

COMMISSION DECISION

of 13 February 2013

terminating the anti-dumping proceeding concerning imports of white phosphorus, also called elemental or yellow phosphorus, originating in the Republic of Kazakhstan

(2013/81/EU)

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ⁽¹⁾ ('the basic Regulation'), and in particular Article 7 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

1. INITIATION

- (1) On 17 December 2011, the European Commission ('the Commission') announced, by a notice published in the *Official Journal of the European Union* ⁽²⁾ ('notice of initiation'), the initiation of an anti-dumping proceeding with regard to imports into the Union of white phosphorus, also called elemental or yellow phosphorus, originating in the Republic of Kazakhstan ('Kazakhstan' or 'the country concerned').
- (2) The proceeding was initiated as a result of a complaint lodged on 7 November 2011 by Thermphos International BV ('the complainant') the only producer of white phosphorus in the Union representing therefore the total Union production. The complaint contained *prima facie* evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding.

2. PARTIES CONCERNED BY THE PROCEEDING

- (3) The Commission officially advised the complainant, the sole known exporting producer in the country concerned, the producer in the analogue country, importers, traders, users known to be concerned, and the representatives of Kazakhstan of the initiation of the proceeding. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation.
- (4) All interested parties who so requested and showed that there were particular reasons why they should be heard

were granted a hearing. All oral and written comments submitted by the interested parties were considered and taken into account where appropriate.

- (5) In order to allow the exporting producer in Kazakhstan known to be concerned to submit a claim for market economy treatment ('MET') or to request individual treatment ('IT'), the Commission sent a claim form to this exporting producer. In addition, the Commission sent a claim form to the authorities of Kazakhstan. The sole known exporting producer in Kazakhstan made itself known and requested MET.
- (6) The Commission sent a questionnaire to the known exporting producer in the country concerned and the complainant which provided the Commission with responses.
- (7) In view of the apparent large number of unrelated importers which were potentially concerned by this investigation, sampling was envisaged in the notice of initiation in accordance with Article 17 of the basic Regulation. In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, all unrelated importers were asked to make themselves known to the Commission and to provide information specified in the notice of initiation. Only seven companies provided the information specified in the notice of initiation. They indicated that they were importers/users of the product concerned. Given the low number of importers which made themselves known, it was considered that sampling would not be necessary. Subsequently, the Commission sent to these parties both a questionnaire for importers and a questionnaire for users. In addition, over 30 companies made themselves known as users to which the Commission sent a users' questionnaire. As a result, five companies filled in both questionnaires, one company the importers' questionnaire and seven companies the users' questionnaire. It should be noted that one user subsequently decided to withdraw its cooperation.
- (8) The Commission sought and verified all the information deemed necessary for a provisional determination of dumping, resulting injury and Union interest and carried out verifications at the premises of the following companies:

(a) Union producer

⁽¹⁾ OJ L 343, 22.12.2009, p. 51.

⁽²⁾ OJ C 369, 17.12.2011, p. 19.

Thermphos International BV, Vlissingen, The Netherlands

(b) Exporting producer in the country concerned
Kazhposphate LLC, Almaty, Republic of Kazakhstan

(c) Importer
Ciech SA, Warsaw, Poland

(d) User
Zakłady Chemiczne Alwernia SA, Alwernia, Poland

(e) Importers/Users
Fosfa akciová společnost, Breclav, Czech Republic
ICL-IP Bitterfeld GmbH, Bitterfeld, Germany
Italmatch Chemicals Spa, Genoa, Italy

3. INVESTIGATION PERIOD

- (9) The investigation of dumping and injury covered the period from 1 January 2011 to 31 December 2011 ('investigation period' or 'IP'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2008 to the end of the IP ('period considered').

4. NON-IMPOSITION OF PROVISIONAL MEASURES

- (10) It was considered that the imposition of provisional measures would not be appropriate, in particular in view of the need of a further analysis of certain aspects of causation and Union interest.
- (11) All interested parties received an information document containing the essential facts and considerations on the basis of which it was decided not to impose provisional measures ('information document'). Several interested parties made written submissions making known their views on the findings spelled out in the information document. The parties who so requested were granted the opportunity to be heard.

5. RIGHTS OF PARTIES AND CONFIDENTIALITY

- (12) As the Union industry is constituted of only one producer, sensitive data had to be indexed or given in a range for reasons of confidentiality. Furthermore, and for the same reasons, as there is only one exporting producer and limited number of importers in the Union market, all figures related to consumption, import volume from the country concerned and other countries as well as import prices had to be indexed. Similarly, as far as the users are concerned, in most cases actual data could not be provided because of their limited number.

B. PRODUCT CONCERNED AND LIKE PRODUCT

1. PRODUCT CONCERNED

- (13) The product concerned is white phosphorus, also called elemental or yellow phosphorus, originating in

Kazakhstan, currently falling within CN code ex 2804 70 00 ('white phosphorus' or 'the product concerned').

- (14) White phosphorus is a chemical element derived from phosphate rock and has a wide variety of applications. White phosphorus is used as a starting product for non-acid applications mainly for pharmaceuticals and agricultural chemicals, for the manufacture of phosphoric acid and its derivatives that are used for food and detergents, and for the manufacture of phosphor alloys that can be used in metallurgy. The investigation revealed that there is only one type of the product concerned.

2. LIKE PRODUCT

- (15) The investigation showed that white phosphorus produced and sold in the Union by the Union industry and the white phosphorus produced in the country concerned and exported to the Union had the same basic physical, chemical and technical characteristics and uses. Therefore, these products are provisionally considered to be alike within the meaning of Article 1(4) of the basic Regulation. In the light of the determination concerning market economy treatment as outlined below in recitals 14 to 17 and the fact that data of the analogue market producer was not used, no determination was made with respect of the like product produced and sold in the analogue market.

