⁾ Commission Implementing Regulation (EU) 2019/1267, recitals (78)-(80).

⁽²⁶⁾ Commission Implementing Regulation (EU) 2019/1267, recitals (81)-(90).

⁽²⁷⁾ Commission staff working document SWD (2017) 483 final/2, 20.12.2017, available at: [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2017\)483&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2017)483&lang=en).

⁽²⁸⁾ Expiry review request under Article 11(2) of Regulation 2016/1036 on tungsten carbide from China. Submitted on 25 February 2022 by the EU WC Industry.

⁽²⁹⁾ Commission Implementing Regulation (EU) 2019/1267.

Communist Party ('CCP') rather than reflect the prevailing economic conditions in free market ⁽³⁰⁾; (2) the Chinese tungsten industry specifically is subject to a high level of government intervention and control, as well as a high share of state-owned enterprises ('SOEs'). The further request details, that the GOC sets annual mining quotas and production quotas for SOEs, transferring these quotas to lower level SOEs, private firms and Chinese-foreign joint ventures ⁽³¹⁾. Chinese tungsten producers are further organised in the China Tungsten Industry Association, which is part of the China Non-Ferrous Metals Industry Association underlining in its Articles of Association, that it adheres to party guidelines and policies, thus exercising control over the tungsten industry ⁽³²⁾. The China Tungsten Industry Association is also actively controlling the output of production, as well as influencing tenders to purchase tungsten concentrates ⁽³³⁾.

- (84) The request further elaborates on different examples of guiding plans that show the high level of government intervention into the tungsten industry. First, the request mentions the 13th Five-Year Plan ('FYP') which tasks industrial stakeholder, to further develop high temperature alloy materials, encourage the increase of production and export capacities in the non-ferrous metal industry and directly influence the production process of the non-ferrous metal industry ⁽³⁴⁾. The 14th FYP further promotes the optimization and structural adjustment of the raw material industries including non-ferrous metals ⁽³⁵⁾. The 13th Non-Ferrous FYP mentions tungsten as one of the industries supported by the GOC, outlines the creation of a group of champion enterprises and non-ferrous metal products that can integrate into foreign mid-to-high-end product supply chains, as well as promotes the innovation through the granting of subsidies for the industry sector ⁽³⁶⁾. The 13th Non-Ferrous FYP also provides for more quantitative targets, setting out strict governmental control of production capacity in the field of non-ferrous metals, outlining domestic reserve capacities for tungsten ore, setting the goal to improve production restrictions, adjusting and controlling mining volume control indicators for tungsten, foreseeing the management of rare earths, including tungsten, and strengthening overall control indicators to key rare materials ⁽³⁷⁾. The non-ferrous industries are also defined as encouraged industries under the Made in China 2025 initiative, thus supported by different State and bank funds, with the aim to providing support to the encouraged industries ⁽³⁸⁾.
- (85) The request also further points out State intervention in selected provinces, such as in Hebei, Jiangxi and Hunan. Indeed, the 13th FYP for Mineral Resources lists tungsten in a list of strategic minerals. The GOC consolidates tungsten resource bases in south Jiangxi and Hunan, to stabilize the scale of mining operations and limit the overall mining volume tungsten ore, sets out percentage targets for medium to large-sized mines and stabilizes the level of domestic effective supplies of tungsten ⁽³⁹⁾. The Hebei 2016 New Material Industry Development Plan further sets out the goal to create industry chains in Hebei, including a specific tungsten industry chain ⁽⁴⁰⁾. The 14th FYP for the non-ferrous metal industry in Jiangxi lists the tungsten industry, including the tungsten carbide powder industry, as a key industry to develop ⁽⁴¹⁾. Lastly, tungsten is also included in the list of products subject to export duties, licensing export requirements as well as state trading ⁽⁴²⁾.
- (86) As stated in previous investigation of the Commission on tungsten, there is substantial government intervention in the Chinese tungsten market, as well as significant distortions of different factors of production. This includes significant control over various aspects of the economy, such as energy prices, land ownership, wages, finance, and credit ratings. The request outlines that the primary and secondary raw materials in China are distorted, referring to

⁽³⁰⁾ Expiry review request, para. 60.

⁽³¹⁾ Ibid., para. 62.

⁽³²⁾ Ibid., para. 63.

⁽³³⁾ Ibid., para. 65.

⁽³⁴⁾ Ibid., para. 70.

⁽³⁵⁾ Ibid., para. 71.

⁽³⁶⁾ Ibid., para. 72.

⁽³⁷⁾ Ibid., paras. 72-75.

⁽³⁸⁾ Ibid., para. 78.

⁽³⁹⁾ Ibid., para. 76.

⁽⁴⁰⁾ Ibid., para. 80.

⁽⁴¹⁾ Ibid., para. 81.

⁽⁴²⁾ Ibid., para. 82.

the recent Commission findings concerning distortions in the carbon black industry ⁽⁴³⁾. The request further outlines, that gas is produced and controlled in China mainly by SOEs and gas prices are regulated and controlled by the National Development and Reform Commission (NDRC) ⁽⁴⁴⁾. The NDRC further regulates domestic electricity prices, implementing a differentiated electricity price policy that encourages eligible users to make direct deals with power generation companies. The request provides the example of the Guiding Opinion on creating an excellent market environment, fostering the non-ferrous metal industry's structural adjustment and transformation and increasing benefits which outlines the continued goal of differentiated electricity price policy, favouring different industries ⁽⁴⁵⁾. Similarly, all land in China is owned by the State, and the government allocates it according to specific political goals and economic plans ⁽⁴⁶⁾.

- (87) In addition, the request outlines that wage costs in certain industries, such as tungsten, are distorted by the lack of collective organization rights for workers and employers, as well as China's non-ratification of International Labour Organization conventions. Trade unions are not independent from State authorities and collective bargaining and protection of workers' rights are rudimentary. Moreover, the request points out, that the household registration system restricts labour mobility ⁽⁴⁷⁾.
- (88) Access to finance is also granted by institutions that implement public policy objectives or are linked to the State. Chinese banks, for instance, comply with an explicit legal obligation to conduct their business in accordance with national economic and social development needs and under the guidance of State industrial policies. As a result, the availability and cost of capital are not equal for all players in the market, leading to a bias for lending to State-owned enterprises, large well-connected private firms, and key industrial sectors ⁽⁴⁸⁾. The request also points towards a study by the IMF that found credit ratings are distorted, as Chinese credit ratings systematically correspond to lower international ratings ⁽⁴⁹⁾.
- (89) Furthermore, the request alleges, that the government-induced distortions have resulted in price signals that are not the result of free market forces ⁽⁵⁰⁾. China's borrowing costs have been kept artificially low to stimulate investment growth ⁽⁵¹⁾, and credit ratings are often influenced by the firm's strategic importance to the government and the strength of any implicit guarantee by the government ⁽⁵²⁾. As a result, bad debt issues have been handled by rolling over debt, creating so-called 'zombie' companies, or by transferring the ownership of the debt ⁽⁵³⁾.
- (90) The GOC did not comment or provide evidence supporting or rebutting the evidence on the case file, including the Report and the additional evidence provided by the applicants, on the existence of significant distortions and/or appropriateness of the application of Article 2(6a) of the basic Regulation in the case at hand.
- (91) Specifically in the sector of the product under review a substantial degree of ownership by the GOC persists in the sense of Article 2(6a)(b), first indent of the basic Regulation.

⁽⁴³⁾ Commission Implementing Regulation (EU) 2021/1812 of 14 October 2021 imposing a provisional anti-dumping duty on imports of certain graphite electrode systems originating in the People's Republic of China, OJ 2021 L366/62, recital 90.

⁽⁴⁴⁾ Expiry review request., para. 86.

⁽⁴⁵⁾ Ibid., para. 87.

⁽⁴⁶⁾ Ibid., para. 88.

⁽⁴⁷⁾ Ibid., para. 89.

⁽⁴⁸⁾ Ibid., para. 90.

⁽⁴⁹⁾ Ibid., para. 91.

⁽⁵⁰⁾ Ibid., para. 94.

⁽⁵¹⁾ Ibid., para. 93.

⁽⁵²⁾ Ibid., para. 91.

⁽⁵³⁾ Ibid., para. 95.

- (92) The investigation confirmed that China Minmetals Co. ⁽⁵⁴⁾, an SOE under SASAC, holds several of the biggest Chinese Tungsten Carbide producing companies, namely Zhuzhou Cemented Carbide Group Co., Ltd. ⁽⁵⁵⁾, Xiamen Golden Egret Special Alloy Co., Ltd. ⁽⁵⁶⁾ and Zigong Cemented Carbide Group Co., Ltd. ⁽⁵⁷⁾. The Zhuzhou Cemented Carbide Group is held by China Minmetals through the intermediary company China Tungsten Advanced Materials Co. Ltd. ⁽⁵⁸⁾, while Xiamen Golden Egret Special Alloy is held through the intermediary company Xiamen Tungsten Co., Ltd. ⁽⁵⁹⁾. Concerning direct distortions, China Minmetals has outlined in its 2021 annual report ⁽⁶⁰⁾ a general financial government grant of RMB 38.7 million ⁽⁶¹⁾, as well as a grant from the central financial fund to support zombie enterprises of RMB 46.8 million ⁽⁶²⁾. Xiamen Tungsten's 2022 annual report noted a financial government grant of RMB 300.3 million ⁽⁶³⁾. Furthermore, a public article on China Minmetals' website underscores the presence of the CCP in the company by outlining that: *'The Party organization of China Minmetals thoroughly implements the spirit of the national State-owned enterprise party building conference, [...] closely focuses on the jointly strengthening of the Party leadership together with improving corporate governance, [...] building a system of modern State-owned enterprises with Chinese characteristics (and) [...] effectively promote the deep integration of Party building work with production operations'* ⁽⁶⁴⁾.
- (93) In addition, given that CCP interventions into operational decision making have become the norm also in private companies ⁽⁶⁵⁾, with CCP claiming leadership over virtually every aspect of the country's economy, the influence of the State by means of CCP structures within companies effectively results in economic operators being under control and policy supervision of the government, given how far the State and Party structures have grown together in the PRC. The privately owned tungsten carbide producer OKE carbide ⁽⁶⁶⁾ has, for example, outlined in their 2022 half-year report ⁽⁶⁷⁾ governmental grants of RMB 44.7 million ⁽⁶⁸⁾.
- (94) This is apparent also at the level of the China Tungsten Industry Association ('CTIA') and the China Nonferrous Metals Industry Association ('CNIA'). According to Article 3 of their Articles of Association, CTIA, as well as CNIA, *'adheres to the overall leadership of the Communist Party of China [and] accepts the business guidance, supervision and management by the entities in charge of registration and management, by entities in charge of party building, as well as by the relevant administrative departments in charge of industry management'* ⁽⁶⁹⁾.
- (95) The investigation has further confirmed that the GOC is interfering with prices and costs through State presence in firms in the sense of Article 2(6a)(b), second indent of the basic Regulation, establishing the existence of personal connections between producers of tungsten carbide and the CCP. For example, the Chairmen of the Board of Directors of Zhuzhou Cemented Carbide Group Co., Ltd. holds in parallel the position of Deputy Secretary of the Party Committee ⁽⁷⁰⁾. Similarly, the Chairmen of the Board of Xiamen Golden Egret Special Alloy Co., Ltd. does hold
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- ⁽⁵⁴⁾ See at: <http://www.minmetals.com.cn/> (Accessed 11 May 2023).
- ⁽⁵⁵⁾ See at: <https://www.601.cn/> & https://aiqicha.baidu.com/company_detail_30386666552710 (Accessed 11 May 2023).
- ⁽⁵⁶⁾ See at: <http://www.gesac.com.cn> & https://aiqicha.baidu.com/company_detail_29681726678350 (Accessed 11 May 2023).
- ⁽⁵⁷⁾ See at: <http://www.zgcc.com/> (Accessed 11 May 2023).
- ⁽⁵⁸⁾ See at: <http://www.minmetals.com.cn/> (Accessed 11 May 2023).
- ⁽⁵⁹⁾ See at: <http://www.gesac.com.cn> & https://aiqicha.baidu.com/company_detail_29681726678350 (Accessed 11 May 2023).
- ⁽⁶⁰⁾ China Minmetals 2021 annual report. See at: http://static.sse.com.cn/disclosure/listedinfo/announcement/c/new/2022-03-15/600058_20220315_11_WhMHFybV.pdf (Accessed 11 May 2023).
- ⁽⁶¹⁾ Ibid., Page 189.
- ⁽⁶²⁾ Ibid., Page 181/244.
- ⁽⁶³⁾ Xiamen Tungsten 2022 annual report, Page 237/304 and page 255/304. See at: https://pdf.dfcfw.com/pdf/H2_AN202304211585690834_1.pdf?1682102399000.pdf (Accessed 11 May 2023).
- ⁽⁶⁴⁾ See at: <http://www.minmetals.com.cn/ddjj/gztx/> (Accessed 11 May 2023).
- ⁽⁶⁵⁾ See for example Art. 33 of the CCP Constitution.
- ⁽⁶⁶⁾ See at: www.oke-carbide.com (Accessed 11 May 2023).
- ⁽⁶⁷⁾ OKE carbide 2022 half-year report. See at: http://file.finance.sina.com.cn/211.154.219.97:9494/MRGG/CNSESHT_STOCK/2022/2022-8/2022-08-10/8408838.PDF (Accessed 11 May 2023).
- ⁽⁶⁸⁾ Ibid., Page 133.
- ⁽⁶⁹⁾ China Tungsten Industry Association. Available at: <https://www.ctia.net.cn/about/Charter/> (Accessed 11 May 2023) & China Nonferrous Metals Industry Association Articles of Association. Available at: www.chinania.org.cn (Accessed 11 May 2023).
- ⁽⁷⁰⁾ See at: <https://minmetaltungsten.com/news/940.html> (Accessed 11 May 2023).

the position of Secretary of the Party Committee ⁽⁷¹⁾. The interference of the CCP into the work of Xiamen Golden Eagle, through the party committee, is also apparent from the Articles of Association of its holding company, the SOE Xiamen Tungsten Co., Ltd., which outlines that: *'the Party organization ensure the function of of (sic) leadership core and political core, setting the direction, managing the overall situation and ensuring implementation'* ⁽⁷²⁾ and *'if the company's Party committee finds that the board of directors and the chairman's team intend to make decisions that do not comply with the party's line, principles, policies and national laws and regulations or may damage the interests of the State, the public interest and the legitimate rights and interests of the company and its employees, it is necessary to draw up an opinion to cancel or postpone the decision'* ⁽⁷³⁾.

(96) Further, policies discriminating in favour of domestic producers or otherwise influencing the market in the sense of Article 2(6a)(b), third indent of the basic Regulation are in place in the sector of the product under review. The investigation identified policy documents showing that the industry benefits from governmental guidance and intervention into the product under review as part of the tungsten sector.

(97) The tungsten industry keeps being regarded as a key industry by the GOC. This is confirmed in the numerous plans, directives and other documents focused mentioning tungsten, which are issued at national, regional and municipal level. The latest Chinese policy documents concerning the tungsten sector confirm the continued importance which GOC attributes to the sector, including the intention to intervene in the sector in order to shape it in line with the government policies. This is exemplified by the Ministry of Natural Resources ('MNR') Notice concerning the control of overall mining quantities and first batch of indicators applicable to rare earth and tungsten ore in 2023 ⁽⁷⁴⁾ which calls to *'strengthen the control and management of the total amount of mining'* ⁽⁷⁵⁾ and further outlines that *'the Ministry of Industry and Information Technology and the Ministry of Natural Resources have assigned the quotas for controlling the total amount of rare earth mining to all rare earth enterprise groups'* ⁽⁷⁶⁾. The document further specifies specific distributions of tungsten: *'In 2023, the total mining control indicator for the first batch of tungsten concentrates (65% tungsten trioxide content) is set at 63 000 tons'* ⁽⁷⁷⁾. The MNR Notice concerning the control of overall mining quantities and first batch of indicators applicable to rare earth and tungsten ore in 2022 ⁽⁷⁸⁾ does also specify the output of tungsten claiming that *'in 2022, the national tungsten concentrate (65% tungsten trioxide content) total mining control indicator was set at 109 000 tons, of which the key mining indicator was 81 170 tons, and the comprehensive utilization indicator was 27 830 tons'* ⁽⁷⁹⁾. Furthermore, the 14th FYP on developing raw materials industry ⁽⁸⁰⁾ does specify that *'domestic mineral resources will be developed rationally'*, outlining that *'measures will be taken to optimize the management mechanism applicable to the annual total mining control indicators, and reasonably regulate the mining scale of RE [Rare Earth], tungsten and other mineral resources'* ⁽⁸¹⁾, and further *'support dominant enterprises to establish recycling bases and industrial agglomeration areas for large-size steel scrap as well as renewable aluminium, copper, lithium, nickel, cobalt, tungsten and molybdenum'* ⁽⁸²⁾.