C. DUMPING

1. MARKET ECONOMY TREATMENT (MET)

- (16) Pursuant to Article 2(7)(b) of the basic Regulation, in anti-dumping investigations concerning imports originating in Kazakhstan, normal value shall be determined in accordance with paragraphs (1) to (6) of the said Article for the exporting producer that was found to meet the criteria laid down in Article 2(7)(c) of the basic Regulation. Briefly, and for ease of reference only, these criteria are set out in summarised form below:

Criterion 1 — Business decisions are made in response to market signals, without significant State interference, and costs reflect market values;

Criterion 2 — Firms have one clear set of independently audited accounting records;

Criterion 3 — No distortions are carried over from the non-market economy system;

Criterion 4 — Bankruptcy and property laws guarantee stability and legal certainty;

Criterion 5 — Exchange rate conversions are carried out at market rates.

- (17) The sole known exporting producer in Kazakhstan ('the exporting producer') requested MET and submitted a claim form. The information provided was verified by the Commission at the premises of the company in question.
- (18) Taking into consideration the verified evidence, it was concluded that the company met all requirements laid down in Article 2(7)(c) of the basic Regulation and could be granted MET.
- (19) The Commission disclosed the result of the MET findings to the exporting producer, the authorities of Kazakhstan and to the complainant and gave them the opportunity to provide comments.
- (20) The complainant alleged that there were links between the exporting producer and the Kazakh State and that the company failed to provide evidence of its ultimate shareholding. The investigation revealed, however, that the company was a 'Limited Liability Partnership' in accordance with the law of Kazakhstan and that its direct shareholders were two private companies. It was verified that the State did not hold any shares in the company, directly or indirectly. The investigation therefore confirmed that the company was fully privately owned. The claims of the complainant in this regard were therefore rejected.
- (21) It was also argued that the company had a joint venture with a State-owned/funded company which would provide for privileged access to State financing. Although the investigation confirmed the existence of a joint venture, it did not have any activity during the IP and covered sulphuric acid only, which is a distinct business sector from white phosphorus. The claims in this regard were therefore rejected.
- (22) The composition and functioning of the Executive and Supervisory Boards, the main decision-making organs within the company, were examined. As a result, the investigation did not reveal any State interference.
- (23) The complainant further claimed that the company's production costs were distorted and did not reflect normal market economy conditions, especially in relation to the costs of the mining of phosphate rocks, one of the major raw materials. The investigation revealed that the company sourced phosphate rock from affiliated mines in Kazakhstan benefitting from exclusive exploitation rights. These rights have been

purchased, evaluated at fair value and correctly accounted for. The company furthermore paid corporate income tax, mineral extraction tax as well as other associated costs at the same level as any other mineral developer in Kazakhstan. The financial commitment linked to these obligations were part of the company's total operating costs. On this basis, it was concluded that there was no significant State interference and that the costs linked to phosphate rocks were not distorted. The claims made by the complainant in this regard were therefore rejected.

- (24) The electricity, which represents a significant proportion of the total cost of manufacturing, is provided by unrelated suppliers. The investigation showed that the average electricity price was lower than the average price for other industrial users in Kazakhstan. However, the company is one of the biggest energy consumers in the country and such practice was not found to be against market economy principles. The complainant alleged that the company benefited from preferential transport cost for electricity when using the State owned transportation grids. This allegation was however not confirmed during the investigation. It was therefore concluded that there was no significant State interference with regard to electricity costs and the claims made by the complainant in this regard were rejected.
- (25) Other major raw materials are coke, phosphate fine coals, quartzite, electrodes, cake and silicate ore, which were all purchased from unrelated suppliers on the international market, mainly China and Russia, or locally sourced. The investigation did not reveal any State interference with regard to the purchase or pricing of these materials.
- (26) The complainant further alleged that although the relevant legal framework existed in Kazakhstan, labour and social rights for employees in Kazakhstan are in practice suppressed by the State which had an impact on the company's wages and labour cost. The investigation had shown that labour is hired and laid off freely by the company's management and subject to the legal minimum wage. It was found that all relevant Kazakh legislation was respected and that the company had individual labour contracts with each one of the employees. The investigation did therefore not reveal any State interference and the claims made by the complainant in this regard were rejected.
- (27) Finally, the complainant argued that, since there were no domestic sales of white phosphorus in Kazakhstan, sales restrictions on the domestic market were very likely. However, the company's business licence did not show any sales restriction, neither on the domestic nor on the export market. The lack of domestic sales was due to the fact that there is neither demand nor processing capacity in Kazakhstan for white phosphorus. The allegations of the complainant in this regard were therefore rejected.