⁽⁷¹⁾ See at: https://aiqicha.baidu.com/company_detail_29681726678350 (Accessed 11 May 2023).

⁽⁷²⁾ Xiamen Tungsten Industry Articles of Association, Article 2. See at: <https://data.eastmoney.com/notices/detail/600549/AN202304211585690826.html#> (Accessed 11 May 2023).

⁽⁷³⁾ Ibid., Article 98.

⁽⁷⁴⁾ Notice 2023/48 concerning the control of overall mining quantities and first batch of indicators applicable to rare earth and tungsten ore in 2023. Available at: http://gi.mnr.gov.cn/202304/t20230412_2781069.html (Accessed 11 May 2023).

⁽⁷⁵⁾ Ibid., Section I.1.

⁽⁷⁶⁾ Ibid.

⁽⁷⁷⁾ Ibid., Section II.5.

⁽⁷⁸⁾ Notice 2022/138 concerning the control of overall mining quantities and first batch of indicators applicable to rare earth and tungsten ore in 2022. Available at: http://gi.mnr.gov.cn/202208/t20220817_2745900.html (Accessed 11 May 2023).

⁽⁷⁹⁾ Ibid., Section I.

⁽⁸⁰⁾ 14th FYP on raw material industry development. See at: https://www.miit.gov.cn/zwgk/zcwj/wjfb/tz/art/2021/art_2960538d19e34c66a5eb8d01b74cbb20.html (Accessed 11 May 2023).

⁽⁸¹⁾ Ibid., Section VII.1.

⁽⁸²⁾ Ibid.

- (98) Similar examples of the intention by the Chinese authorities to supervise and guide the developments of the tungsten sector can also be seen in different Chinese provinces, such as in Jiangxi, which outlines in the provinces 14th FYP on the high-quality development of non-ferrous metals ⁽⁸³⁾ that *‘during the 14th Five-Year Plan period, the average annual growth rate of the operating revenue of Jiangxi’s non-ferrous metals industry will stand at around ten percent. In terms of operating revenue, the non-ferrous metals industry will have a scale of more than RMB one trillion by around 2023, and the industries of tungsten, rare earth, and other strategic resources will have a scale of more than RMB 100 billion by 2025’* ⁽⁸⁴⁾, specifying that *‘the concentration level of copper, tungsten, rare earth, and other key industries will be further increased’* ⁽⁸⁵⁾. The FYP also dedicates a whole section on the development of tungsten ⁽⁸⁶⁾ aiming to develop *‘nano-scale, ultra-fine and ultra-coarse tungsten powder and tungsten carbide powder, high-purity APT, high-purity tungsten powder, as well as tungsten target materials, etc.’* ⁽⁸⁷⁾.
- (99) Similarly, the Henan 14th FYP on developing a high-quality manufacturing industry ⁽⁸⁸⁾ foresees to *‘extend the deep processing industry chain of tungsten, molybdenum, titanium and zirconium, and promote the extension towards high-end products’* ⁽⁸⁹⁾.
- (100) In sum, the GOC has measures in place to induce operators to comply with the public policy objectives of supporting encouraged industries, including the production of the main raw materials used in the manufacturing of tungsten. Such measures impede market forces from operating freely.
- (101) The present investigation has not revealed any evidence that the discriminatory application or inadequate enforcement of bankruptcy and property laws according to Article 2(6a)(b), fourth indent of the basic Regulation in the sector of product under review would not affect the manufacturers of the product under review.
- (102) The tungsten sector is also affected by the distortions of wage costs in the sense of Article 2(6a)(b), fifth indent of the basic Regulation. Those distortions affect the sector both directly (when producing tungsten or the main inputs), as well as indirectly (when having access to inputs from companies subject to the same labour system in the PRC) ⁽⁹⁰⁾.
- (103) Moreover, no evidence was submitted in the present investigation demonstrating that the sector of the product under review is not affected by the government intervention in the financial system in the sense of Article 2(6a)(b), sixth indent of the basic Regulation. Therefore, the substantial government intervention in the financial system leads to the market conditions being severely affected at all levels.
- (104) Finally, the Commission recalls that in order to produce tungsten carbide, a number of inputs is needed. When the producers of tungsten carbide purchase/contract these inputs, the prices they pay (and which are recorded as their costs) are clearly exposed to the same systemic distortions mentioned before. For instance, suppliers of inputs employ labour that is subject to the distortions. They may borrow money that is subject to the distortions on the financial sector/capital allocation. In addition, they are subject to the planning system that applies across all levels of government and sectors.
- (105) As a consequence, not only the domestic sales prices of tungsten carbide is not appropriate for use within the meaning of Article 2(6a)(a) of the basic Regulation, but all the input costs (including raw materials, energy, land, financing, labour, etc.) are also affected because their price formation is affected by substantial government intervention, as described in Parts I and II of the Report. Indeed, the government interventions described in relation to the allocation of capital, land, labour, energy and raw materials are present throughout the PRC. This means, for instance, that an input that, in itself was produced in the PRC by combining a range of factors of production, is exposed to significant distortions. The same applies for the input to the input and so forth.

⁽⁸³⁾ See Jiangxi 14th FYP on the high-quality development non-ferrous metals. Available at: http://www.jiangxi.gov.cn/art/2021/11/11/art_5006_3717077.html (Accessed 11 May 2023).

⁽⁸⁴⁾ Ibid., Section II.3.

⁽⁸⁵⁾ Ibid.

⁽⁸⁶⁾ Ibid. Section III.2.

⁽⁸⁷⁾ Ibid.

⁽⁸⁸⁾ Henan 14th FYP on developing a high-quality manufacturing industry. Available at: <http://fgw.henan.gov.cn/2022/01-27/2389710.html> (Accessed 11 May 2023).

⁽⁸⁹⁾ Ibid., Section IV.3.

⁽⁹⁰⁾ See Commission Implementing Regulation (EU) 2019/1267, recitals (78)-(80).

3.3.2. Representative country

3.3.2.1. General remarks

- (106) The choice of the representative country was based on the following criteria pursuant to Article 2(6a) of the basic Regulation:
- A level of economic development similar to the PRC. For this purpose, the Commission used countries with a gross national income per capita similar to the PRC on the basis of the database of the World Bank ⁽⁹¹⁾;
 - Production of the product under review in that country ⁽⁹²⁾;
 - Availability of relevant public data in the representative country;
 - Where there is more than one possible representative country, preference should be given, where appropriate, to the country with an adequate level of social and environmental protection.
- (107) As explained in recital (73), the Commission issued a Note on relevant sources to use for the determination of the normal value. This Note described the facts and evidence underlying the relevant criteria. The Note informed interested parties of the Commission's intention to consider Türkiye as an appropriate representative country in the present case if the existence of significant distortions pursuant to Article 2(6a) of the basic Regulation were confirmed.
- (108) With regard to the corresponding costs of production and sale of the product under review in an appropriate representative country, the expiry review request proposed to select either Russia or Türkiye as representative country.
- (109) According to the applicants, tungsten carbide is produced in Brazil, Canada, the PRC, Israel, Japan, Russia, South Korea, and the United States. Out of these countries, only Brazil and Russia represent upper-middle income countries according to the World Bank classification. The Commission further identified South Africa as an upper middle income with production of tungsten carbide. The Commission did not consider Russia as an appropriate representative country given the recent geo-political and economic developments. South Africa and Brazil were excluded due to non-available public data.
- (110) The Commission subsequently looked for countries with production of products of the same general category and/or sector of the product under review. As mentioned by the applicants, the production of the product under review belongs to the sector of non-ferrous metals. Relevant public data for producers in this sector was available for Russia and Türkiye.
- (111) The Commission considered further if it would be possible to use the main factors of production of tungsten carbide from appropriate representative countries.
- (112) According to the request, the production process of tungsten carbide is globally identical and produced either from primary (or virgin materials), i.e., ores or secondary materials, i.e. tungsten carbide scrap. However, depending on the upstream integration, producers might start the process either from primary materials, APT, or tungsten oxide ('WO₃').
- (113) The Commission decided to start its normal value calculations from the cost of APT, i.e., the main material, taking into account the information in the request and considering that it is the first production step irrespective of the source of the raw material. APT represents more than 90% of the total cost of manufacturing of the product under review.

⁽⁹¹⁾ World Bank Open Data – Upper Middle Income, <https://data.worldbank.org/income-level/upper-middle-income>

⁽⁹²⁾ If there is no production of the product under review in any country with a similar level of development, production of a product in the same general category and/or sector of the product under review may be considered.

- (114) In line with Article 2(6a)(a) of the basic Regulation, the Commission searched the availability of import price data for APT in all upper-middle income class countries based on the HS code 2841 80. According to GTA APT was imported into Argentina, Brazil, Malaysia, Russia, Thailand, Türkiye and South Africa. However, import volumes in all these countries were very low and therefore considered not to be representative for establishing a reliable benchmark price. Moreover, imports into Argentina originated entirely from the PRC. The majority of imports into Russia (more than 75%) and South Africa (97%) originated also from the PRC. Since no sufficient representative information was available for any of the countries mentioned, the Commission decided to use an international benchmark for this input according to Article 2(6a)(a) second indent, based on Argus Metals International prices.
- (115) In light of the above, the Commission considered that Türkiye had detailed readily available data related to labour, energy, and SG&A and profit for an upper middle-income country available. The Commission considered Türkiye therefore as an appropriate representative country within the meaning of Article 2(6a) of the basic Regulation.
- (116) Interested parties were invited to comment on the appropriateness of Türkiye as a representative country.
- (117) Following the Note, no interested party made any comments regarding the selection of Türkiye as a representative country.
- (118) Finally, given the absence of cooperation and having established that Türkiye was an appropriate representative country, based on all of the above elements, there was no need to carry out an assessment of the level of social and environmental protection in accordance with the last sentence of Article 2(6a)(a) first indent of the basic Regulation.

3.3.2.2. Conclusion

- (119) In the absence of cooperation, as proposed in the expiry review request and given that Türkiye met the criteria laid down in Article 2(6a)(a), first indent of the basic Regulation, the Commission selected Türkiye as the appropriate representative country.

3.3.3. Sources used to establish undistorted costs

- (120) In the Note, the Commission listed the factors of production such as materials, energy and labour used in the production of the product under review by the exporting producers. The Commission also stated that, in order to construct the normal value in accordance with Article 2(6a)(a) of the basic Regulation, it would use GTA and the international benchmark Argus Metals International prices as published by the National Minerals Information Center of the U.S. Geological Survey to establish the undistorted cost of most of the two factors of production, notably the raw materials. In addition, the Commission stated that it would use the information from the Turkish Statistical Institute for establishing undistorted costs of labour, electricity, and gas suppliers in Türkiye.
- (121) Finally, the Commission stated that to establish SG&A costs and profit, it would use the information on average SG&A costs and profits for companies active in the industry sector of basic precious and other non-ferrous metals that is published by the Turkish Central Bank, as indicated in recital (73).

3.3.3.1. Undistorted costs and benchmarks

3.3.3.1.1. Factors of production

- (122) Considering all the information based on the request and subsequent information collected during the proceeding, the following factors of production and their sources have been identified in order to determine the normal value in accordance with Article 2(6a)(a) of the basic Regulation:

Table 1

Factors of production of tungsten carbide

Factor of Production	Commodity Code in Türkiye	Undistorted value (RMB)	Unit of measurement
Raw materials			
Ammonium paratungstate	2841 8010	219,12	kg
Labour			
Labour cost per man-hour	N/A	34,88	Hour
Energy			
Electricity	N/A	0,50	kWh
Gas	N/A	1,61	m ³

3.3.3.1.2. Raw materials

- (123) In order to establish the undistorted price of the main raw material APT at the gate of a representative country producer, the Commission noted that imports of APT into Türkiye were insignificant and thus could not be considered representative, as explained in recital (114). The Commission used the weighted average import price based on the international benchmark Argus Metals International prices, obtained from the National Minerals Information Center of the U.S. Geological Survey ⁽⁹³⁾. In this case, even if the benchmark may include imports from distorted sources, the Commission recalled that, in the context of an expiry review, there is no need to re-calculate duties; only to establish likelihood of dumping. Therefore, the Commission considered it appropriate to use Argus Metals International prices as a benchmark in this case.
- (124) Following the Note, the applicants requested to use the Fastmarkets or Argus data for APT prices in Europe instead of the Argus Metal data obtained from the National Minerals Information Center of the U.S. Geological Survey. They argued that in Türkiye, APT is primarily traded according to Fastmarkets quotations for (wider) Europe and not the US.
- (125) The Commission noted that in the request only a summary of the average APT was provided for the period of request, since no permission was received from the copyright holder Fastmarkets to use the data during the investigation. Considering that according to Article 2(6a)(a) of the basic Regulation, the data used has to be publicly available, the Commission based the normal value calculation on the APT benchmark based on Argus Metals International prices obtained from the National Minerals Information Center of the U.S. Geological Survey. The Commission noted also that the difference between the benchmark of Fastmarkets and the U.S. Geological was minor. Consequently, the difference in any dumping margin calculation would have been minor (1%).
- (126) Normally, domestic transport cost should also be added to these import prices. However, considering the nature of expiry review investigations, which are focused on finding whether dumping continued during the review investigation period or could reoccur, rather than finding its exact magnitude, the Commission decided that adjustments for domestic transport, in this case, were unnecessary. Such adjustments would only result in increasing the normal value and hence of the dumping margin.

⁽⁹³⁾ The benchmark is available at <https://www.usgs.gov/centers/national-minerals-information-center/tungsten-statistics-and-information>.

3.3.3.1.3. Labour

- (127) To establish the benchmark for labour costs the Commission used the most recent statistics published by the Turkish Statistical Institute ⁽⁹⁴⁾. This institute publishes detailed information on labour costs in different economic sectors in Türkiye. The Commission established the benchmark based on hourly labour costs for 2020 or the economic activity 'Manufacture of basic metals' NACE code C.24 according to the NACE Rev.2 classification. The values were further adjusted for inflation using the domestic producer price index ⁽⁹⁵⁾ to reflect the costs for the review investigation period.
- (128) Following the Note, the Union industry argued that a detailed breakdown of personnel types should be used for the purpose of the dumping calculation.
- (129) The Commission rejected this comment as the Turkish Statistical Institute does not provide such detailed breakdown, considering the fact that this is an expiry review and as noted above it is not necessary to calculate the exact magnitude of dumping.

3.3.3.1.4. Energy

- (130) To establish the benchmark price for electricity and gas, the Commission used prices for companies (industrial users) in Türkiye published by the Turkish Statistical Institute ⁽⁹⁶⁾. The benchmark was established based on the price for electricity and gas, published on 31 March 2022. The price referred to is the average for 2021. The Commission used the data on the industrial electricity and gas prices in the corresponding consumption bands, net of value added tax.

3.3.3.1.5. Manufacturing overhead costs, SG&A, profits and depreciation

- (131) According to Article 2(6a)(a) of the basic Regulation, *'the constructed normal value shall include an undistorted and reasonable amount for administrative, selling and general costs and for profits'*. In addition, a value for manufacturing overhead costs needs to be established to cover costs not included in the factors of production referred to above.
- (132) In order to establish an undistorted value of the manufacturing overheads and given the absence of cooperation from the Chinese producers, the Commission used facts available in accordance with Article 18 of the basic Regulation. Therefore, based on the data provided by the applicants, the Commission established the ratio of manufacturing overheads to the total manufacturing. This percentage was then applied to the undistorted value of the cost of manufacturing to obtain the undistorted value of manufacturing overheads.
- (133) For establishing an undistorted and reasonable amount for SG&A and profit, the Commission relied on the most recent available financial data for companies active in the industry sector of basic precious and other non-ferrous metals that is published by the Turkish Central Bank ⁽⁹⁷⁾. As mentioned in recital (121), this sector is considered as the general category as the product under review. The Commission used the SG&A of 9,50% and profit of 6,61% of the cost of goods sold ('COGS').
- (134) Following the Note, comments were received from the Union industry to consider spare parts and other raw materials, as well as depreciation in the manufacturing overheads. The Commission took these comments into account in the dumping calculation as described in recital (137).

3.3.3.2. Calculation of the normal value

- (135) On the basis of the above, the Commission constructed the normal value per product type on an *ex-works* basis in accordance with Article 2(6a)(a) of the basic Regulation.

⁽⁹⁴⁾ The labour costs are available at <https://data.tuik.gov.tr/Bulten/DownloadIstatistikselTablo?p=tg4QGRdNcBVDQo/mmOOyD/8g3GIHdKhWMOsMnhh4V/APyz9UrZvk0kK90vktK5jo>.