- (28) The company had one set of basic accounting records yearly audited by independent audit firms in line with IFRS (International Financial Reporting Standards) and applied for all purposes.
- (29) The company's financial accounts revealed that it granted free loans, which were however fully repaid during the IP. Interest free loans between related or even unrelated companies as such are not against international accounting standards, but allowed under certain conditions such as the respect of the reporting requirement and their disclosure in the financial accounts. The investigation did not reveal any irregularities in this respect and all accounting requirements were fulfilled.
- (30) The company was found to be subject to the relevant bankruptcy and property laws, the application of which is designed to guarantee legal certainty and stability for the operation of firms. There were no indications that these laws would not be applicable and implemented for the company.
- (31) The investigation has not revealed any restrictions concerning the use and conversion of foreign currency. The company's foreign exchange transactions were conducted according to market rates and it was able to freely dispose of the usage of its own funds.
- (35) Following disclosure of the information document, the exporting producer claimed that in accordance with Article 2(5) of the basic Regulation costs should have been established on the basis of the records kept by the party under investigation. Since depreciation costs of the mining rights were only reflected in the accounts of the exporting producer's mother company, located outside Kazakhstan, and since the latter company would not be covered by the investigation, the determination of costs of the exporting producer should not have been based on information recorded in the accounts of this company.
- (36) It is recalled that since the phosphate rock mine is located in Kazakhstan and that the exporting producer was mining phosphate rock for the purpose of the production of white phosphorus, the costs recorded in the accounts of the exporting producer should indeed have included the depreciation cost of the mining rights. Therefore, in accordance with Article 2(5) of the basic Regulation, the records of the exporting producer did not reasonably reflect the costs associated with the production and sale of the product under investigation. It was therefore warranted to correct the reported costs accordingly.
- (37) The accounts of the mother company were consolidated accounts for the whole group, i.e. they also contained data of the activities of the exporting producer in Kazakhstan. The mining rights recorded related to the overall mining activities, including the one of exporting producer in relation to the production of white phosphorus. It was therefore considered justified to correct the reported cost of manufacturing on this basis.

2. NORMAL VALUE

- (32) As a result of the findings laid out above in recital 14 with regard to the company's claim for MET, normal value was established on the basis of Article 2(1) to (6) of the basic Regulation.
- (33) The company did not sell white phosphorus on the domestic market during the IP, nor were there other sellers or producers of white phosphorus in Kazakhstan. Normal value could therefore not be determined on the basis of the domestic sales prices in accordance with Article 2(1) of the basic Regulation. Consequently, normal value was constructed in accordance with Article 2(3) of the basic Regulation, on the basis of the costs of manufacturing of the product concerned by adding a reasonable amount for selling, general and administrative ('SG&A') costs and for profit.
- (34) The investigation revealed that the reported cost of manufacturing did not contain any depreciation costs of mining rights which had therefore to be added. In this regard the amount of the yearly depreciation of the mining rights related to the product concerned, evaluated on the basis of 'fair value' was considered as appropriate.
- (38) The exporting producer further argued that the depreciation cost recorded represented the total depreciation cost of all mining rights of the company group relating to the production of various products including white phosphorus. The amount for depreciation costs added to the reported manufacturing costs of white phosphorus should, however, only relate to the depreciation cost directly linked to the production of white phosphorus. This claim was accepted and the manufacturing cost corrected accordingly, by allocating the total depreciation costs to the activity related to the production of white phosphorus only.
- (39) The determination of SG&A and profit was based on the actual amounts incurred for production and sales on the domestic market of the same general category of products in accordance with Article 2(6)(b) of the basic Regulation since no other producers of white phosphorus were present on the Kazakh domestic market. In this regard, mainly chemical products such as fertilisers and other derivatives from white phosphorus were taken into consideration.

(40) Following the disclosure of the information document, the exporting producer claimed that the amounts taken into consideration for the determination of profits relating to 'other products' are not adequate. In particular, it was claimed that the production process of some of these products and the commercial terms when selling them were significantly different from those of white phosphorus and higher profit margins were therefore generated when selling these products. It was claimed that as far as the determination of the profit margin for the purpose of constructing normal value is concerned, the amounts for profits should be determined on the basis of Article 2(6)(c) of the basic Regulation, i.e. by any other reasonable method. In this regard, it was argued that the profit of white phosphorus realised on export sales to the Union or other third countries should be taken into account, or alternatively an average of these profit margins. Finally, it was argued that should none of the above be acceptable, the average profit margin of the mother company relating to the production and sales of all products during the IP should be taken into consideration.

(41) The information concerning different production processes for producing 'other products' as well as different commercial terms when selling them were provided at a very late stage of the investigation and was not accompanied by any supporting evidence. It was also not shown whether and to what extent these alleged differences had an impact on sales prices and consequently on the profit margins. Finally, the exporting producer did not show that any of the above suggested methodologies under the application of Article 2(6)(c) of the basic Regulation would indeed lead to more accurate results than the methodology based on Article 2(6)(b) of the basic Regulation. In particular, it was not explained in how far export sales would have comparable sales conditions to sales on the domestic market and would therefore constitute an appropriate proxy for sales on the domestic market. These claims had therefore to be rejected.

3. EXPORT PRICE

(42) All export sales to the Union were made directly to independent customers in the Union, and therefore the export price was based on the prices actually paid or payable for the product concerned in the IP in accordance with Article 2(8) of the basic Regulation.

(43) Following the disclosure of the information document, the exporting producer argued that the export price used was incorrect. It is noted that the determination of the export price was based on the verified information submitted by the exporting producer during the investigation and that there was therefore no basis to correct these figures. This claim had therefore to be rejected.

4. COMPARISON

(44) The constructed normal value and export price were compared on an ex-works basis.

(45) For the purpose of ensuring a fair comparison between the ex-works normal value and the export price, due allowance in the form of adjustment was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. Adjustments were made in respect of freight in the country concerned and in the Union, handling and ancillary costs, and credit costs in all cases where they were found to be reasonable, accurate and supported by verified evidence.

5. DUMPING MARGINS

(46) Pursuant to Article 2(11) of the basic Regulation, the dumping margin for the exporting producer in Kazakhstan was established on the basis of a comparison of the weighted average normal value with a weighted average export price.

(47) Considering that the level of cooperation was maximal as the only cooperating exporter producer represented 100 % of the export sales of the product concerned, the countrywide duty was set at the same level as the one for the cooperating exporter producer.

(48) On the basis of the above methodology, the dumping margin, expressed as a percentage of the CIF Union frontier price, duty unpaid, are the following:

Company	Dumping margin
Kazphosphate LLC	10,5 %
All other companies	10,5 %

D. INJURY

1. UNION PRODUCTION AND UNION INDUSTRY

(49) The complaint was lodged by Thermphos International BV ('the complainant'), the only producer of white phosphorus in the Union, representing the total Union production.

(50) The complainant therefore constitutes the Union industry within the meaning of Article 4(1) and Article 5(4) of the basic Regulation and will hereinafter be referred to as the 'Union industry'.

- (51) Subsequent to the disclosure of the information document, Thermphos International BV had to file bankruptcy and later the Breda District Court ordered liquidation of the company on 21 November 2012. As a consequence, the Union industry stopped its production of white phosphorus. In a press release issued by the Union industry, the latter indicated, however, that the remaining stocks of white phosphorus are sufficient to continue supplying their subsidiaries, manufacturing downstream products, for some months. Meanwhile, the Union industry has been implementing a supervised deactivation of their production plants of white phosphorus. In parallel negotiations are ongoing for a potential takeover with the perspective of possibly restarting the production of white phosphorus in the short term.
- (52) Several interested parties claimed that given the above development the investigation should be terminated forthwith on the grounds that the Union industry has ceased to exist. In reply to these claims, it is noted that the Union industry was producing white phosphorus during the entire IP and that, as long as the bankruptcy proceedings and the negotiations for a possible takeover were still ongoing, it is unclear whether the production of white phosphorus will indeed cease on a permanent basis or whether the production stop is only of a temporary character. Therefore, it is premature to conclude that the Union industry has ceased to exist. Consequently, the claims to terminate the proceeding on these grounds were rejected.
- ## 2. DETERMINATION OF THE RELEVANT UNION MARKET
- (53) The Union industry is vertically integrated and a substantial part of its own production went to captive use. Indeed, it was found that the sole Union producer used a considerable part of the white phosphorus production as a raw material for the manufacture of various downstream products used mainly in pharmaceutical, agricultural, food and chemicals sectors. This captive use did not enter the free market and did not enter into direct competition with imports of the product concerned. By contrast, production destined for the free market sales was found to be in direct competition with the imports of the product concerned.
- (54) Therefore, for the purpose of establishing whether the Union industry had suffered material injury, it was considered appropriate to distinguish between sales of the Union industry to the free market and those to the captive market for the analysis of certain injury indicators, wherever possible.
- (55) As regards profitability and cash flow the analysis focused at the level of the free market since prices in the captive market were not reflecting market prices which had an impact on those indicators. As regard return on investment, as it was not possible to distinguish between the investments made in respect of the product sold on the free market and that sold on the captive market, return on investment was assessed at the level of the total market. Consumption, sales volume, sales prices and market shares in the Union market were also analysed and evaluated in relation to the situation prevailing on the free market where transactions were made under normal market conditions implying free choice of supplier. The evolution of these indicators in the captive market was however also taken into account and compared to data for the free market in order to determine whether the situation of the captive market was likely to change the findings based on the analysis of the free market alone.
- (56) However, it was found that the following economic indicators related to the Union industry should be examined by referring to the total activity (including the captive use of the Union industry): production, production capacity, capacity utilisation, growth, investments, stocks, employment, productivity, wages, ability to raise capital and magnitude of the dumping margin. This is because those indicators can be affected by the dumped imports regardless of whether the product is transferred downstream within the company or the company group for further processing or whether it is sold on the free market. Hereinafter the captive and the free market together are referred to as 'total market'.
- (57) One interested party claimed that the analysis of the injury indicators should be based on the total market, as an analysis based on the free market only would not allow a reliable assessment of the situation, given the particular status of the Union industry, having shifted mainly to captive use and thus allegedly not being perceived as a genuine supplier of white phosphorus in the free market.
- (58) As mentioned above in recital 55, only for profitability and cash flow the analysis focused on the free market. This was due to the fact that prices in the captive market did not reflect market prices which had an impact on those indicators. Moreover, the investigation focused primarily on the free market because sales on the captive market did not compete with products sold on the free market including the dumped imports. The interested party did not explain why an analysis including the captive market would none the less be more meaningful. For all other indicators, where appropriate, the analysis focused on the activities in the total market on the one hand and separately on the free and captive market, on the other hand. Therefore, the activities of the Union industry in all markets was sufficiently taken into consideration where appropriate and this claim was rejected.

- (59) Moreover, the same interested party claimed that the Commission when examining the evolution of the injury indicators compared the situation at the end-points of the period considered rather than considering the precise trends throughout the whole period considered. It is indeed the Commission's practice to assess the injury indicators over the period considered and describe, where appropriate, possible fluctuations in the developments of injury indicators, if applicable. This has also been done in the present investigation. Therefore, this claim was rejected.

3. UNION CONSUMPTION

- (60) The Union consumption in the total market was established by adding the total import volume of white phosphorus from all sources based on Eurostat and the verified data provided by the exporting producer as well as the cooperating importers/users to the total sales volume of the Union industry on the Union market, as well as the production of Union industry destined for captive use. The consumption in the free market was established by subtracting the production of Union industry that was destined for captive use.
- (61) Some interested parties claimed that the CN code covered also imports of red phosphorus. The investigation showed, however, that no imports of red phosphorus were made from the country concerned over the period considered. In addition, limited evidence was forthcoming in relation to imports of red phosphorus from other third countries. This limited evidence, suggested that imports of red phosphorus, if any, were minimal.
- (62) The information document disclosed to the interested parties erroneously included imports of the Union industry from Kazakhstan in the captive use which was deducted accordingly in Table 1 below. This did not affect the trends in Union consumption in the free market.
- (63) On this basis, the Union consumption was found to have developed as follows:

Table 1

Consumption in the Union

Index 2008 = 100	2008	2009	2010	IP
Total market	100	74	96	103
Captive market	100	119	109	117
Free market	100	54	91	98

Source: Eurostat and information obtained from interested parties through the questionnaire responses.