⁽⁹⁵⁾ <https://data.tuik.gov.tr/Bulten/Index?p=Consumer-Price-Index-December-2021-45789>

⁽⁹⁶⁾ <https://data.tuik.gov.tr/Kategori/GetKategori?p=cevre-ve-enerji-103&dil=2>; <https://data.tuik.gov.tr/Bulten/Index?p=Electricity-and-Natural-Gas-Prices-Period-II:-July-December,-2021-45566>; <https://data.tuik.gov.tr/Bulten/Index?p=Electricity-and-Natural-Gas-Prices-Period-I:-January-June,-2021-37459>

⁽⁹⁷⁾ <https://www3.tcmb.gov.tr/sektor/#/en>

- (136) First, the Commission established the undistorted manufacturing costs. In the absence of cooperation by the exporting producers, the Commission relied on the information provided by the applicants in the request on the usage of the two main raw materials for the production of the product under review. For labour and energy, the Commission relied on the information provided by one Union producer.
- (137) Once the undistorted manufacturing cost was established, the Commission added the manufacturing overheads, SG&A and profit. Manufacturing overheads were determined based on data provided by the applicants. SG&A and profit were determined based on the most recent available financial data for companies active in the industry sector of basic precious and other non-ferrous metals that is published by the Turkish Central Bank ⁽⁹⁸⁾ (see Section 3.3.2). The Commission added the following items to the undistorted costs of manufacturing:
- Manufacturing overheads, which accounted in total for 4% of the direct costs of manufacturing;
 - Consumables were taken into account for 1% of the direct costs of manufacturing;
 - SG&A and other costs, which accounted for 9,50% of the COGS of Turkish companies active in the industry sector of basic precious and other non-ferrous metals, and
 - Profits, which amounted to 6,61% of the COGS as achieved by Turkish companies active in the industry sector of basic precious and other non-ferrous metals, were applied to the total undistorted costs of manufacturing.
- (138) On that basis, the Commission constructed the normal value per product type on an *ex-works* basis in accordance with Article 2(6a)(a) of the basic Regulation.

3.4. Export price

- (139) As mentioned above in recital (48), due to the non-cooperation of the Chinese exporting producers, the export price was based on facts available, in accordance with Article 18 of the basic Regulation, i.e. on the information from Eurostat.
- (140) Exports from China were made under both the inward processing procedure ('IPP') and the normal regime. As shown in recital (191), since the exports made under the normal regime represented only 0,3% of the Union market share during the RIP, they were considered negligible and calculations were performed on the export price under the IPP only, as reasonably available information about the price that would be charged in the absence of measures. The Commission established the export price based on the available statistics, namely the Comext database (Eurostat). Since the prices in Comext are recorded at Cost, Insurance, and Freight ('CIF') level, the *ex-works* level was established based on the evidence provided in the request for transport cost, handling and ocean freight.

3.5. Comparison

- (141) The Commission compared the normal value established in accordance with Article 2(6a)(a) of the basic Regulation and the export price on an *ex-works* basis as established above.

3.6. Dumping margin

- (142) On this basis, the dumping margin was found to be significant (68%). It was therefore concluded that dumping continued during the review investigation period.

⁽⁹⁸⁾ <https://www3.tcmb.gov.tr/sektor/#/en>

4. LIKELIHOOD OF CONTINUATION OF DUMPING

- (143) Further to the finding of the existence of dumping during the review investigation period, the Commission investigated, in accordance with Article 11(2) of the basic Regulation, the likelihood of continuation of dumping, should the measures be allowed to lapse. The Commission considered the IPP prices as reasonably available information about the price that would be charged in the absence of measures. The following additional elements were analysed: (1) the production capacity and spare capacity in the PRC, (2) tungsten ore reserves and export tax on tungsten concentrate, and (3) the attractiveness of the Union market and the export prices to third countries.
- (144) As a consequence of the non-cooperation of Chinese exporting producers and of the GOC, the Commission based its assessment on the facts available in accordance with Article 18 of the basic Regulation, namely on information provided in the request for review, public available information, and information from the GTA database.
- (145) Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret claimed that whether a market was attractive is not a required legal standard to be considered in an expiry review investigation as a dynamic and freely competitive market remains attractive for all the economic operators.
- (146) As outlined below in recitals (156) to (163), the Commission under the heading of the ‘attractiveness of the Union market’ examines whether it is likely that the Chinese exporting producers would increase their exports of tungsten carbide to the Union should measures be allowed to lapse, and whether these exports would be made at dumped prices. This is fully in line with the legal test in Article 11(2) of the basic Regulation and therefore this claim was rejected.

4.1. Production capacity and spare capacity in the PRC

- (147) In the request the applicants provide information regarding production capacity and spare capacity of tungsten carbide in China. According to the Report on the Development of China's Tungsten Industry 2020 published by China Tungsten Industry Association ⁽⁹⁹⁾ the production capacity in China was of 80 000 tonnes. The applicants estimated the demand in China to 30 000 tonnes based on its market knowledge. Furthermore, after deducting the exports of China to all countries the spare capacity was calculated to 18 000 tonnes. However, during the investigation the applicants clarified that in their calculation they inadvertently used the price column instead of the volume column and therefore the correct spare capacity in China was around 41 000 tonnes.
- (148) The Commission also calculated the spare capacity of tungsten carbide in the PRC during the review investigation period. According to the Report on the Development of China's Tungsten Industry 2021 published by China Tungsten Industry Association ⁽¹⁰⁰⁾, the production capacity of tungsten carbide in China amounted to 90 000 tonnes. The production of tungsten carbide in China was estimated at around [30 000 – 35 000] tonnes based on the Roskill Tungsten outlook to 2030 report ⁽¹⁰¹⁾ and considering that about 60% of the production of tungsten is used to produce tungsten carbide ⁽¹⁰²⁾. These estimates result in a spare capacity of [55 000 – 60 000] tonnes or [61% - 67%]. Considering that the Union free market consumption amounted to 15 101 tonnes (see Table 4) during the review investigation period, the Chinese spare capacity was more than 3,5 times the Union consumption in the free market.
- (149) In their comments following the final disclosure, Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret reiterated their claim that the source used for the production capacity of tungsten carbide in China as stated in recital (148) was not reliable and provided the website link of the China Tungsten Industry Association.

⁽⁹⁹⁾ <http://www.ctia.com.cn/en/news/31091.html>

⁽¹⁰⁰⁾ <http://www.ctia.com.cn/en/news/32684.html>

⁽¹⁰¹⁾ The report can be purchased under the following website: <https://www.woodmac.com/reports/metals-roskill-tungsten-outlook-to-2030-528383/>.

⁽¹⁰²⁾ https://www.itia.info/assets/files/newsletters/ITIA_Newsletter_2018_05.pdf

- (150) The Commission noted that Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret did not provide any information concerning production capacity of tungsten carbide in China. The Commission searched the website provided by the Chinese producer and it could not find data regarding production capacity of tungsten carbide in China. Instead, the Commission found that based on the Roskill Tungsten outlook to 2030 report ⁽¹⁰³⁾ the Chinese production capacity of tungsten carbide in 2021 was estimated at [50 000 - 75 000] tonnes per year in terms of tungsten, or [53 000 – 80 000] tonnes of tungsten carbide ⁽¹⁰⁴⁾. Using the production volume stated in recital (148), which was not contested by Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret, the spare capacity of tungsten carbide in China still amounted to [23 000 – 45 000] tonnes which represents more than 1,5 times the Union consumption in the free market during the review investigation period, which was still considered significant.
- (151) The Commission compared also the production capacity of tungsten carbide in the PRC during review investigation period with the capacity during the previous expiry review investigation and noted a substantial increase. While the production capacity was estimated at 42 000 to 50 000 tonnes during the previous expiry review, it is estimated at 90 000 tonnes during the review investigation period of the current investigation. This results in an increase of more than 80%, despite an already existing spare capacity of 12 000 to 20 000 during the previous expiry review, without any indication that such increased capacity could be absorbed by the Chinese domestic market, or any third country market. This situation will ultimately lead to an even greater spare capacity that could be directed to the Union market.
- (152) The Commission further noted substantial spare capacities in the replies of Chinese exporting producers to the sampling exercise. The three exporting producers reported in total a production volume of 13 500 tonnes during the review investigation period, compared to a total production capacity of 17 800 tonnes. This results in a spare capacity of 30%.
- (153) Excess in production capacities is an incentive to continue exporting at dumped prices. It is clear that Chinese exporters must exploit all existing possibilities to increase production to fully benefit from the significant investments they made in installed capacities. The most obvious way is to penetrate any open market worldwide and very likely at dumped prices as it is still the case in the current investigation.
- (154) Based on the above facts and considerations, the Commission concluded that the Chinese exporting producers have significant spare capacities, which would likely be used for exporting tungsten carbide at dumped prices to the Union if the measures were allowed to lapse.

4.2. Tungsten ore reserves and export tax on tungsten concentrate

- (155) The PRC controls more than 55% of the tungsten ore reserves ⁽¹⁰⁵⁾ in the world and, at the same times, levies an export tax of 20% on tungsten concentrate ⁽¹⁰⁶⁾. This restriction leads to a high availability of raw materials in the Chinese market, which permits the Chinese exporting producers to fill in quickly their spare capacity mentioned in recital (151).

4.3. Attractiveness of the Union market and export prices to third countries

- (156) The Commission examined whether it was likely that Chinese exporting producers would increase their export sales at dumped prices should measures be allowed to lapse. Therefore, the Commission analysed the price level of Chinese exports to third country markets and compared them to the price level on Chinese exports to the Union. The Chinese export volumes and the attractiveness of the Union market were established based on facts available in accordance with Article 18 of the basic Regulation and based on GTA data and information in the request.

⁽¹⁰³⁾ The report can be purchased under the following website: <https://www.woodmac.com/reports/metals-roskill-tungsten-outlook-to-2030-528383/>.

⁽¹⁰⁴⁾ The conversion factor from W to WC is 1,065.

⁽¹⁰⁵⁾ <https://www.mdpi.com/2075-163X/11/7/701>

⁽¹⁰⁶⁾ <https://www.argusmedia.com/en/news/2171663-china-to-maintain-ferroalloys-metals-tariffs-in-2021>

- (157) The Commission used the data from the GTA database and focused on the three main export markets for China, namely Japan, South Korea, and the US, which represent approximately 75% of the total exports of the PRC. During the review investigation period, the average price of Chinese exports to the Union of products falling under the Chinese Commodity Code 2849 9020 was at a similar level as the average price of exports to the three main third country markets. However, looking at country level, the Chinese export prices to Germany was higher than the Chinese export price to South Korea and the Chinese export price to the Netherlands was higher than the Chinese export price to Japan. This shows that certain markets within the Union are more lucrative than two of the top three Chinese export markets for the product concerned. The Commission did not consider the Chinese exports under the Chinese Commodity Code 3824 3000 during the analysis, since it might also include products other than the product concerned and therefore the average price would not be only for tungsten carbide.
- (158) In their comments following the final disclosure, Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret claimed that the Commission disregarded the information provided by them regarding the development of Chinese exports of tungsten carbide to other third countries based on the ITC Trade Map ⁽¹⁰⁷⁾. They reiterated that based on these data, Chinese exports to other third countries, rather than exports to the Union market, would further increase. Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret claimed that the Commission did not explain why this information was disregarded.
- (159) It is clarified that the Commission did not disregard the data provided from the ITC Trade Map as such. As explained in recital (157), the Commission used the data from the GTA database, which like the ITC Trade Map showed that the main export markets for China were Japan and South Korea and that there was an increasing trend of exports to these markets between 2019 and 2021. The Commission, however, disagreed with the conclusion that such trend necessarily continued in future to such an extent that it could absorb the high spare capacities available in China. Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret did not provide any evidence in support of this allegation and disregarded the findings of the Commission that the Union market is an attractive market for Chinese exports should measures be allowed to lapse. Therefore, given the high spare capacity in China it is very likely that large part thereof would be directed to the Union, should the measures be allowed to lapse. The same is true for the allegedly increasing consumption in China. The exporting producer has not provided any evidence of current consumption in China or that future domestic demand would be likely to absorb the significant spare capacity in China. Therefore, the claim was rejected.
- (160) In their comments following final disclosure, Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret disagreed with the Commission's conclusion in recital (157) that the export prices to certain countries in the Union appeared to be more lucrative than prices to the top two Chinese exporting markets. They argued that each market has a different competitive situation, whereas prices reflect trends of demand and supply.
- (161) It is true that prices are affected by demand and supply in a certain market. However, this conclusion does not devalue the fact that prices in certain countries in the Union are higher compared to those in main Chinese export markets and that the Union market, in particular the market of certain Member States, is therefore a more attractive market in comparison. Therefore, this claim was rejected.
- (162) It is recalled that tungsten carbide represents an important intermediate product for a high number of sectors in the Union, including personal care products and paper to machines, rail tracks cars, to trains and airplanes and therefore represents an integral part of the industrial value chain in the Union. The importance of tungsten carbide indicates a large market potential for Chinese exporting producers. It is noteworthy that, even with the measures in place, Chinese exports to the Union continued at dumped prices.
- (163) Based on the foregoing and considering in particular the level of Chinese export prices to the Union compared to other export markets and the key role of tungsten carbide in many sectors of the internal market, it follows that Chinese exporters would have a strong incentive to continue exporting at dumped prices to the Union if the measures were allowed to lapse, considering also that other export markets would not be able to absorb the significant amount of Chinese tungsten carbide.

⁽¹⁰⁷⁾ <https://www.trademap.org/Index.aspx>

4.4. Conclusion

- (164) Considering the significant spare capacity in the PRC and taking into account the evidence on the attractiveness of the Union market, the Commission concluded that should the measures lapse, it was likely that the Chinese exporting producers would activate the spare capacity and likely even redirect exports from third countries towards the Union market at dumped prices and in significant volumes.
- (165) In view of its findings on the continuation of dumping during the review investigation period and on the likely development of exports should the measures lapse, the Commission concluded that there was a strong likelihood that the expiry of the anti-dumping measures on imports from the PRC would result in the continuation of dumping.

5. INJURY

5.1. Definition of the Union industry and Union production

- (166) The like product was manufactured by nine producers, belonging to seven groups, in the Union during the period considered. Out of these, seven producers produce and sell on the free market and the remaining two producers produce tungsten carbide mainly as an input for their downstream products ('captive use'). They constitute the 'Union industry' within the meaning of Article 4(1) of the basic Regulation.
- (167) The total Union production during the review investigation period was established at 17 026 tonnes. The Commission established this figure on the basis of the verified macro data in the questionnaire reply provided by the applicants. As indicated in recital (41), three Union producers were selected for the sample, representing more than 69% of the total Union production of the like product.
- (168) Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret argued that as the Union industry was composed of two market segments (i.e. virgin and recycling) and that as several recycling producers including an association cooperated in the investigation and were against the removal of the measures, the Commission should carry out two separate injury analyses, one per each segment.
- (169) In this respect, the Commission recalled that pursuant to Article 4(1) of the basic Regulation the definition of the Union industry refers to the like product. Having established in recital (61) that the like product corresponds to the definition of the product under review, the Commission noted that the like product manufactured through virgin production and the like product manufactured through recycling have identical physical and chemical characteristics and the same usage. Their only difference is the raw material: while for the virgin production is tungsten ore or subsequent intermediate products (tungsten concentrate, APT, tungsten oxide), for recycling production the raw material is scrap derived from used hard metal tools incorporating tungsten carbide. The final product is exactly the same. The alleged market segments based on the difference in production process and raw material do not correspond to differences in the output. Therefore, there was no reason for segmenting the market and carrying out different injury analyses. Consequently, this claim was rejected.
- (170) In their comments on the final disclosure, Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret reiterated their comments stated in recital (168), i.e. that the Union industry would be composed of two market segments (i.e. virgin and recycling) and that the Commission should carry out two separate injury analyses, one per each segment. In particular, they argued that the difference in raw materials for virgin and recycling production processes had an effect on costs and financial indicators and could still warrant a market segmentation, even if the tungsten carbide manufactured through virgin production and the tungsten carbide manufactured through recycling are like products. They also requested more details on the impact that the cost of the respective raw materials had on the two production processes.
- (171) However, the difference in raw materials did not correspond to a difference in output and, therefore, a market segmentation between virgin and recycling production was not warranted. The financial indicators presented under section 5.5 include both production processes. Thus, this claim was dismissed.