- (64) In the period considered consumption in the total Union market increased by 3 %, while it increased in the captive

market by 17 %, with some fluctuations during the period considered, while consumption in the free market decreased by 2 % between 2008 and the IP.

4. IMPORTS FROM THE COUNTRY CONCERNED

4.1. Volume and market share

- (65) The evolution of imports from the country concerned, in volume and market share, was as follows:

Table 2

Imports from Kazakhstan

(Index 2008 = 100)	2008	2009	2010	IP
Import volumes from Kazakhstan	100	57	108	132
Market share in free market	100	107	120	136

Source: Eurostat and information obtained from interested parties through the questionnaire responses.

- (66) Over the period considered, imports to the Union from the country concerned increased by 32 %. This led to a market share increase in free market by 36 % during the same period. The market share of the cooperating exporting producer in the free market was very significant during the IP.
- (67) Several interested parties claimed that import volumes of the product concerned decreased considerably after the IP and that this development should be taken into account in the injury analysis. This allegation was unfounded as the information available has shown that imports after the IP remained in the same range as during the IP. Moreover, according to Article 6(1) of the basic Regulation, information relating to a period subsequent to the investigation period shall normally not be taken into account in the findings. As a result, this claim was rejected.

4.2. Prices of imports and price undercutting

- (68) Average prices of the imports from the country concerned in the free market developed as follows:

Table 3

Price of imports from Kazakhstan

(Index 2008 = 100)	2008	2009	2010	IP
Import prices	100	84	75	81

Source: Eurostat and information obtained from exporting producer through the questionnaire responses.

(69) While seeing a price increase in the IP as compared to 2010, the overall average imports price from the country concerned decreased by 19 % between 2008 and the IP.

(70) For the purpose of analysing price undercutting, a comparison of the average prices of the Union industry charged on the free market and average import prices from the country concerned was made. The relevant sales prices of the Union industry were adjusted where necessary to an ex-works level, i.e. excluding freight costs in the Union and after deduction of discounts and rebates. The import prices of the cooperating exporting producer, net of discounts, were adjusted where necessary to CIF Union frontier price duly adjusted for customs clearance costs and post-importation costs.

(71) The comparison showed that during the IP, imports of the product concerned from the exporting producer were sold in the Union at prices which undercut the Union industry's prices. The average level of undercutting, when expressed as a percentage of the Union industry's prices, was in the range of 30-40 %, based on the verified data submitted by the cooperating exporting producer. This level of undercutting was combined with a negative price development and a substantial price depression on the Union market.

5. ECONOMIC SITUATION OF THE UNION INDUSTRY

5.1. General

(72) Pursuant to Article 3(5) of the basic Regulation, the examination of the impact of dumped imports on the Union industry included an evaluation of all economic factors and indices relating to the state of the Union industry from 2008 to the end of the IP.

(73) Several interested parties claimed that the year 2008 was inappropriate as a reference point since it was an exceptionally successful year for the Union industry. Following the information document, some interested parties claimed that 2007 should have been used as the starting point for the examination of injury trends relevant for the assessment of injury. It should be noted that 2008 was a profitable year for the entire phosphate sector and not only for the Union industry. Additionally, the year 2009 was also exceptional due to the economic crisis and in 2007 the exporting producer in Kazakhstan and the Union industry were related, i.e. these years would not have been necessarily more appropriate as a starting point for the injury analysis. In any event, exceptional circumstances during the period considered are factored in the relevant parts of the causation analysis, if appropriate. These claims were therefore rejected.

5.1.1. Production, production capacity and capacity utilisation

(74) The table below shows the evolution of production, production capacity and capacity utilisation of the Union industry in the total market:

Table 4

Production, production capacity and capacity utilisation

(Index 2008 = 100)	2008	2009	2010	IP
Production	100	55	68	75
Production capacity	100	100	100	100
Capacity utilisation	100	55	68	75

Source: verified questionnaire reply.

(75) As shown in the table above, during the period considered, the Union production decreased by 25 %. While between 2008 and 2009, production decreased by 45 %, the situation improved after 2009 until the IP; however, production did not reach in the IP the levels of 2008. Given that the production capacity remained stable, the decrease in production led to significant decrease in capacity utilisation by 25 % between 2008 and the IP.

5.1.2. Sales volumes and market share

(76) The figures below present the sales volume and market share of the Union industry split between the total, captive and free market.

Table 5

Sales volumes and market share

(Index 2008 = 100)	2008	2009	2010	IP
Sales volume total market	100	84	83	83
Market share of Union industry total market (%)	100	114	86	80
Sales volume captive market	100	119	109	117
Market share of Union industry captive market (%)	100	100	100	100

(Index 2008 = 100)	2008	2009	2010	IP
Sales volume free market	100	37	47	36
Market share of Union industry free market (%)	100	69	52	37

Source: verified questionnaire reply.

- (77) Sales in the total market decreased by 17 % in the period considered. This drop was even steeper in the free market where it fell by 64 % between 2008 and the IP. The captive market followed the opposite trend and sales volume increased by 17 % in the same period. The drop in sales volume was reflected in market share that saw a 20 % decrease for the total market and 63 % decrease in the free market between 2008 and the IP. As the captive market is comprised of white phosphorus from the sole Union producer, the market share remained unchanged and in these circumstances is not a relevant indicator.

5.1.3. Growth

- (78) During the period considered it emerged that Union consumption decreased only slightly in the free market by 2 % while sales and market share of the Union industry decreased significantly, respectively by 64 % and by 63 % during the same period. The captive market followed the opposite trend and sales volume increased by 17 % in the same period. At the same time, imports from the Republic of Kazakhstan increased by 32 % over the period considered. As a consequence, the market share of the Union industry decreased significantly over the same period.

5.1.4. Employment, productivity and wages

- (79) The table below shows the evolution of employment, productivity and wages of the Union industry in the total market:

Table 6

Employment, productivity and wages

(Index 2008 = 100)	2008	2009	2010	IP
Number of employees	100	101	98	93
Total Productivity (MT/employee)	100	55	69	81
Yearly wages	100	95	103	106

Source: verified questionnaire reply.

- (80) Employment slightly decreased between 2008 and the IP, while wages slightly increased. During the period

considered the total productivity per employee decreased by 19 %. This followed the decrease in production, as explained in recitals 74 and 75 above.

5.1.5. Magnitude of the actual margin of dumping

- (81) The dumping margins as specified above in recital 48 were above the *de minimis* level. Furthermore, given the volumes and the prices of the dumped imports, the impact of the actual margins of dumping cannot be considered as negligible.

5.1.6. Stocks

- (82) The figures below represent the evolution of the stocks of the Union industry in the total market during the period considered:

Table 7

Stocks

(Index 2008 = 100)	2008	2009	2010	IP
Stocks	100	26	17	48

Source: verified questionnaire reply.

- (83) Stocks represented around 12 % of the production volume in the IP. Stocks decreased by 52 % over the period considered. However, this indicator is not to be considered as relevant in this sector, as it is based mainly on orders and, accordingly, producers tend to hold limited stocks. The decrease in stocks in the IP should be seen in light of the lower level of activity following the downsizing of the Union industry.

5.1.7. Sales prices

- (84) The following table represents the Union industry's price evolution split between the captive and the free market.

Table 8

Sales prices

(Index 2008 = 100)	2008	2009	2010	IP
Average unit selling price on captive market	100	90	67	78
Average unit selling price on free market	100	86	75	83

Source: verified questionnaire reply.

- (85) Sales prices fell in both markets, even if the decrease was sharper in the captive market (– 22 %) than in the free market (– 17 %).

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

Table 9

Profitability and cash flow

(Index 2008 = 100)	2008	2009	2010	IP
Profitability on free market	100	85	73	75
Cash flow on free market	100	56	54	52

Source: verified questionnaire reply.

- (86) Profitability for the like product on the free market was established by expressing the pre-tax net profit of the sales of the like product by the Union industry on the Union free market, as the percentage of the turnover of such sales.
- (87) The profitability on the free market decreased sharply and turned to losses over the period considered. Profitability was showing a decreasing trend between 2008 and the IP. Although slightly increasing during the IP compared to 2010, profitability remained negative.
- (88) Cash flow also followed a progressively negative trend between 2008 and the IP, decreasing by 48 % during the period considered.
- (89) The ability to raise capital was analysed in relation to the total market and it has been found that there is a constant deterioration of the ability of the Union industry to generate cash and consequently, a weakening of the financial situation of the Union industry.
- (90) Following the disclosure of the information document, one interested party claimed that profitability, cash flow should be examined at the level of the total market and not only at the level of the free market, as an assessment of the injury at the level of the free market only would not be complete, given the Union industry's specific situation where most of its sales are destined for captive use.
- (91) As mentioned above in recitals 55 and 58, it should be noted that as the prices in the captive market are merely transfer prices, an analysis at the level of the captive market would not have been meaningful for the purpose of the injury analysis, as it would not reflect prices of the free market where the competition with the imports from Kazakhstan took place. Moreover, the

effect of the Union industry's activities in the captive market has been factored in the relevant parts of the causality analysis, and more specifically in recitals from 135 to 136 below. Therefore this argument was rejected.

- (92) The figures below represent the evolution of investments of the Union industry in relation to the total market during the period considered:

Table 10

Investments and return on investment

(Index 2008 = 100)	2008	2009	2010	IP
Investments	100	98	79	69
Return on investment on total market	100	20	19	15

Source: verified questionnaire reply.

- (93) The table above demonstrates that the Union industry decreased its investments by 31 % in the like product. This was linked to the downsizing of the industry. The investments made were mainly linked to the need to comply with regulatory requirements as well as improving and maintaining production technology and process in order to improve efficiency.
- (94) The return on investments of white phosphorus also followed a negative trend between 2008 and the IP.

5.1.9. Conclusion on injury

- (95) The analysis of the situation of the Union industry showed a clear downward trend of all the main injury indicators. Against a relatively stable consumption on the free market, overall production fell by 25 % in the period considered. During the same period, the Union industry lost 20 % of the overall market share and 63 % of the free market. Capacity utilisation decreased by 25 %.
- (96) Over the period considered, the overall Union industry's sales volume decreased by 17 %. A stronger downward trend in sales volumes could be observed in the free market which saw a 64 % decrease over the period considered.
- (97) The decrease in sales volumes of Union industry was accompanied by a decrease in sales price by 17 %. The situation was similar in the captive market where prices decreased by 22 % during the period considered. The loss of sales volume along with the decrease in prices had an effect on profit levels and led to losses.

(98) Several interested parties claimed that Union industry was performing well after its recovery from the economic downturn in 2009. In specific, it was claimed that the evolution of certain injury indicators, namely the Union domestic and export sales volume and prices, cost of goods and investments but also production and capacity utilisation would not show material injury. These allegations were not confirmed by the results of the present investigation which has shown clear downward trends maybe not in all but in the main injury indicators even after 2009.