5.2. Union consumption

- (172) As mentioned in recital (166) some of the Union producers mainly produce the product under review for the captive use as primary raw material for the production of various downstream products and therefore captive and free market consumption were analysed separately.
- (173) The distinction between captive and free market is relevant for the injury analysis because products destined for captive use are not exposed to direct competition from imports. By contrast, production destined for the free market is in direct competition with imports of the product under review and prices are free market prices.
- (174) The Commission established total Union consumption (captive and free market) on the basis of the verified macro data in the questionnaire reply provided by the applicants (for total sales of the Union industry in the Union market) and of Eurostat data (for imports into the Union). Data on total Union consumption is presented in ranges in the table below to protect the confidentiality of data on captive consumption, which during the period considered derived from the activity of only two Union producers, as reported in recital (180).
- (175) Union consumption developed as follows:

Table 2

Union consumption (tonnes)

	2018	2019	2020	Review investigation period
Total Union consumption	[14 875-18 465]	[11 439-14 200]	[10 586-13 141]	[14 458-17 948]
<i>Index</i>	100	77	71	97

Source: Data from the applicants and Eurostat

- (176) The Union consumption decreased by 29% between 2018 and 2020 and then increased by 37% in the review investigation period as compared to 2020. Overall, the Union consumption decreased by 3% during the period considered.
- (177) The trend of the Union consumption resulted from the fact that, according to the applicants, in 2018, the Union demand for the product under review was above the mid- to long-term average of the industry. Indeed, Union consumption in 2018 constituted the peak of the increasing trend in consumption observed in the previous expiry review ⁽¹⁰⁸⁾. Following the increased consumption in 2018, the Union demand then dropped in 2019 by 23%. In 2020, restrictions imposed in relation to the Covid-19 pandemic led to a further, albeit temporary, decrease in the demand for the product under review. In particular, several major users of the product under review, notably operators in the construction and automotive sectors, had to temporarily curtail or close their production. In the review investigation period, demand started to recover in line with the easing of measures related to the Covid-19 pandemic. Throughout the review investigation period, the Union market benefitted from the recovery of the demand as well as from re-stocking. In this regard, the applicants reported that logistical and supply chain issues (such as lack of containers and delays at seaports) triggered concerns about supply security and thus led to additional sourcing in the form of stockpiling or buffer stocking. However, the Union consumption did not reach pre-pandemic levels.
- (178) On the basis of the verified macro data in the questionnaire reply provided by the applicants for the entire activity of the Union industry (captive and free markets), the Commission determined that approximately [8 - 10]% of the total Union production in the review investigation period was destined for captive use.

⁽¹⁰⁸⁾ Commission Implementing Regulation (EU) 2017/942, recitals (105) and (108).

- (179) Furthermore, in the free market the Union industry produces under normal agreements (the Union industry purchases the raw material) and under tolling agreements (the customer of tungsten carbide remains the owner of the raw material and pays a processing fee to the Union producers for the conversion of the raw material into tungsten carbide). The tolling agreements are used for recycling activities as the customers supply the scrap to the Union industry for processing. During the review investigation period, 96% of the total production volume was manufactured under normal agreements, while the rest of production (4%) was manufactured under tolling agreements.

5.2.1. Captive consumption

- (180) The Commission established the Union captive consumption on the basis of the captive use in the Union market of all known producers in the Union. During the period considered, only two Union producers had captive use, therefore the data in the table below is presented in ranges to preserve the confidentiality of the data of the Union producers concerned. On this basis, the Union captive consumption developed as follows:

Table 3

Captive consumption (tonnes)

	2018	2019	2020	Review investigation period
Captive consumption	[1 417-1 759]	[1 154-1 433]	[1 189-1 476]	[1 321-1 639]
Index	100	81	84	93

Source: Data from the applicants

- (181) The Union captive consumption decreased by 16% between 2018 and 2020 and subsequently increased by 11% in the review investigation period as compared to 2020. Overall, the Union captive consumption decreased by 7% during the period considered.
- (182) The Union captive consumption showed a slightly different trend compared to the overall Union consumption. In fact, the Covid-19 pandemic impacted less the internal consumption of the Union producers, which showed a slight increase in 2020 as compared to 2019.

5.2.2. Free market consumption

- (183) The Commission established the Union free market consumption on the basis of: (a) the free sales volume in the Union of all known Union producers, and (b) the total import volumes into the Union as reported by Eurostat. On this basis, the Union free market consumption developed as follows:

Table 4

Free market consumption (tonnes)

	2018	2019	2020	Review investigation period
Free market	15 468	11 822	10 800	15 101
Index	100	76	70	98

Source: Data from the applicants and Eurostat

- (184) The Union free market consumption decreased by 30% between 2018 and 2020 and then increased by 40% in the review investigation period as compared to 2020. Overall, the Union free market consumption decreased by 2% during the period considered.

(185) The trend of the Union free market consumption followed the overall trend of the Union consumption.

5.3. Imports from the country concerned

5.3.1. Volume and market share of the imports from the country concerned

(186) The Commission established the volume of imports on the basis of Eurostat data. Also, the market share of the imports was established on the basis of import data from Eurostat and Union consumption. Imports into the Union from the country concerned developed as follows:

Table 5

Import volume and market share

	2018	2019	2020	Review investigation period
Volume of imports from China (tonnes)	718	462	294	336
<i>Index</i>	100	64	41	47
Market share (%)	4,6	3,9	2,7	2,2
<i>Index</i>	100	85	55	45

Source: Eurostat and data from the applicants

(187) Imports from China decreased by 59% between 2018 and 2020 and then increased by 14% in the review investigation period as compared to 2020. Overall, imports from China decreased by 53% during the period considered.

(188) The market share of Chinese imports decreased by 2,4 percentage points over the period considered.

(189) Imports from China followed the trend of the Union demand. 2021 levels did not reach 2018 levels, and not even 2019 levels. According to the applicant, the recovery in imports in 2021 did not reach higher volumes due to several factors: (i) the continued restrictions affecting supply chains and shipping from China, and (ii) the users' concerns about supply security of deliveries from China. The trend of the market shares of Chinese imports is instead consistently downward, even though import prices consistently lowered, as showed in Table 7, because in the review investigation period the Union consumption increased by a higher magnitude than the Chinese import volume.

5.3.2. Import regimes

(190) The product concerned was imported from China both under the normal import regime and under IPP, as shown below:

Table 6

Import volume and market share by import regime

	2018	2019	2020	Review investigation period
Normal import regime				
Volume of imports from China (tonnes)	33	16	33	38
<i>Index</i>	100	50	100	116
Market share (%)	0,2	0,1	0,3	0,3
<i>Index</i>	100	65	146	120

IPP				
Volume of imports from China (tonnes)	685	446	261	298
<i>Index</i>	100	65	38	44
Market share (%)	4,4	3,7	2,4	2,0
<i>Index</i>	100	85	55	45

Source: Eurostat and data from the applicants

- (191) During the period considered, almost all imports from China were made under the IPP. Imports under IPP decreased by 62% between 2018 and 2020 and then increased by 14% in the review investigation period as compared to 2020. Overall, imports under IPP from China decreased by 56% during the period considered. Imports from China under the normal import regime were negligible throughout the period considered, amounting to a range between 0,1% and 0,3% market share.
- (192) Imports under IPP from China followed the general trend of imports from China and mirrored the trend of the Union consumption. Imports under normal regime showed an increase already in 2020 but their volume did not influence the general trend of imports from China due to their negligible volume.

5.3.3. Prices of the imports from the country concerned and price undercutting

- (193) The Commission established the prices of imports from China on the basis of Eurostat data. As import volumes from the PRC under normal import regime were negligible, they were disregarded in the determination of the average import price and in the price undercutting calculation. Price undercutting of the imports was established on the basis of the questionnaire replies of the sampled Union producers and of Eurostat data.
- (194) The weighted average price of imports into the Union from the country concerned developed as follows:

Table 7

Import prices for IPP (EUR/ tonne)

	2018	2019	2020	Review investigation period
Weighted average of Chinese import prices	36 957	36 159	32 086	30 864
<i>Index</i>	100	98	87	84

Source: Eurostat

- (195) The average price of the product concerned imported under IPP, overall, decreased by 16% over the period considered.
- (196) The Commission, due to the lack of cooperation of Chinese exporting producers, could not verify the reasons for this trend. However, it noted that the decreasing trend was consistent throughout the period considered.
- (197) On the basis of the information provided by the cooperating users and the import regimes used for imports from the PRC, all imports from the PRC of the product under review were made under normal agreements defined in recital (32). Therefore, and for the purpose of a fair comparison, in the calculation of the price undercutting, sales of the Union industry made under tolling agreements were disregarded. Furthermore, as mentioned in recital (191), the imports under normal regime were negligible throughout the period considered and were, consequently, disregarded. Therefore, the calculation of undercutting was based on the IPP import prices only. In addition, the calculation took into consideration the fact that zinc reclamation powders were not imported from the PRC during the review investigation period and were, thus, excluded.

(198) The Commission determined the price undercutting during the review investigation period by comparing:

- the weighted average sales prices of the sampled Union producers charged to unrelated customers on the Union market under normal agreements and excluding zinc reclamation powders, adjusted to an *ex-works* level; and
- the corresponding weighted average prices of the imports from Eurostat under IPP, with appropriate adjustments for post-importation costs. These prices were free from customs and anti-dumping duties.

(199) The result of the comparison was expressed as a percentage of the sampled Union producers' turnover during the review investigation period. It showed a weighted average undercutting margin of 7% by the imports from the country concerned on the Union market.

5.4. Imports from third countries other than the PRC

(200) The imports of the product under review from third countries other than the PRC were mainly from the United States of America ('USA'), South Korea and India. The quantity and the price trend are based on Eurostat and cover all import regimes (normal regime, inward processing process and outward processing process). The majority of the import volume from third countries is imported under the normal regime.

(201) The (aggregated) volume of imports into the Union as well as the market share and price trends for imports of the product under review from other third countries developed as follows:

Table 8

Imports from third countries other than the PRC

Country		2018	2019	2020	Review investigation period
USA	Volume (tonnes)	1 042	659	304	429
	<i>Index</i>	100	63	29	41
	Market share (%)	6,7	5,6	2,8	2,8
	<i>Index</i>	100	83	42	42
	Average price (EUR/tonne)	34 843	41 222	41 990	40 099
	<i>Index</i>	100	118	121	115
South Korea	Volume (tonnes)	288	228	231	280
	<i>Index</i>	100	79	80	97
	Market share (%)	1,9	1,9	2,1	1,9
	<i>Index</i>	100	100	115	100
	Average price (EUR/tonne)	40 857	37 445	31 415	35 076
	<i>Index</i>	100	92	77	86
India	Volume (tonnes)	161	213	225	250
	<i>Index</i>	100	132	100	95
	Market share (%)	1,0	1,8	2,1	1,7
	<i>Index</i>	100	173	200	159
	Average price (EUR/tonne)	26 562	27 834	28 347	25 921
	<i>Index</i>	100	105	107	98

Others (excluding China)	Volume (tonnes)	877	578	564	573
	Index	100	66	64	65
	Market share (%)	5,7	4,9	5,2	3,8
	Index	100	86	92	67
	Average price (EUR/tonne)	33 468	34 748	29 423	30 627
	Index	100	104	88	92
Total of all third countries except China	Volume (tonnes)	2 368	1 678	1 323	1 531
	Index	100	71	56	65
	Market share (%)	15,3	14,2	12,3	10,1
	Index	100	93	80	66
	Average price (EUR/tonne)	34 501	36 777	32 473	33 323
	Index	100	107	94	97

Source: Eurostat and data from the applicants

- (202) Total imports from all third countries except China decreased by 44% between 2018 and 2020 and then increased by 16% in the review investigation period as compared to 2020. Overall, imports from third countries except China decreased by 35% over the period considered. Their trend followed the general trend of the Union consumption. The market share of these imports decreased from 15,3% in 2018 to 10,1% in the review investigation period while the import prices decreased by 3% over the period considered.
- (203) Imports from India did not follow this overall trend and slightly increased during the period considered, remaining however at a lower level than the Chinese imports in the review investigation period. Their market share decreased by 0,4 percentage points between 2020 and the review investigation period, while overall, it increased by 0,7 percentage points during the period considered. The average Indian import prices were on average lower than Chinese import prices during the period considered. The low level of the import prices from India could be explained by the fact that a certain volume of imports from India were in fact related sales between an Indian producer of tungsten carbide and a Union user, both of them related to a Union producer, and therefore these prices were likely not at arms' length. There are no other known producers of tungsten carbide in India.

5.5. Economic situation of the Union industry

5.5.1. General remarks

- (204) The assessment of the economic situation of the Union industry included an evaluation of all economic indicators having a bearing on the state of the Union industry during the period considered.
- (205) As mentioned in recital (41), sampling was used for the assessment of the economic situation of the Union industry.
- (206) For the injury determination, the Commission distinguished between macroeconomic and microeconomic injury indicators. The Commission evaluated the macroeconomic indicators on the basis of data contained in the questionnaire reply provided by the applicants and related to all Union producers. The Commission evaluated the microeconomic indicators on the basis of data contained in the verified questionnaire replies from the sampled Union producers. Both sets of data were found to be representative of the economic situation of the Union industry.

- (207) The macroeconomic indicators are: production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, magnitude of the dumping margin, and recovery from past dumping.
- (208) The microeconomic indicators are: average unit prices, unit cost, labour costs, inventories, profitability, cash flow, investments, return on investments, and ability to raise capital.

5.5.2. Macroeconomic indicators

5.5.2.1. Production, production capacity and capacity utilisation

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

Table 9

Production, production capacity and capacity utilisation

	2018	2019	2020	Review investigation period
Production volume (tonnes)	17 980	13 470	11 976	17 026
<i>Index</i>	100	75	67	95
Production capacity (tonnes)	22 850	22 850	22 845	23 215
<i>Index</i>	100	100	100	102
Capacity utilisation (%)	79	59	52	73
<i>Index</i>	100	75	67	93

Source: Data from the applicants

- (210) The data in the above table includes both the production under normal and tolling agreements, for virgin and recycling products.
- (211) The production volume decreased by 33% between 2018 and 2020 and then increased by 42% in the review investigation period as compared to 2020. Overall, the production volume decreased by 5% during the period considered.
- (212) The production trend followed the trend in consumption. In addition to the remarks in recital (177), the Commission noted that in 2020 certain Union producers stopped completely the production for some periods.
- (213) The production capacity remained almost stable between 2018 and 2020 and subsequently increased by 2% in the review investigation period as compared to 2020. Overall, production capacity increased by 2% during the period considered.
- (214) The trend in production capacity is due to the fact that during the period considered the Union producers invested in small expansions of capacity, especially recycling capacity, which materialised in 2021. Moreover, capacity depends on the mix of grades produced: more capacity is needed to produce coarse size grains, whereas less capacity is needed to produce finer grains.
- (215) The capacity utilisation rate decreased by 33% between 2018 and 2020 and then increased by 40% in the review investigation period as compared to 2020. Overall, the capacity utilisation rate decreased by 7% during the period considered.

- (216) The Commission noted that the spare capacity of the Union industry did not correspond simply to the difference between production and production capacity. Indeed, other products resulted from the different production steps before the final transformation of tungsten metal powder in tungsten carbide, notably: APT, tungsten oxide, tungsten metal powder. Therefore, depending on the prices of these products and on business considerations, a certain part of the capacity is always allocated to these other products. Thus, the spare capacity resulting from the data in Table 9 is slightly overstated.

5.5.2.2. Sales volume and market share

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

Table 10

Sales volume and market share

	2018	2019	2020	Review investigation period
Union industry sales volume on Union market (tonnes)	12 383	9 681	9 183	13 234
<i>Index</i>	100	78	74	107
Market share (%)	80,1	81,9	85,0	87,6
<i>Index</i>	100	102	106	109

Source: Eurostat and data from the applicants

- (218) The sales volume of the Union industry on the Union market decreased by 26% between 2018 and 2020 and then increased by 44% in the review investigation period as compared to 2020. Overall, the sales volume of the Union industry on the Union market increased by 7% during the period considered.
- (219) The market share of the Union industry in the Union market increased by 7,5 percentage points during the period considered, reaching 87,6% during the review investigation period.
- (220) The trend of the sales volume of the Union industry followed the trend of the Union consumption stated in recital (177). However, sales volume in the review investigation period was higher than in 2018, contrary to Union consumption and production, where the levels in the review investigation period were slightly below the levels in 2018. This could be due to the factor stated in recital (189) that users were concerned by the supply chain disruptions linked to supplies from overseas, and thus preferred to purchase from the Union industry. Indeed, the Union industry increased its market share over the period considered, whereas Chinese imports and imports from third countries other than China decreased their market share.
- (221) In the Union free market, 3% of the sales of the Union industry derived from tolling and 97% from normal agreements.

5.5.2.3. Growth

- (222) During the period considered, the Union industry of the like product almost regained its 2018 production levels and increased its sales in the Union and the number of employees. Production and sales followed the trend of the Union consumption, which in the review investigation period almost regained its 2018 levels. Furthermore, the increase in the number of employees between 2020 and the review investigation period followed the recovered consumption. As explained in recital (189), factors such as logistical issues and users' concerns over security of supply favoured purchasing from the Union industry compared to importing from third-country in the review investigation period. As a consequence, the market share of the Union industry increased by 7,5 percentage points during the period considered.

- (223) However, production in the review investigation period was still below 2018 levels and investments of the Union industry in the review investigation period still lagged 21% behind the 2018 level. Taking into account also the decreased profitability and cash flow, this showed that the financial situation of the Union industry must still improve.