(99) Some parties claimed that there was a decreasing trend both in volume and market share of imports from the country concerned during the period considered and that the capacity of the Kazakh phosphorus industry was overestimated. Likewise, these allegations were not confirmed by the findings of the present investigation which showed a constant increase in volume and market share of imports from Kazakhstan. Likewise, production capacity of the exporting producer in Kazakhstan was determined on the basis of the verified data submitted by this company.

(100) In view of the above, the investigation confirmed that should dumped imports continue to enter the Union market, the losses of the Union industry would be likely to lead to the permanent discontinuation of any sizeable Union production of white phosphorus. This seems to be confirmed by the developments after the IP, i.e the Union industry has filed for bankruptcy and is under liquidation process.

(101) Due to the circumstances presented above, it was concluded that the Union industry suffered material injury within the meaning of Article 3(5) of the basic Regulation.

E. CAUSATION

1. INTRODUCTION

(102) In accordance with Article 3(6) and (7) of the basic Regulation it was examined whether the material injury suffered by the Union industry was caused by the dumped imports from the country concerned. Furthermore, known factors other than dumped imports, which might have injured the Union industry, were examined to ensure that any injury caused by those factors was not attributed to dumped imports.

2. EFFECT OF DUMPED IMPORTS

(103) The investigation showed that dumped imports from Kazakhstan increased dramatically over the period considered, increasing their market share in the free market by 36 %. There was a clear coincidence in time between the increase of dumped imports and the loss of market share of the Union industry. The investigation also established that the dumped imports continuously

undercut the prices of the Union industry. The prices of the dumped imports decreased by 19 % during the period considered and led to an increase of undercutting. Against this price pressure, the Union industry was not able to increase its prices. As a consequence, they were not able to cover the increase in costs as shown in below table. Moreover, the profitability of the Union industry's sales in the Union market decreased dramatically.

Table 11

Cost of production (Union industry)

(Index 2008 = 100)	2008	2009	2010	IP
Cost of production (euro/MT)	100	105	103	112

Source: verified questionnaire reply.

(104) Several interested parties claimed that imports from Kazakhstan merely followed the development in the consumption and did thus not influence the market situation of white phosphorus. However, neither the import figures nor the consumption figures determined during the investigation confirmed these claims, which on the contrary showed that, while consumption in the free market slightly decreased during the period considered, imports from Kazakhstan increased, i.e. followed an opposite trend during the same period. This increase in imports from Kazakhstan coincided with the deterioration of the Union industry. These claims were therefore rejected.

(105) Based on the above, it is concluded that the increase of the dumped imports from Kazakhstan at prices constantly undercutting those of the Union industry have had a determining role in the material injury suffered by the Union industry.

3. EFFECT OF OTHER FACTORS

3.1. Imports from other third countries

(106) The following table shows the developments of imports from other third countries.

Table 12

Imports and market shares from other third countries

(Index 2008 = 100)	2008	2009	2010	IP
Import Volume People's Republic of China	100	58	118	89

(Index 2008 = 100)	2008	2009	2010	IP
Average Unit price People's Republic of China	100	62	54	68
Import volume Socialist Republic of Vietnam	100	671	363	470
Average Unit price Socialist Republic of Vietnam	100	92	73	74
Market share of imports from the People's Republic of China in total market	100	96	150	102
Market share of imports from the Socialist Republic of Vietnam in total market	100	1 120	459	540

Source: Eurostat and information obtained from interested parties through the questionnaire responses.

(107) The market of white phosphorus is highly concentrated, since there are only few producers in the world. Information gathered during the investigation has shown that the People's Republic of China is the leading producer of white phosphorus. At the beginning of the period considered in 2008, the People's Republic of China introduced an export duty rate of 100 % on white phosphorus in addition to the then existing export duty rate applicable of 20 %. As a result, imports from the People's Republic of China dropped sharply and the import volumes remained low throughout the period considered, although the export duty rate decreased to 20 % in the IP.

(108) Imports from the Socialist Republic of Vietnam ('Vietnam') represented a relatively small import volume during the period considered.

(109) It should be noted that the average unit import prices from the People's Republic of China and Vietnam are in the same range as the average unit price of the Union industry.

(110) Following the disclosure of the information document, one interested party claimed that the price pressure on the Union market was caused by imports of white phosphorus from People's Republic of China. However, the

available data do not confirm this allegation as import volumes from People's Republic of China decreased between 2008 and the IP (with a peak in 2010) and import prices from the People's Republic of China were at approximately the same levels than the Union industry's sales prices throughout the whole period considered, or even higher. It can be further observed that the market share of imports of the People's Republic of China remained relatively stable between 2008 and the IP (with a peak in 2010), unlike the Kazakh's market share which increased constantly, by 36 % in total between 2008 and the IP. Therefore, this claim was rejected.

3.2. Development of the Union industry's cost of production

(111) Following the disclosure of the information document, the same party claimed that the increase in the unit cost of production of the Union industry should be recognised as a separate cause of injury. It was argued that while the price of the main raw material decreased overall, unit costs increased. The investigation showed that the main reason for the increase of Union industry's unit cost was in fact the loss of the economies of scale due to the decreased sales on the free market as a result of the dumped imports from Kazakhstan and the subsequent decrease of production volume. Therefore, the increase in unit costs cannot be considered as a separate cause of injury, but as a consequence of the dumped imports. Therefore, this claim was rejected.