5.5.2.4. Employment and productivity

- (224) Employment and productivity developed over the period considered as follows:

Table 11

Employment and productivity

	2018	2019	2020	Review investigation period
Number of employees (FTE)	984	987	987	1 015
<i>Index</i>	100	100	100	103
Productivity (tonnes/employee)	18	14	12	17
<i>Index</i>	100	75	66	92

Source: Data from the applicants

- (225) The number of employees in the Union industry slightly increased by 0,3% between 2018 and 2019, remained stable in 2020 and then increased by 3% in the review investigation period as compared to 2020. Overall, the number of employees in the Union industry increased by 3% during the period considered.
- (226) While the increase in the number of employees between 2020 and the review investigation period followed the Union consumption, the stable number of employees between 2019 and 2020 was due to government support measures due to the Covid-19 pandemic.
- (227) As a result of the decrease in production between 2018 and 2020, productivity decreased by 33% between 2018 and 2020. Then, as a result of the increase in production between 2020 and the review investigation period and despite the increase in employees in the same period, productivity increased by 42% in the review investigation period as compared to 2020. Overall, as a result of the overall slight decrease of production during the period considered, productivity decreased by 6% during the period considered.

5.5.2.5. Magnitude of the dumping margin and recovery from past dumping

- (228) The dumping margin established during the review investigation period were significantly above the *de minimis* level. At the same time, the level of imports during the review investigation period represented 2,2% of Union free market consumption. Therefore, the impact of the magnitude of the actual margins of dumping on the Union industry was rather limited.

5.5.3. Microeconomic indicators

5.5.3.1. Prices and factors affecting prices

- (229) Over the period considered, the weighted average unit sales prices of the Union industry to unrelated customers in the Union for both normal and tolling agreements, adjusted to an *ex-works* level, developed as follows:

Table 12

Sales prices and cost of production in the Union (normal and tolling agreements) (EUR/tonne)

	2018	2019	2020	Review investigation period
Weighted average unit sales price in the Union	34 663	31 560	28 933	30 015
<i>Index</i>	100	91	83	87
Unit cost of production	29 172	29 692	26 787	26 862
<i>Index</i>	100	102	92	92

Source: Questionnaire replies from sampled Union producers

- (230) The average unit sales price for both normal and tolling agreements of the Union industry decreased by 17% between 2018 and 2020 and then increased by 4% in the review investigation period as compared to 2020. Overall, the average unit sales price decreased by 13% during the period considered.
- (231) The average unit sales price of the Union industry followed the trend of consumption. Moreover, it followed also the trend of the price of the main raw material for the like product, i.e., APT, whose price decreased between 2018 and 2020 and then increased in the review investigation period as compared to 2020.
- (232) The unit cost of production for both normal and tolling agreements of the Union industry slightly increased by 2% between 2018 and 2019, then decreased by 10% between 2019 and 2020 and subsequently increased again by 0,3% in the review investigation period as compared to 2020. Overall, the unit cost of production decreased by 8% during the period considered.
- (233) The increase of unit cost of production between 2018 and 2019 was the result of lower production, whereas the decrease between 2019 and 2020 was the result of a decrease in the cost of raw materials.
- (234) In addition, for the purposes of the determination of the price undercutting reported in recital (199), the Commission used the weighted average sales prices of the sampled Union producers to unrelated customers in the Union only under normal agreements, excluding zinc-reclamation powders, adjusted to an *ex-works* level, as all imports from the PRC were made under normal agreements. On this basis, during the period considered, only two sampled Union producers could be considered for the price undercutting, therefore the data in the table below is presented in ranges to preserve the confidentiality of the figures of the Union producers concerned. During the period considered, their trend developed as follows:

Table 13

Sales prices under normal agreements in the Union (EUR/tonne)

	2018	2019	2020	Review investigation period
Weighted average unit sales price in the Union under normal agreements	[29 188 – 42 160]	[28 441 – 41 081]	[24 928 – 36 007]	[26 808 – 38 722]
<i>Index</i>	100	97	85	92
Unit cost of production under normal agreements	[25 996 – 37 550]	[28 339 – 40 935]	[24 193 – 34 946]	[24 080 – 34 783]
<i>Index</i>	100	109	93	93

Source: Questionnaire replies from sampled Union producers

- (235) The average unit sales price of the Union industry under normal agreements decreased by 15% between 2018 and 2020 and then increased by 8% in the review investigation period as compared to 2020. Overall, the average unit sales price under normal agreements decreased by 8% during the period considered.
- (236) The unit cost of production of the Union industry under normal agreements increased by 9% between 2018 and 2019 and then decreased by 15% in the review investigation period as compared to 2019. Overall, the unit cost of production under normal agreements decreased by 7% during the period considered.

5.5.3.2. Labour costs

- (237) The average labour costs of the Union industry developed over the period considered as follows:

Table 14

Average labour costs per employee

	2018	2019	2020	Review investigation period
Average labour costs per employee (EUR)	80 168	82 390	75 923	83 832
Index	100	103	95	105

Source: Questionnaire replies from sampled Union producers

- (238) The average labour costs per employee of the Union industry slightly increased by 3% between 2018 and 2019, then decreased by 11% between 2019 and 2020 and subsequently increased again by 10% in the review investigation period as compared to 2020. Overall, the average labour cost per employee slightly increased by 5% during the period considered.
- (239) The reduction in average labour costs per employee of the Union industry between 2019 and 2020 despite the stability of the number of employees was due to government support measures due to the Covid-19 pandemic. The increase between the review investigation period and 2020, was due to inflation adjustments, the hiring of R&D professionals and production premiums.

5.5.3.3. Inventories

- (240) Stock levels of the Union industry developed over the period considered as follows:

Table 15

Inventories

	2018	2019	2020	Review investigation period
Closing stocks (tonnes)	922	740	1 009	1 049
Index	100	80	109	114
Closing stocks as a percentage of production (%)	5	5	8	6
Index	100	107	164	120

Source: Questionnaire replies from sampled Union producers

- (241) The level of inventories of the Union industry decreased by 20% between 2019 and 2018 and then increased by 42% in the review investigation period as compared to 2019. Overall, the level of inventories increased by 14% during the period considered.
- (242) The high level of inventories of the Union industry in 2020 followed the low consumption, whereas the high level of inventories in the review investigation period mirrored the increase in production.

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

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

Table 16

Profitability, cash flow, investments and return on investments

	2018	2019	2020	Review investigation period
Profitability of sales in the Union to unrelated customers (% of sales turnover)	11,5	6,5	2,0	7,7
<i>Index</i>	100	56	17	67
Cash flow (EUR)	42 601 601	36 752 500	14 507 327	36 754 191
<i>Index</i>	100	92	59	79
Investments (EUR)	13 364 299	12 282 221	7 843 646	10 537 497
<i>Index</i>	100	92	59	79
Return on investments (%)	65	22	9	38
<i>Index</i>	100	34	14	59

Source: Questionnaire replies from sampled Union producers

- (244) The Commission established the profitability of the Union industry by expressing the pre-tax gross profit (calculated as the difference between the turnover and cost of goods sold) of all sales of the like product to unrelated customers in the Union as a percentage of the turnover of those sales. The Union industry was profitable during the period considered, having a fluctuating profitability rate. Notably, the profitability of the Union industry decreased by 83% between 2018 and 2020 and then increased by 285% in the review investigation period as compared to 2020. Overall, the profitability decreased by 33% during the period considered.
- (245) Between 2019 and 2021 the profitability was lower than the target profit of 10% established in the previous expiry review ⁽¹⁰⁹⁾. The industry is characterised by a high percentage of fixed costs linked to the production process as furnaces cannot be shut off. Thus, the Commission concluded that a target profit of at least 10% was still valid and in fact achieved during the period considered, in 2018.
- (246) The net cash flow is the ability of the Union producers to self-finance their activities. The trend in net cash flow showed a decrease by 66% between 2018 and 2020 and then an increase by 153% in the review investigation period as compared to 2020. Overall, the net cash flow decreased by 14% during the period considered. The net cash flow followed the trend of the profitability of the Union industry.

⁽¹⁰⁹⁾ Commission Implementing Regulation (EU) 2017/942, recital (161).

- (247) Investments of the Union industry decreased by 41% between 2018 and 2020 and then increased by 34% in the review investigation period as compared to 2020. Overall, investments decreased by 21% during the period considered. During the period considered, the Union industry's investments exceeded EUR 43 million. Investments were made to improve the recycling process with new production process, to improve production and R&D capacities for finer grain products and to develop additional raw material capacities in order to rely less on third country suppliers of raw material. Investments for expansion of production capacity were made mainly in 2018 and 2019 and showed their effect in 2021, as reported in Table 9. Investments were also made for new, high-tech furnaces and in order to save energy.
- (248) The return on investments is the profit in percentage of the net book value of investments. The return on investments of the Union industry was positive during the period considered. The return on investments of the Union industry showed a decrease by 86% between 2018 and 2020 and then an increase by 322% in the review investigation period as compared to 2020. Overall, the return on investments decreased by 42% during the period considered.

5.6. Conclusion on injury

- (249) Due to the anti-dumping duties in place, the situation of the Union industry is improving.
- (250) During the period considered, imports from China decreased by 53%. In particular, imports under IPP from China decreased by 56%. However, also the price of imports under IPP from China decreased over the period considered, by 16%.
- (251) The import price from China under IPP were slightly higher than the Union prices during the period 2018 and 2020 (3% in 2018, 3% in 2019 and 4% in 2020). This explains why the import volume from China consistently decreased in the same period between 2018 and 2020. However, in the review investigation period the Chinese IPP prices became 7% lower than the Union prices. This coincided with an increase in import volume from China by 14% in the review investigation period as compared to 2020.
- (252) Sales volume, market share and number of employees increased overall during the period considered as the Union industry managed to follow an increase in consumption.
- (253) However, production and capacity utilisation showed an overall slight decrease.
- (254) Injury indicators relating to the financial performance of the Union industry (profitability, cash flow, investments and return on investments) were positive throughout the period considered, even though all had an overall decreasing trend.
- (255) On the basis of the above, the Commission concluded that the Union industry did not suffer material injury within the meaning of Article 3(5) of the basic Regulation during the review investigation period.

6. LIKELIHOOD OF RECURRENCE OF INJURY

- (256) The Commission concluded in recital (255) that the Union industry did not suffer material injury during the review investigation period. Therefore, the Commission assessed, in accordance with Article 11(2) of the basic Regulation, whether there would be a likelihood of recurrence of injury originally caused by the dumped imports from China if the measures were allowed to lapse.
- (257) In this regard, the Commission examined the (i) production capacity and spare capacities in China, (ii) the attractiveness of the Union market, (iii) the likely price levels of imports from China in the absence of anti-dumping measures, and (iv) their likely impact on the Union industry.

Production capacity and spare capacities in China

- (258) As explained in recitals (147)-(154), China has significant production capacity for the production of the product concerned of approximately 90 000 tonnes and a spare capacity of [56 000 – 60 000] tonnes. Such a spare capacity corresponds to more than 3,5 times the Union free market consumption during the review investigation period.

Attractiveness of the Union market

- (259) In the absence of anti-dumping measures, the spare capacity would likely be used to produce for export to the Union, since it is an attractive market for Chinese exporting producers as described in recitals (156)-(163). There are also no indications that there would be an increased demand for the product under review in the markets of third countries and the PRC, while the consumption in the Union showed a steep recovery since 2020. Imports from the PRC are, therefore, likely to re-enter the Union market in significant quantities if measures are allowed to lapse.

Likely price levels of Chinese imports to the Union market

- (260) As an indication of the price level at which it is likely that the product concerned will be imported in the Union market should the measures be repealed, the Chinese export prices to the Union during the review investigation period were taken into account. As set out in recital (191), almost all imports into the Union during the review investigation period were made under the IPP regime. On this basis, the IPP prices without anti-dumping duties and with customs duties included, would still undercut the Union industry's prices by 2% on average. Thus, since Chinese import prices remained lower than the Union industry's prices, it is likely that Chinese imports would increase without the current measures.

Impact on the Union industry

- (261) Given the large spare capacities, it is likely that Chinese import volumes will increase significantly and will exert significant price pressure on the Union market. Under this scenario it is very likely that the Union industry will not be able to maintain its current price levels but will be forced to decrease its prices aligning them to the Chinese import prices.
- (262) Although the Union industry is likely to remain profitable when aligning its prices by 2%, such profitability level would not be sustainable in the medium and short term, because it would be (largely) below the target profit of 10%. However, this scenario does not account for the loss of volume of sales of the Union industry which is likely to happen if measures are terminated as explained in recital (163). As a matter of fact, the Union industry needs a certain level of profits to be able to keep investing to improve the recycling manufacturing process, considering the difficulties in the procurement of virgin raw materials, to continuously improve production and R&D capacities for finer grain products, and to develop additional raw material capacities in order to rely less on third country suppliers of raw material.
- (263) The Commission also considered that the Chinese exporting producers are able to decrease their prices to the Union, while still selling above this price level to other third countries. Based on the significant spare capacities in China and the fact that the investigation did not reveal any evidence showing that those spare capacities could be absorbed by other third country markets or the domestic Chinese market, there is a high incentive for the Chinese exporting producers to decrease price levels even further (i.e., below IPP prices) in order to gain market share in the Union. This will be possible because, as stated in recital (155), China controls 60% of the world's tungsten ore reserves and, at the same time, levies an export tax of 20% on tungsten concentrate. Moreover, Chinese prices from the review investigation period include also a temporary increased ocean freight costs due to the supply chain disruptions caused by Covid-19 pandemic. Under this scenario, the high volumes of cheap tungsten carbide will exert a significant price pressure on the Union industry, that will have to further decrease its prices to still be able to sell on the Union market. At the same time, however, the Union industry will also lose sales volumes as it will not be able to decrease its prices to the same low level as the Chinese export prices. Therefore, the Union industry will react with a combination of strategies in the form of price and volume reduction.
- (264) In this context, the Commission took into account two main factors. First, the Union industry is capital-intensive characterised by high fixed costs as furnaces cannot be shut off. Second, due to this cost structure, price decreases have a higher impact on profitability than sales volume decreases, since a decrease in sales volume can be absorbed as long as fixed costs are covered.
- (265) Against this background, as in the previous expiry review ⁽¹¹⁰⁾, firstly, the Commission analysed the scenario of a decrease in sales volume of 25%. This scenario is likely to happen in the short term. In the review investigation period, such a decrease would amount to 4 250 tonnes or just [10 - 13]% of the Chinese spare capacity. In the most likely response of the Union industry of a mix of price and volume reduction, the Union industry would have become loss-making (already 2% loss making when calculated based on IPP prices) in the review investigation period.

⁽¹¹⁰⁾ Commission Implementing Regulation (EU) 2017/942, recital (183).

- (266) Secondly, the Commission analysed the scenario of a decrease in sales volume of 50%. This scenario is likely to happen in the medium term (2-3 years) especially in the applications of coarse grade and less value-added products, where users will be forced to purchase the cheaper product concerned instead of the like product. In the review investigation period, such a decrease would amount to 8 500 tonnes or [21 - 26]% of Chinese spare capacities. In case of a mixed response of price and volume reduction, the Union industry would have become loss-making (already 16% loss making when calculated based on IPP prices).
- (267) In view of the above, a decrease in the selling price to the level below the IPP import price from the review investigation period, coupled with a decrease in sales volumes, will transform the Union industry in a loss-making industry. In the medium term, it is likely that the non-downstream integrated Union producers will be forced to liquidate their business as they will be directly exposed on the free market to the downward price pressure of the low-priced dumped imports from China. Instead, downstream integrated Union producers will continue to sell tungsten carbide to related users at lower prices. On a longer term, it is likely that also the downstream integrated Union producers will stop their activity as they will not be able to compete with this pressure in the long run, as their related users will opt to purchase tungsten carbide from China as well.
- (268) On this basis, it is concluded that the absence of measures would in all likelihood result in a significant increase of dumped imports from the PRC at injurious prices and material injury would be likely to recur.
- (269) In their comments to the final disclosure, Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret claimed that in view of the overall positive growth of the Union industry, on the one hand and the import prices, import quantity as well as the market share of the Chinese exporters on the Union market on the other hand, the Commission's conclusion of a likelihood of recurrence of injury did not seem to be supported by the evidence.
- (270) The assessment of the likelihood of recurrence of injury was based on the elements presented in recitals (257) to (267) such as (i) production capacity and spare capacities in China, (ii) the attractiveness of the Union market, (iii) the likely price levels of imports from China in the absence of anti-dumping measures, and (iv) their likely impact on the Union industry and thus not on the elements suggested by Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret. Therefore, the claim was rejected.
- (271) Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret also claimed that more than three decades of protection gave the impression that the likelihood of recurrence of injury seemed persistently existent for the Union industry.
- (272) The Commission disagreed with this claim. The current investigation established recurrence of injury based on the elements stated in recital (257). Whether the measures have been in place for a long period of time does not have a bearing on the likelihood of recurrence of injury analysis, which is made at the time of each expiry review. Therefore, the claim was rejected.

7. UNION INTEREST

- (273) In accordance with Article 21 of the basic Regulation, the Commission examined whether maintaining the existing anti-dumping measures would clearly be against the interest of the Union as whole. The determination of the Union interest was based on an appreciation of all the various interests involved, including those of the Union industry, importers, users and suppliers of raw materials. All interested parties were given the opportunity to make their views known under Article 21(2) of the basic Regulation.
- (274) At the outset, the importance of the product under review for a number of industries in the Union should be noted. Tungsten carbide is essential for production of machines, notably in the automobile and aviation sectors, for machines in the construction sector, notably for infrastructure such as roads, motorways and train tracks, and for mining and drilling tools. In addition, tungsten carbide is used in security and defence applications. All these applications suggest that several value chains depend on the continuous and frequent supply of wear parts or surface coatings made of tungsten carbide to keep machines and tools in function.

- (275) Moreover, it should be recalled that, in the previous investigations, the adoption of measures was considered not to be against the interest of the Union. Furthermore, the fact that the present investigation is an expiry review, thus analysing a situation in which anti-dumping measures have already been in place, allows the assessment of any undue negative impact on the parties concerned by the current anti-dumping measures.
- (276) On this basis, it was examined whether, despite the conclusions on the likelihood of a continuation of dumping and recurrence of injury, compelling reasons existed which would lead to the conclusion that it is not in the Union interest to maintain measures in this particular case.

7.1. Interest of the Union industry

- (277) As mentioned in recital (166), during the review investigation period the like product was manufactured by nine Union producers, belonging to seven groups. Out of these, there were six applicants, belonging to five groups. In addition, Nashira Hardmetals S.r.l. ('Nashira') cooperated as a user in the investigation, due to the prevalence of the use of the product under review over its production in its activity. Therefore, most of the Union industry participated actively in the investigation.
- (278) In view of the conclusions on the situation of the Union industry set out in recitals (249) to (255), and pursuant to the arguments relating to the analysis on the likelihood of recurrence of injury as explained in recitals (256) to (268), the Commission concluded that the Union industry would be likely to experience a serious deterioration of its financial situation in case the anti-dumping duties were allowed to expire. The measures are proven to be essential for keeping tungsten carbide production in the Union, as the Union industry would not have been able to withstand the pressure of large volumes of dumped imports of tungsten carbide from the PRC, sold in the Union market below the prices levels of the Union industry.
- (279) It is considered that the continuation of measures would benefit the Union industry, as the current measures have reduced the direct competition from unfairly priced tungsten carbide from China. They have allowed Union tungsten carbide producers to invest intensively to innovate the production process and to increase recycling and raw material capabilities, in order to reduce dependence on imports from China and to make a contribution to the circular economy, embedded in the European Green Deal agenda ⁽¹¹¹⁾.
- (280) By contrast, should the measures be repealed, this will likely have a negative effect on the Union industry. It will seriously threaten the viability of the Union industry that, in consequence, may have to close their operations, thus reducing the available sources of supply and competition on the Union market. Should the Union producers stop their production, the Union hard metal tools' and machine parts' producers will be mainly dependent on imports of raw materials from third countries, and primarily from the PRC, which is not only the world's leading producer of tungsten but also owns the majority of the world's reserves.

7.2. Interest of unrelated importers

- (281) No importers cooperated in the investigation.
- (282) The lack of any response may be, as indicated by the applicants in the request, because importers generally trade a wide portfolio of metals and have alternative sources of tungsten carbide supply besides the Union and China such as Israel, Russia, Japan, South Korea and the USA.
- (283) In line with the findings made in previous investigations, there was no evidence that the importers would not be able to continue to source their supplies from the PRC or that there were important difficulties to find other sources.
- (284) On this basis, the Commission concluded that the importers have no compelling reasons against the maintenance of the existing measures.

⁽¹¹¹⁾ Commission, *The European Green Deal*, COM(2019) 640 final of 11 December 2019.

7.3. Interest of users

- (285) At initiation, 54 known importers/users were contacted and provided with a link to the questionnaire on the Commission's website. Nine of these users came forward within the time limits granted (including, as mentioned in recital (277), Nashira, which was also producing minor volumes of the like product). They used tungsten carbide, *inter alia*, to manufacture cemented carbide to produce hard metal tools for different industries like the automotive, machinery and aerospace industries.
- (286) Questionnaire replies were received from seven of these nine users (three out of the seven are related).
- (287) Another 10 users came forward before disclosure. These users stated their position regarding the continuation of measures in force but did not reply to the questionnaire. Moreover, another user stated its position before disclosure but, since it did not confirm whether this was confidential and did not provide a non-confidential summary of it, its position was not taken into account.
- (288) Among the seven users which replied to the questionnaire, five opposed the continuation of the measures: Betek, Gühring, Konrad Friedrichs and G-ELIT, and Höganas Germany GmbH ('Höganas'). Conversely, Nashira supported the continuation of the measures, whereas Saar-Hartmetall und Werkzeuge GmbH ('Saar-Hartmetall'), while generally in favour of anti-dumping measures, submitted that, as a smaller company, it was suffering more than larger companies from anti-dumping measures.
- (289) Moreover, out of the 10 users which made their position known before disclosure but did not submit a questionnaire reply, six supported the continuation of the measures: Ceratizit Austria GmbH, Ceratizit Luxembourg S.à r.l., AB Sandvik Coromant, Seco Tools AB, Dormer Pramet s.r.o., and Hyperion Materials & Technologies ('Hyperion'). Based on public information, five of these users were related to the Union industry. Conversely, four opposed the continuation of the measures: Fabricación Metales Duros S.A.L., Atlas Diamant GmbH, Abitzsch Präzisionsnormteile GmbH and Oerlikon Metco WOKA GmbH.
- (290) The five users related to the Union industry submitted that tungsten was a strategic raw material and tungsten carbide was the basic ingredient for hard metal tools and machine parts which were widely used in the industrial and construction sectors in the Union. They further claimed that as the tools and parts were consumables, a stable supply of tungsten carbide to produce new tools and parts would be essential to the overall functioning of the Union industry value chain and the broader Union economy. They argued that the Union tungsten carbide industry had a key role in ensuring stability of supply.
- (291) Hyperion also supported the continuation of the measures due to the Union industry's role in ensuring security of supply to the Union market, in addition to sustainability, circular economy and environmental considerations.
- (292) Saar-Hartmetall argued that, if measures were repealed, in the short term, users would benefit from low import prices from China and the Union industry would be driven out of the market. However, in the medium to long-term, Chinese producers of the product concerned would become dominant in the market and be able to set prices in the Union. Moreover, Hyperion submitted that the decrease or closure of production of the Union industry would lead to security of supply issues of tungsten carbide on the Union market. As the Covid-19 pandemic showed, long-distance sourcing from China was fragile, therefore local sourcing in the Union must remain a viable option.
- (293) The four users opposing the continuation of the measures, which did not reply to the questionnaire, submitted that anti-dumping duties on tungsten carbide would weaken their global competitiveness.
- (294) Betek, the Gühring Group, Höganas, Nashira and Saar-Hartmetall ('the cooperating users') purchased an amount of the product under review corresponding to 22,9% of the free market consumption in the Union in the review investigation period. They purchased the product under review from the Union industry, China and other third countries. Most of their imports from China were imported under the IPP. Other third countries supplying tungsten carbide to the cooperating users during the investigation period included: Israel, Russia, Japan and Vietnam.

- (295) The investigation revealed that the turnover deriving from the sale of products incorporating tungsten carbide, for the cooperating users, represented between about 24% and 100% of their total turnover, during the review investigation period. Some of the users were part of vertically integrated groups and sold some products produced to other group companies, while others were independent entities. The independent entities sold cemented carbide tools both on the Union market and outside the Union. For the sales outside the Union, a substantial proportion of the tungsten carbide used as a raw material was purchased from the PRC under the IPP regime and therefore, no import duties were paid.
- (296) The cooperating users were manufacturing a large range of products incorporating the product under review. The importance of the costs of tungsten carbide varied significantly from one user to another. Based on information provided by different users, tungsten carbide represented between 13% and 71% of the costs of products incorporating tungsten carbide, and between 7% and 22% of the total company costs for all products produced. Some users provided cost figures for representative product types which they selected, while others provided costs for the whole company. Therefore, this analysis was carried out on the basis of the figures available to the Commission for each of the two comparisons.
- (297) The cooperating users were generally profitable during the review investigation period, both at the level of the total company and for products incorporating the product concerned. The profitability at company level represented between 1% and 7% of the total turnover, whereas the profitability of products incorporating the product under review represented between 3% and 6% of the turnover generated from sales of products incorporating the product under review.
- (298) One of the cooperating users, Höganäs claimed that, due to the anti-dumping measures in place, it had to compete with companies producing finished products outside the Union, with access to cheaper raw materials. As a result, it had to accept lower margins than users in third countries.
- (299) The Commission noted that the investigation showed, as recalled in recital (297), that users were generally able to achieve some profit during the review investigation period. Against this background, the argument that users in other countries are allegedly generating more profits than Union users is in itself not sufficient to conclude that the measures are clearly against the Union interest. Therefore, the claim was rejected.
- (300) If the measures were maintained, the Gühring Group, which opposed the measures, argued that it would lose market share for its cemented carbide products, because it would be placed at a competitive disadvantage with competitors outside the Union, which could buy Chinese tungsten carbide without paying the anti-dumping duties. It argued that the main cost of its products was the raw materials (i.e., tungsten carbide), a raw material which cannot be replaced by another one. It also would not be possible to absorb higher raw material costs and the only possibility to avoid losing market share would be to relocate production plants outside the Union.
- (301) The continuation of the measures would be limited to the continuation of the anti-dumping duty rate established in the original investigation by maintaining the same duty rate. Therefore, users would not face higher raw material costs than they currently have. The Commission noted that the investigation showed, as recalled in recital (297), that users were generally profitable during the review investigation period. As to the claim concerning the relocation of the users, the Commission noted that users did not relocate the bulk of their production, despite the measures being in place and no evidence was available that would show, to the contrary, that the repeal of the measures would prevent the relocation of users to China or other third countries. Therefore, these claims were rejected.
- (302) Saar-Hartmetall submitted that, while in a scenario of continuation of the measures the Union industry would survive, users which produce hard metal tools would not be competitive for more material-intensive products and for products without a specific technological know-how.
- (303) The Commission noted that, so far, the measures did not prevent the users from processing the product concerned without duties, as the vast majority of imports were under IPP, thus without duties. As set out in Table 7, users paid anti-dumping duties only on 38 tonnes imported under the normal regime during the review investigation period. Moreover, this trade pattern does not seem to be necessarily induced by the measures: as recalled in recital (274), tungsten carbide finds a variety of applications in many industries across all countries, thus hard metal tools made of tungsten carbide are in all likelihood global products prone to export from the Union. Thus, this claim was rejected.

- (304) The investigation found that despite the anti-dumping measures in place, the substantial number of users which provided comments were able to continue their activity in the Union through purchases from the Union industry, imports under IPP from China without the payment of anti-dumping duties and imports from other sources of tungsten carbide. During the review investigation period, anti-dumping duties were actually paid only on 38 tonnes of imports of tungsten carbide under the normal regime. In addition, the users were generally profitable, despite the anti-dumping measures in place. Moreover, several users, both related and unrelated to the Union industry, both involved and not involved also in the production of the like product, supported maintaining the measures. In these circumstances, the Commission concluded that the measures in force do not have a significant negative impact on users.

7.4. Interest of suppliers of raw materials

- (305) Two companies and one association in the upstream recycling industry came forward expressing their support for the continuation of the measures. The two companies were RS-Recycling GmbH and PA Metals Recycling OHG, whereas the association was the European Recycling Industries' Confederation (EuRIC). Another supplier came forward and provided a submission but, since it did not confirm whether this was confidential and did not provide a non-confidential summary of it, its submission was not taken into account.
- (306) The above mentioned two companies and the association argued that they invested substantially in the business of recycling of tungsten and other metal scraps and that, in light of the Union's and global environmental goals, the development of circular economies and sustainable value chains had become increasingly important. They further argued that China had the largest tungsten reserves in the world and that the GOC tended to keep prices of primary-based tungsten products low to discourage the use of secondary raw materials. They argued, therefore, that if the measures were allowed to lapse and dumped imports of tungsten carbide from China (produced mainly from primary raw material) resume, the Union would lose an important part of its circular value chain, which would put the Union recyclers at risk of going out of business and frustrate the Union's efforts to create sustainable and circular supply chains.
- (307) On this basis, the Commission concluded that it is in the interest of the suppliers to maintain the anti-dumping measures in force.

7.5. Other elements being examined

7.5.1. Competition in the Union and new entry in the market

- (308) The exporting producers Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret claimed that the Union market featured closely-interrelated market players, with long-standing commercial relationships, which would have deterred interested parties from openly commenting against the measures. They argued that the Union market was a well-protected and self-reliant market, without the need to diversify sources of supply or to have competition and was dominated by influential players at the expense of the users and importers. They stated that concerns about pricing and profit-making raised by certain users implied that costs and prices in the Union market were set at much higher levels than in other countries.
- (309) It is recalled that there are seven groups of Union producers in the market, using different manufacturing processes and different raw materials. As stated in recitals (56)-(58), some of the Union producers use only virgin raw materials and some are using both virgin raw materials and scrap. The seven groups of Union producers are independent from each other and competing with each other in the Union market. Moreover, the investigation has shown that there are other sources of supply in the Union market, as recalled in recital (294). Finally, the Commission noted that, compared to the previous expiry review – when six groups of Union producers were active in the market – Nashira, a new Union producer, entered the market. This illustrated that the Union market was still dynamic and barriers to entry could be overcome. Therefore, the claim was rejected.

7.5.2. Tungsten as a critical raw material, as a potential strategic raw material and as a conflict mineral

- (310) Since 2011, tungsten has been consistently classified as a critical raw material for the Union ⁽¹¹²⁾. Its continued inclusion in the Union's list of critical raw material has been put forward by the Commission in its proposal for a European Critical Raw Materials Act ⁽¹¹³⁾.
- (311) Moreover, in its proposal for a European Critical Raw Materials Act, the Commission put forward tungsten also as a strategic raw material, a notion encompassing those raw materials of high importance to a technology that support the twin green and digital transition and defence and aerospace objectives ⁽¹¹⁴⁾.
- (312) Finally, the attention that the Union devoted to the supply chain of tungsten was further confirmed by the inclusion of tungsten among the conflict minerals in the Conflict Minerals Regulation ⁽¹¹⁵⁾. This implies that the import of tungsten requires due diligence obligations impingent on Union importers to ensure that tungsten trade is not used to finance armed groups, fuel forced labour and other human rights abuses, and support corruption and money laundering in politically unstable areas.
- (313) In view of the complex regulatory framework of the tungsten supply chain, as well as the strategic importance of tungsten, it is, therefore, in the interest of the Union to keep production of tungsten carbide in the Union, to promote recycling in order to reduce the consumption of primary raw materials and to decrease the relative import dependence.

7.5.3. Possible extension of the measures

- (314) Höganäs, which opposed maintaining the measures, argued that it had to pay the anti-dumping duty on the tungsten carbide, but at the same time there was no anti-dumping duty on the downstream products.
- (315) Nashira, both a producer and a user, which was in favour of the continuation of the measures, also argued that it was facing strong competition from Chinese hard metal tool producers, which were often vertically integrated, producing also tungsten carbide and, in some instances, owning tungsten mines. Nashira further argued that the anti-dumping measures on tungsten carbide were not sufficient to protect and stabilise the tungsten market in Europe and suggested introducing also anti-dumping measures on tungsten-based products under headings 8207 and 8209.
- (316) The Commission noted that the scope of the current investigation is limited to tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powders. In the context of the current investigation, the product scope cannot be modified. Therefore, these claims were rejected.

⁽¹¹²⁾ The first list of critical raw materials included in Commission, *Tackling the challenges in commodity markets and on raw materials*, COM(2011) 25 final of 2 February 2011; the second list in Commission, *On the review of the list of critical raw materials for the EU and the implementation of the Raw Materials Initiative*, COM(2014) 297 final of 26 May 2014; the third list in Commission, *On the 2017 list of Critical Raw Materials for the EU*, COM/2017/0490 final of 13 September 2017; and the fourth list in Commission, *Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability*, COM(2020) 474 final of 3 September 2020.

⁽¹¹³⁾ Annex II, section 1 of Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020, COM(2023) 160 final of 16 March 2023.

⁽¹¹⁴⁾ Annex 1, section 1 of Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020.

⁽¹¹⁵⁾ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017, p. 1.

7.5.4. Duration of measures

- (317) Zhangyuan Tungsten, Xianglu Tungsten and Golden Egret argued that the anti-dumping measures on the product concerned have been in force for too long and therefore their continuation was unjustified.
- (318) The Commission recalled that pursuant to Article 11(2) of the basic Regulation, in case continuation or recurrence of injurious dumping is established and measures are clearly not against the Union interest as a whole, such measures must be maintained. All conditions were met in the present investigation. Likewise, the parties concerned did not demonstrate any specific reason in terms of the overall Union interest that would clearly speak against the continuation of the measures. The Commission has therefore no other option than to impose anti-dumping measures. This argument is therefore rejected.

7.5.5. Fused tungsten carbide

- (319) Technogenia argued that there was no Union interest supporting anti-dumping measures on fused tungsten carbide anymore, as the Union industry stopped producing it.
- (320) While indeed the investigation revealed that fused tungsten carbide is not produced in the Union market anymore, fused tungsten carbide and tungsten carbide are partially interchangeable as stated in recital (66). In addition, the Commission found that there are alternative sources and fused tungsten carbide can be imported from Canada without anti-dumping duties. Therefore, the claim was rejected.

7.6. Conclusion on Union interest

- (321) On the basis of the above, the Commission concluded that there were no compelling reasons of the Union interest against the maintenance of the existing measures on imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder originating in the PRC.

8. ANTI-DUMPING MEASURES

- (322) On the basis of the conclusions reached by the Commission on continuation of dumping, recurrence of injury and Union interest, the anti-dumping measures on tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder from the PRC should be maintained.
- (323) In view of Article 109 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council ⁽¹¹⁶⁾ when an amount is to be reimbursed following a judgment of the Court of Justice of the European Union, the interest to be paid should be the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the *Official Journal of the European Union* on the first calendar day of each month.
- (324) The measures provided for in this regulation are in accordance with the opinion of the Committee established by Article 15(1) Regulation (EU) 2016/1036,

⁽¹¹⁶⁾ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is imposed on imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder, currently falling under CN codes 2849 90 30 and ex 3824 30 00 ⁽¹⁷⁾ (TARIC code 3824 30 00 10) and originating in the People's Republic of China.
2. The rate of the definitive anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, of the product described in paragraph 1, shall be 33%.
3. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

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, 8 August 2023.

For the Commission
The President
Ursula VON DER LEYEN

⁽¹⁷⁾ The particles are irregular and not free flowing in contrast to 'ready to press powder' particles, which are spherical or granular shaped, homogeneous and free flowing. The lack of flowability can be measured and established by using a calibrated funnel e.g. a HALL flow meter according to ISO standard 4490.

COMMISSION IMPLEMENTING REGULATION (EU) 2023/1619**of 8 August 2023****on temporary emergency measures derogating in respect of the year 2023 from certain provisions of Regulations (EU) No 1308/2013 and (EU) No 2021/2117 of the European Parliament and of the Council, to resolve specific problems in the fruit and vegetables and wine sectors caused by adverse meteorological events**

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 221(1) thereof,

Whereas:

- (1) Due to severe adverse meteorological events that have taken place in several Member States' regions in the spring of 2023, the production of fruits and vegetables has been dramatically damaged. In Spain, the planned production in the region of Catalonia is reduced of at least 50 % due to a drought situation, whereas the production in the region of Emilia-Romagna in Italy has been destroyed by a flood. Drought has also seriously impacted the level of production and its quality in some regions in France and in Portugal.
- (2) Given the severe adverse meteorological events of the spring of 2023, many recognised producer organisations and associations of producer organisations in the fruit and vegetables sector are facing difficulties in implementing their approved operational programmes. Some of the approved actions and measures will not be implemented in 2023 and therefore part of the operational funds will not be spent. Other recognised producer organisations and associations of producer organisations are amending their operational programmes with a view to implementing actions and measures to address the impact of the severe adverse meteorological events in the fruit and vegetables sector, such as crisis management measures.
- (3) Recognised producer organisations and associations of producer organisations may implement, as part of their approved operational programmes, crisis and prevention measures in the fruit and vegetables sector that are intended to increase their resilience to market disturbances. However, in accordance with Article 33(3), fourth subparagraph, of Regulation (EU) No 1308/2013, these crisis prevention and management measures are not to comprise more than one third of the expenditure under the operational programme. In order to provide greater flexibility for those producer organisations and to enable them to focus the resources under operational programmes to addressing the market disturbance caused by measures related to the adverse meteorological events, that rule should not apply in the year 2023. This temporary derogation should apply to operational programmes which continue to operate under the conditions applicable under Regulation (EU) No 1308/2013 in accordance with Article 5(6), first subparagraph, point (c), of Regulation (EU) 2021/2117 of the European Parliament and of the Council ⁽²⁾.
- (4) In addition, recognised producer organisations and associations of producer organisations need to be able to redirect funds, including Union financial assistance within their corresponding operational fund to the actions and measures that are necessary to address the consequences of the adverse meteorological events of the spring of 2023. To ensure that recognised producer organisations and associations of producer organisations are able to do this, it is necessary to increase in the year 2023 the limit of Union financial assistance laid down in Article 34(1) of Regulation (EU) No 1308/2013 from 50 % to 60 % of the actual expenditure incurred. This temporary derogation should apply to

⁽¹⁾ OJ L 347, 20.12.2013, p. 671.

⁽²⁾ Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union (OJ L 435, 6.12.2021, p. 262).

operational programmes which continue to operate under the conditions applicable under Regulation (EU) No 1308/2013 in accordance with the transitional provision laid down in Article 5(6), first subparagraph, point (c), of Regulation (EU) 2021/2117.

- (5) The adverse meteorological events of the spring of 2023 affected severely also the Union wine sector, where exceptional difficulties have been encountered by wine growers located in the concerned regions of Member States. In particular, the exceptional weather conditions have prevented wine growers from carrying out works on their vineyards, which are typically performed in spring, such as cleaning and preparation of the soil, planting out of new vines or grafting. In the regions hit by exceptional drought, such activities are not possible because of the dryness of the soil and the extremely unfavourable conditions for growing new plantings, in the regions concerned by floods, such activities are not possible because vineyards are either not accessible or destroyed by the water masses.
- (6) Article 62(3), first subparagraph, of Regulation (EU) No 1308/2013 provides that vine planting authorisations, including authorisations for new planting and replanting authorisations, are valid for 3 years from the date on which they were granted. Article 68(2), first subparagraph, of that Regulation lays down that authorisations granted following a conversion of planting rights have the same period of validity as the original planting rights. Within the period of validity of each given authorisation, wine growers will typically prepare the soil in autumn and source the new vines, which are then planted during spring since spring is the most suitable period of the year for planting.
- (7) Due to the adverse meteorological events, wine growers holding planting authorisations to be used in the affected regions that expire in 2023 have been prevented from making use of the authorisations during the spring in the last year of their validity as planned. Since it is impossible to predict how long such adverse meteorological events and their consequences will last, it is not certain that those wine growers will have the possibility to use their planting authorisations within the respective validity periods. Winegrowers would have to plant the vines during the hot season and thus at a less suitable moment of the growing cycle, under difficult conditions and at additional cost, when the wine sector is already suffering from unfavourable market conditions.
- (8) Therefore, and to avoid the loss of the planting authorisation or a rapid deterioration of the conditions under which the planting would have to be carried out, it is necessary to allow without delay for an extension of the validity of planting authorisations that expire in the year 2023 in regions affected by the adverse meteorological events. The validity of all authorisations expiring in 2023 that are to be used in the affected regions should therefore be extended for 12 additional months as of their current date of expiration in 2023 to allow wine growers to plant the vines in 2024.
- (9) Given the unforeseen difficulties wine growers in affected regions encounter due to the adverse meteorological events, such wine growers should be allowed to waive their planting authorisation that expire in the year 2023 without incurring the administrative penalty referred to in Article 62(3) of Regulation (EU) No 1308/2013 if they no longer wish to expand their vineyard area.
- (10) In respect of wine growers holding newly planted vineyards in the areas that have been seriously affected by the adverse meteorological events of the spring of 2023 in the related regions and that were planted, in anticipation of the grubbing-up of an equivalent area, using re-planting authorisations granted by Member States in accordance with Article 66(2) of Regulation (EU) No 1308/2013, it is pertinent to prolong by one year the four year deadline for the grubbing up of the previous planted area. This will allow wine growers to benefit for an additional harvest year from the previous planted area in compensation for the damages in the newly planted vineyard, given that

such damages may delay the start of use of the newly planted area or have as a result that the newly planted area has to be planted again. Consequently, the deadline laid down in Article 5, second paragraph, of Commission Delegated Regulation (EU) 2018/273 ⁽³⁾ should be adapted as well.

- (11) Transitional arrangements should be put in place for the expenditure incurred after December 2022 under the national support programmes in the wine sector referred to in Article 40 of Regulation (EU) No 1308/2013. In particular, Article 5(7) of Regulation (EU) 2021/2117 lays down that the support programmes in the wine sector are to continue to apply until 15 October 2023. For that purpose, Articles 39 to 54 of Regulation (EU) No 1308/2013 are to continue to apply after 31 December 2022 as regards expenditure incurred and payments made for operations implemented under Regulation (EU) No 1308/2013 before 16 October 2023. In addition, Articles 39 to 54 of Regulation (EU) No 1308/2013 are to continue to apply also to expenditure incurred and payments made for operations implemented pursuant to Articles 46 and 50 of Regulation (EU) No 1308/2013 before 16 October 2025, provided that by 15 October 2023 such operations have been partially implemented and the expenditure incurred amounts to at least 30 % of the total planned expenditure.
- (12) However, due to the unforeseen difficulties wine growers encountered following the severe consequences of the adverse meteorological events of the spring of 2023, it has become impossible for some wine growers to implement the operations under Article 46 of Regulation (EU) No 1308/2013 in order to comply with the threshold of 30 % of expenditure that has to be incurred by 15 October 2023. It is therefore considered necessary to reduce the threshold of 30 % to a threshold of 3 %, to ensure that wine growers that have started implementing the measure but are prevented from advancing by the unforeseen weather conditions are not unnecessarily penalised and can continue implementing the measure once the situation allows it. This flexibility should only apply to wine growers holding authorisations for replanting authorisations to be used in the regions impacted by the adverse meteorological events incurred in the spring of 2023.
- (13) The overall situation constitutes a specific problem within the meaning of Article 221 of Regulation (EU) No 1308/2013 that cannot be readily addressed by measures taken pursuant to Articles 219 or 220 of that Regulation. The situation is not specifically linked to an existing identified unique market disturbance or a precise threat thereof. It is not linked either to measures that would combat the spread of animal diseases or the loss of consumer confidence due to public, animal or plant health risks.
- (14) In view of the unprecedented nature of the severe adverse meteorological events of the spring of 2023, it is necessary to alleviate those difficulties by derogating only to an extent that is strictly necessary from certain provisions of Regulations (EU) No 1308/2013 and (EU) No 2021/2117.
- (15) In view of the necessity to take immediate action, this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*.
- (16) The measures provided for in this Regulation are in accordance with the opinion of the Committee for the Common Organisation of the Agricultural Markets,

⁽³⁾ Commission Delegated Regulation (EU) 2018/273 of 11 December 2017 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards the scheme of authorisations for vine plantings, the vineyard register, accompanying documents and certification, the inward and outward register, compulsory declarations, notifications and publication of notified information, and supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council as regards the relevant checks and penalties, amending Commission Regulations (EC) No 555/2008, (EC) No 606/2009 and (EC) No 607/2009 and repealing Commission Regulation (EC) No 436/2009 and Commission Delegated Regulation (EU) 2015/560 (OJ L 58, 28.2.2018, p. 1).

HAS ADOPTED THIS REGULATION:

Article 1

Temporary derogations from Regulation (EU) No 1308/2013 with regard to fruit and vegetables

1. By way of derogation from Article 33(3), fourth subparagraph, of Regulation (EU) No 1308/2013, the limit of one third of expenditure for crisis prevention and management measures under the operational programme referred to in that provision shall not apply in the year 2023 in respect of areas affected by the adverse meteorological events of the spring of 2023 to be identified by the Member States.
2. By way of derogation from Article 34(1) of Regulation (EU) No 1308/2013, the Union financial assistance to the operational fund referred to in that provision granted in the year 2023 to producer organisations or associations of producer organisations affected by the adverse meteorological events of the spring of 2023 to be identified by Member States shall not exceed the amount of the Union financial contribution to operational funds approved by Member States for the year 2023 and shall be limited to 60 % of the actual expenditure incurred.

Article 2

Temporary derogations from Regulation (EU) No 1308/2013 with regard to wine

1. By way of derogation from Article 62(3), first subparagraph, first sentence, and Article 68(2), first subparagraph, first sentence, of Regulation (EU) No 1308/2013, planting authorisations granted in accordance with Articles 62, 64, 66 and 68 of that Regulation that expire in the year 2023 and are to be used in regions affected by the adverse meteorological events of the spring of 2023 shall only expire 12 months from their initial date of expiry.
2. By way of derogation from Article 62(3), first subparagraph, second sentence, of Regulation (EU) No 1308/2013, wine growers who hold planting authorisations that expire in the year 2023 and are to be used in regions affected by the adverse meteorological events of the spring of 2023 shall not be subject to administrative penalties, under the condition that they inform the competent authorities by 31 December 2023 that they do not intend to make use of their authorisation and do not wish to benefit from the extension of validity provided for in paragraph 1 of this Article.
3. By way of derogation from Article 66(2) of Regulation (EU) No 1308/2013, Member States may extend the deadline for grubbing up to the end of the fifth year from the date on which the new vines have been planted in cases where the newly planted area has been seriously affected by the adverse meteorological events of the spring of 2023 to the extent that either the start of use of the newly planted area is delayed or the newly planted area has to be planted again.

Within 2 months as from the submission of the application for the extension of the deadline for grubbing up Member States shall inform the applicant of the approval or rejection of its application. In case of rejection of the application, Member States shall inform the applicant of the reasons thereof.

Article 5, second paragraph, of Delegated Regulation (EU) 2018/273 shall apply if the grubbing up is not carried out by the wine grower by the end of the extended deadline.

Wine growers benefitting from the extension shall not be eligible for support for green harvesting referred to in Article 47 of Regulation (EU) No 1308/2013 until the end of the extended deadline, on either the newly planted area or the area which is due to be grubbed up.

*Article 3***Temporary derogations from the transitional provisions laid down in Article 5(7), point (b), of Regulation (EU) 2021/2117 regarding the application of Articles 39 to 52 of Regulation (EU) No 1308/2013**

By way of derogation from Article 5(7), point (b), of Regulation (EU) 2021/2117, Articles 39 to 54 of Regulation (EU) No 1308/2013 shall continue to apply after 31 December 2022 as regards expenditure incurred and payments made for operations implemented pursuant to Article 46 of Regulation (EU) No 1308/2013 before 16 October 2025, provided that:

- (a) by 15 October 2023 such operations have been partially implemented and the expenditure incurred amounts to at least 3 % of the total planned expenditure; and
- (b) such operations are fully implemented by 15 October 2025.

Member States shall ensure that this derogation only applies to wine growers holding replanting authorisations to be used in regions impacted by the adverse meteorological events that occurred in the spring of 2023.

*Article 4***Entry into force and application**

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

It shall apply until 9 August 2024.

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

Done at Brussels, 8 August 2023.

For the Commission
The President
Ursula VON DER LEYEN

COMMISSION IMPLEMENTING REGULATION (EU) 2023/1620**of 8 August 2023****on temporary emergency measures derogating in respect of the year 2023 from certain provisions of Regulation (EU) 2021/2115 of the European Parliament and of the Council, to resolve specific problems in the fruit and vegetables sector caused by adverse meteorological events and measures linked to them**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013 ⁽¹⁾, and in particular Article 148(1) thereof,

Whereas:

- (1) Due to severe adverse meteorological events that have taken place in several Member States' regions in the spring of 2023, the production of fruit and vegetables has been dramatically damaged, affecting both the volume produced and its quality, with higher proportion of class II products and consequent unbalanced pricing among qualities. In Spain, the planned production in the region of Catalonia is reduced of at least 50 % due to a drought situation, whereas the production in the region of Emilia-Romagna in Italy has been destroyed by a flood. Drought has also seriously impacted the level of production and its quality in some regions in France and in Portugal.
- (2) Given the severe adverse meteorological events of the spring of 2023, many recognised producer organisations and associations of producer organisations in the fruit and vegetables sector are facing difficulties in implementing their approved operational programmes. Some of the approved actions and measures will not be implemented in 2023 and therefore part of operational funds will not be spent. Other recognised producer organisations and associations of producer organisations are amending their operational programmes with a view to implementing interventions to address the impact of the severe adverse meteorological events in the fruit and vegetables sector, such as interventions aiming to crisis prevention and risk management objectives.
- (3) Recognised producer organisations and associations of producer organisations may implement, as part of their approved operational programmes, interventions pursuing crisis prevention and management objectives in the fruit and vegetables sector as referred to in Article 47(2), points (f), (g) and (h) of Regulation (EU) 2021/2115 that are intended to increase their resilience to market disturbances.
- (4) However, pursuant to Article 50(7), first subparagraph, point (d), of Regulation (EU) 2021/2115, such interventions are not to comprise more than one third of the total expenditure under the operational programme. In order to provide greater flexibility for producer organisations impacted by the severe adverse meteorological events of the spring of 2023 and to enable them to focus the resources under operational programmes to addressing the consequences of such events, that rule should not apply in the year 2023.
- (5) Recognised producer organisations and associations of producer organisations need to be able to redirect funds, including Union financial assistance within the operational fund to the interventions that are necessary to address the consequences of the severe adverse meteorological events of the spring of 2023. To ensure that recognised producer organisations and associations of producer organisations are able to do this, it is necessary to increase in the year 2023 the limit of Union financial assistance laid down in Article 52(1) of Regulation (EU) 2021/2115 from 50 % to 60 % of the actual expenditure incurred.

⁽¹⁾ OJ L 435, 6.12.2021, p. 1.

- (6) In view of the unprecedented nature of the severe adverse meteorological events of the spring of 2023, it is necessary to alleviate those difficulties by derogating only to an extent that is strictly necessary and only for the year 2023, from certain provisions of Regulation (EU) 2021/2115 applicable to interventions in the fruit and vegetables sector.
- (7) In view of the necessity to take immediate action, this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*.
- (8) The measures provided for in this Regulation are in accordance with the opinion of the Common Agricultural Policy Committee,

HAS ADOPTED THIS REGULATION:

Article 1

Temporary derogations from Regulation (EU) 2021/2115 with regard to fruit and vegetables

1. By way of derogation from Article 50(7), first subparagraph, point (d), of Regulation (EU) 2021/2115, the limit of one third of the total expenditure for interventions within the types of intervention referred to in Article 47(2), points (f), (g) and (h), of that Regulation, shall not apply in the year 2023 in areas affected by the severe adverse meteorological events of the spring of 2023 to be identified by the Member States.
2. By way of derogation from Article 52(1) of Regulation (EU) 2021/2115, the Union financial assistance to the operational fund in the year 2023 of producer organisations or associations of producer organisations affected by the severe adverse meteorological event of the spring of 2023 to be identified by the Member States shall not exceed the amount of the Union financial contribution to operational funds approved by Member States for the year 2023 and shall be limited to 60 % of the actual expenditure incurred.

Article 2

Entry into force

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

This Regulation shall apply until 31 December 2023.

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

Done at Brussels, 8 August 2023.

For the Commission
The President
Ursula VON DER LEYEN

DECISIONS

DECISION No 1/2023 OF THE SPECIALISED COMMITTEE ESTABLISHED BY ARTICLE 8(1)(R) OF THE TRADE AND COOPERATION AGREEMENT BETWEEN THE EUROPEAN UNION AND THE EUROPEAN ATOMIC ENERGY COMMUNITY, OF THE ONE PART, AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, OF THE OTHER PART,

of 19 June 2023

establishing a standard form for requests for mutual assistance [2023/1621]

THE SPECIALISED COMMITTEE ON LAW ENFORCEMENT AND JUDICIAL COOPERATION,

Having regard to the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (the 'Trade and Cooperation Agreement') ⁽¹⁾, and in particular Article 635(1) thereof,

HAS ADOPTED THIS DECISION:

Article 1

Annex 50 to the Trade and Cooperation Agreement establishing a standard form for requests for mutual assistance in criminal matters as set out in the Appendix to this Decision is hereby adopted.

Article 2

This Decision shall take effect on the first day of the third month following the date of its adoption.

Done at Brussels, 19 June 2023.

For the Specialised Committee on Law Enforcement and Judicial Cooperation

The Co-chairs

Chris JONES

Bruno GENCARELLI

Stephen CURZON

⁽¹⁾ OJ L 149, 30.4.2021, p. 10.

APPENDIX

REQUEST FOR MUTUAL ASSISTANCE IN CRIMINAL MATTERS

This form shall be used by the competent authorities to which it applies under the Trade and Cooperation Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland.

The information provided must be relevant and not go beyond what is necessary to execute this request, in line with relevant data protection requirements.

SECTION A

Case Reference:

Requesting State:

Requesting Authority:

Requested State:

Requested Authority (if known):

SECTION B: Urgency

Please indicate if there is any urgency due to:

- ☐ Evidence being concealed or destroyed
- ☐ Imminent trial date
- ☐ A person in custody
- ☐ Period of statute of limitations expiring
- ☐ Any other reason

Please specify below:

.....

Time limits for execution of the request are laid down in the Trade and Cooperation Agreement Article 640. However, if this request is urgent and / or requires action by/on a specific date, please specify and explain the reason for this:

.....

SECTION C: Confidentiality

- ☐ This request is confidential

Please provide additional information where relevant:

.....

SECTION D: Relation to an earlier or simultaneous request for assistance

Please identify any actions undertaken in these or related proceedings to seek this evidence via other routes, where applicable. Please indicate whether this request for mutual assistance supplements an earlier or any simultaneous request/requests for assistance to the Requested State and, if relevant, to another State.

☐ **Previous engagement with law enforcement authorities, prosecutors or other authorities**

Provide details of any prior contact by the requesting State including the name of the State, the authority contacted, relevant contact details and any case reference numbers:

.....
.....

☐ **Previous related or simultaneous request for mutual assistance or European Investigation Order**

Provide information relevant to identify the other requests including the name of the State, the authority to which it was transmitted, the date of request, and reference numbers given by the requesting and requested authorities:

.....
.....

☐ **Other**

If relevant, provide information related to this other request for assistance:

.....
.....
.....

SECTION E: Grounds for the request

1. Classification of the offence(s)

To ensure this request is sent to the appropriate body, what is the nature and legal classification of the offence(s) for which the request is made:

.....

Please provide the maximum penalty, the statute of limitation and if applicable, the text of the statutory provision/code including the relevant provisions relating to penalties:

.....

2. Summary of the facts

Description of the conduct giving rise to the offence(s) in respect of which assistance is sought and a summary of underlying facts:

.....

For service of procedural documents and judicial decisions, please provide a short summary of the document(s) and/or decision(s) to be served, if it is not available in the language of the requested State:

.....

For other requests, please describe how the evidence/measure sought can help to investigate and prosecute the offence(s):

.....

Stage of investigation/proceedings:

☐ investigation

☐ prosecution

☐ trial

☐ other, specify:

.....

Description of risks associated with obtaining this evidence, if applicable:

.....

Any other information which the requesting State considers useful to the executing authority in executing the request for assistance, if applicable:

.....

3. Is this offence a Driving Offence referred to in Article 640(6) of the Trade and Cooperation Agreement:

☐ Yes

☐ No

4. Type of proceedings for which the request is issued:

☐ proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State

☐ proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested State by virtue of being infringements of the rules of law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.

SECTION F: Identity of the natural or legal persons concerned

Please only provide information that is relevant and does not go beyond what is necessary for this request. If more than one person is concerned, please provide the information for each person.

1. State all information, as far as known, regarding the identity of the person(s) concerned by the measure:

(i) In the case of natural person(s)

Name:

First name(s):

Other relevant name(s), if applicable:

Aliases, if applicable:

Sex:

Nationality:

Identity number or social security number:

Type and number of the identity document(s) (ID card, passport), if available:

.....

Date of birth:

Place of birth:

Residence and/or known address; if address not known, state the last known address:

.....

Workplace (including contact details):

Other contact details (email, phone No):

Language(s) which the person understands:

Please describe the position the concerned person currently holds in the proceedings:

☐ Suspected or accused person

☐ Victim

☐ Witness

☐ Expert

☐ Third Party

Other (Please specify):

(ii) In the case of legal person(s)

Name:

Form of legal person:

Shortened name, commonly used name or trading name, if applicable:

.....

Registered seat/office:

Registration number:

Address of the legal person:

Other contact details (email, phone No):

Name of the legal person's representative:

Please describe the position the concerned person currently holds in the proceedings:

☐ Suspected or accused person

☐ Victim

☐ Witness

☐ Expert

☐ Third Party

☐ Other (Please specify):

2. Any other relevant information:

.....

.....

SECTION G: Measure required

1. Please specify the measure required:

- ☐ Search and seizure (If ticked section H1 must be completed)
- ☐ Provision of documents and/or business records
- ☐ Provision of banking materials or information from other financial institutions (If ticked section H2 must be completed)
- ☐ Service of procedural documents and judicial decisions with assistance of requested State
- ☐ Obtaining information or evidence which is already in the possession of the requested State
- ☐ Obtaining information contained in databases held by police or judicial authorities
- ☐ Statements and Hearings (If ticked Section F (Identity of the natural or legal persons concerned) and Section I (Formalities and procedures requested for the execution), must be completed):
 - ☐ witness
 - ☐ expert
 - ☐ suspected or accused person
 - ☐ victim
 - ☐ third party
- ☐ Hearing by videoconference, telephone conference or other audio-visual transmission. (If ticked section H4 must be completed):
 - ☐ witness
 - ☐ expert
 - ☐ suspected or accused person
 - ☐ victim
 - ☐ third party
- ☐ Obtaining subscriber / entity data (If ticked section H3 must be completed)
- ☐ Obtaining traffic / events (including location) data (If ticked section H3 must be completed)
- ☐ Obtaining content data (If ticked section H3 must be completed)
- ☐ Investigative measure implying the gathering of evidence in real time, continuously and over a certain period of time:
 - ☐ monitoring of banking or other financial operations
 - ☐ controlled deliveries
 - ☐ other (If so please specify):
- ☐ Provisional measure(s) for the purpose of preserving evidence, maintaining an existing situation or protecting endangered legal interests (If ticked section H5 must be completed)
- ☐ Temporary transfer of a person held in custody to the requesting State (If ticked section H6 must be completed)
- ☐ Temporary transfer of a person held in custody to the requested State (If ticked section H6 must be completed)
- ☐ Covert investigation (If ticked section H7 must be completed)
- ☐ Other (If so please specify):

2. Please describe the assistance required, and, if known, the locations where the evidence is located/believed to be located and any necessary information needed to carry out this measure. To request any formalities or procedures are observed please see section I:

SECTION H: Additional requirements for certain measures

Fill out the sections relevant to the investigative measure(s) requested:

SECTION H1: Search and seizure

Natural or legal person linked to search. If more than one, please provide the details for each:

.....

.....

Premises to be searched. Please provide details on how the person is linked to the premises. If more than one, please provide the information for each:

.....

.....

What evidence is being sought? Identify the material for which you want to search in as much detail as practicable:

.....

.....

Why do you believe that the evidence is likely to be found in the place mentioned above and to be relevant and of substantial value to the investigation:

.....

.....

Is there any risk of privileged material being recovered? If so, please provide detail:

.....

.....

.....

Will any officials of the requesting State need to be present at the search? (If yes, please provide details in section I):

- ☐ Yes
- ☐ No

Any known information relating to investigations in other states which may impact this search and seizure request:

.....

.....

Please provide any other relevant information relating to the search and seizure:

.....

SECTION H2: Provision of information on bank or other financial accounts

If more than one account is concerned, please provide the information for each account.

Please specify what information is being sought:

- ☐ Information on bank accounts that the person holds in respect of which he or she has the power of attorney
- ☐ Information on other financial accounts that the person holds or in respect of which he or she has the power of attorney
- ☐ Information on banking operations:
- ☐ Bank Statements
 - ☐ Account opening documentation
 - ☐ Power of Attorney or additional name on account
 - ☐ Other (If so please specify):
- ☐ Information on other financial operations:
- ☐ Account Statements
 - ☐ Account opening documentation
 - ☐ Power of Attorney or additional name on account
 - ☐ Other (If so please specify):

If available, please provide:

Name of Account Holder:

Name of bank/financial institution:

IBAN or Account Number and Sort Code:

Time Scale for transactions:

☐ Other (If so, please specify):

Please provide additional justification as to why this evidence is likely to be relevant and of substantial value to the investigation, including the link of the account to the crime committed:

.....

If necessary, please provide any additional information likely to be required to execute this request:

.....

SECTION H3: Subscriber, traffic, location and content data

Type of data requested:

- ☐ Subscriber / entity data (e.g. subscription to phone number or IP address), specify:
-
- ☐ Traffic / events data, specify:
- ☐ Location data, specify:
- ☐ Content data (e.g. web/mailbox dump or message log, snapshot), specify:
-
- ☐ Other, specify:

All requests for subscriber, traffic or location, and content data requires the following information:

- ☐ Date (DD/MM/YYYY):
- ☐ Timestamp (hh:mm:ss):
- ☐ Time Zone:

Provide further details to help identify the data requested:

- ☐ IP address (and Port number if applicable):
- ☐ Telephone number(s):
- ☐ IMEI number(s):
- ☐ Other (Please specify):

SECTION H4: Video or telephone conference or other audio-visual transmission

If hearing by videoconference or telephone conference or other audio-visual transmission is requested:

Please indicate the name of the authority that will conduct the hearing (please include name of the person who will conduct the hearing/contact details/language where available):

.....

Proposed date(s) (DD/MM/YYYY):

Start time of conference (hh:mm:ss):

Time Zone:

Approximate length of hearing:

Technical details:

Site name:

Communication system:

Contacts of technician (language):

Pre-test date and time:

Contact details for pre-test operator if known:

Language and interpretation arrangements:

Any other requirements (If so please specify):

.....

.....

☐ This request concerns an accused person or the suspect and the hearing is, or forms part of, the trial of that person

Reason(s) why it is not desirable or possible for the witness or expert to attend in person:

Please specify if the individual, suspected or accused person has given their consent:

☐ Yes

☐ No

☐ I request that the person's consent is sought before this request proceeds

SECTION H5: Provisional measures

If a provisional measure for the purpose of preserving evidence, maintaining an existing situation or protecting endangered legal interests is requested, please indicate whether:

- ☐ the item is to be transferred to the requesting State
- ☐ the item is to remain in the requested State; please indicate an estimated date:
for lifting of provisional measure:
- for the submission of a subsequent request concerning the item:

SECTION H6: Transfer of a person held in custody

(1) If a temporary transfer to the requesting State of a person held in custody for the purpose of the investigation is requested, please indicate whether the person consented to this measure:

- ☐ Yes ☐ No ☐ I request that the person's consent is sought

(2) If a temporary transfer to the requested State of a person held in custody for the purpose of investigation is requested, please indicate whether the person consented to this measure:

- ☐ Yes ☐ No

If necessary, please provide any additional information:

SECTION H7: Covert Investigations

Please indicate the reasons why you consider the covert investigative measure relevant for the purpose of the criminal proceedings:

.....

.....

.....

Please provide the following information:

(a) Information for the purpose of identifying the subject of the covert investigation:

- (b) The desired start date and duration of the covert measure:
- (c) Details of vehicles/address of the covert measure:
- (d) If necessary, please provide any additional information relevant for execution of this request:

.....

.....

SECTION I: Formalities and procedures requested for the execution

1. Tick and complete, if applicable

- ☐ It is requested that the relevant / competent authority of the requested State comply with the following formalities and procedures (including any rights/ cautions/warnings that need to be communicated to the person):

.....

2. Tick and complete, if applicable

- ☐ It is requested that one or several officials of the requesting State is present during the execution of the request in support of the competent authorities of the requested State.

Name, job title and contact details of the officials:

.....

.....

Languages that may be used for communication, if different from language indicated in section J:

.....

.....

Nature of assistance to be provided by official(s) of requesting State, and/or any further relevant details:

.....

.....

3. Secure transmission of information and/or evidence

Please specify a secure electronic transmission route, if electronic transmission is accepted:

.....

.....

If electronic transmission is not accepted or would be inappropriate in this case, please advise the method of transmission requested:

.....

SECTION J: Details of the authority which issued the request

1. Name of authority which issued the request:
Name of representative/contact point:
Address:
Tel. No: (country code) (area/city code)
E-mail:
2. If different from the above, name of the authority conducting criminal investigation:
.....
Name and title of an official conducting criminal investigation:
.....
Address:
Tel. No: (country code) (area/city code)
E-mail:
3. Languages in which it is possible to communicate with the requesting authority:
.....
4. If different from above, the contact details of the person(s) to contact for additional information or to make practical arrangements for the transfer of evidence:
Name/Title/Organisation:
Address:
E-mail:
Contact Phone No:

SECTION K: Signature

By signing this form, I certify that:

- the content of the request as set out in this form is accurate and correct,
- this request has been issued by a competent authority,
- the issuing of this request is necessary for the purpose of the proceedings, and
- the investigative measures requested could have been ordered under the same conditions in a similar domestic case, and where applicable the necessary authorisation has been obtained.

Signature of the requesting authority and/or its representative:

Name:

Post held:

Date:

Official stamp (if available):

List of enclosures (if applicable):

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