3.3. Preferential agreement with exporting producer

(112) Some interested parties claimed that any injury suffered by the Union industry was caused by the end of the relationship between the Union industry and the cooperating exporting producer and the consequent loss of the preferential supply agreement, which meant that the Union industry had to face the competition of direct imports from the exporting producer. According to these parties, the preferential agreement compensated for the lack of direct access by the Union industry to the main raw material, phosphate rock.

(113) Other parties argued that given the end of the preferential agreement, alleged past investments of the Union industry in the former related company contributed to the injury suffered, because the end of the preferential agreement did not allow the Union industry to benefit from these investments.

(114) Indeed, the investigation showed that between 2003 and 2007 the Union industry and the cooperating exporting producer were owned by the same shareholder and after that a preferential sales agreement continued to exist between the two parties until 2008.

(115) The parties concerned did not provide any supporting evidence showing the level of any alleged investments of the Union industry in the activities of the exporting producer in Kazakhstan. The investigation did, furthermore, not reveal any direct link between any possible past investments of the Union industry and the material injury suffered during the IP. Indeed, the information available did not show to what extent the alleged investments could have contributed to the current situation of the Union industry, if they contributed at all. Therefore, this claim was rejected as unfounded.

(116) As to the loss of the common ownership, this cannot be considered as a factor which as such is causing injury. Indeed, the loss of the common ownership merely meant that the exporting producer in Kazakhstan could export the product concerned directly to independent customers in the European Union. It did not mean however that such exports should be made at injurious dumping prices. It is the latter that are causing injury to the Union industry.

3.4. Access to the main raw material

(117) Several interested parties claimed that the material injury suffered by the Union industry was linked to a lack of competitiveness in terms of costs, as it had no direct access to phosphate rock, one of the main raw materials to produce white phosphorus, while the cooperating exporting producer in Kazakhstan is located next to phosphate rock mines and enjoys exclusive exploitation rights. It has been argued that transport costs of phosphate rocks and costs for the disposal of sludge (waste in the white phosphorus production) are significant since there are no natural storages for sludge available.

(118) While the investigation showed that the cost of phosphate rock is indeed significant, this factor alone could not explain the injurious situation of the Union industry. Indeed, even if the cost difference of phosphate rock between the Union industry and the cooperating exporting producer is taken into account in assessing the injury suffered by the Union industry, injury would still remain significant.

(119) The investigation showed that while the transport cost for phosphate rock is significant for the Union industry, it is not so as to render the production in the Union of white phosphorus uncompetitive as such. Even taking into account the transport costs of phosphate rock in the cost of production of the Union industry, the injury margin would still remain substantial.

(120) Regarding the claim of the lack of natural storage of sludge, the investigation confirms that no evidence was found that this generated a disadvantage to the Union industry, as it was able to recycle sludge by bringing it back into the production process of white phosphorus.

(121) In summary, the investigation showed that even if the cost advantage of the cooperating exporting producer was to be taken into account, this would not explain the injurious situation of the Union industry and that therefore the cost difference in sourcing phosphate rock could only have had a partial impact on the injurious situation of the Union industry. This finding was supported by the fact that significantly better profitability figures were recorded for derivatives products manufactured by the Union industry that incorporate white phosphorus.

(122) On these grounds, it was concluded that the access to the raw material and its impact on costs although contributing to some extent to the injurious situation of the Union industry was not such as to break the causal link established between the dumped imports from Kazakhstan and the material injury suffered by the Union industry.

3.5. Production achievements of the Union industry and imports by the Union industry of the product concerned

(123) Several interested parties claimed that according to the annual report of 2010 the Union industry faced severe technical problems in 2010 and in the first half of 2011 and that these problems had an adverse effect on its production levels which led it to import the product concerned from Kazakhstan. They also argued that any injury suffered was also the result of these imports and was therefore self-inflicted. The investigation showed that the technical problems that the Union industry faced in 2010 and in the first half of 2011 did not significantly affect its situation, as it led neither to a stop in production, nor to a situation where it could not meet demands of supply from clients in the free market for white phosphorus, from its own production. Furthermore, it was found that the Union industry imported from Kazakhstan and that those imports were complementary in nature and exceptional as well as limited in terms of volume when compared to the total Union production. Moreover, the investigation found no evidence that the Union industry sold any of the imports in the free market. Furthermore, it should be noted that the director's report of 2010 was attached to the consolidated annual accounts of the Union industry for the whole activities of the company and did not only therefore relate to the white phosphorus production.

(124) On these grounds, it was found that the impact of the technical difficulties faced by the Union industry during part of the period considered and the limited imports of the product concerned, did not have a significant impact, if any at all, on the situation of the Union industry with regard to white phosphorus destined for the free market and was not such as to break the causal link. The arguments raised by the interested parties in this regard were rejected.

3.6. New production process of the Union industry

- (125) Some interested parties claimed that the Union industry invested significant amounts in new production technologies resulting in technical difficulties and environmental problems which caused the material injury suffered by the Union industry.
- (126) The investigation confirmed that the Union industry invested in the development of a new production process substituting phosphate rock by phosphate extracted from waste streams. However, as mentioned in recital 92, in Table 10 above, the investigation has also shown that the investments regarding white phosphorus decreased over the period considered. The investments in new technology could thus not have played a significant part in the deterioration of the situation of the Union industry. Furthermore, the investigation did not reveal any evidence that the new technologies resulted in technical difficulties and environmental problems, as claimed, and the interested parties concerned did not support their allegations with any factual data. The arguments of the parties in this respect were therefore rejected.

3.7. Export performance of the Union industry

- (127) Some interested parties claimed that the Union industry's export sales have dropped significantly during the period considered and that this has caused the material injury suffered by the Union industry.
- (128) The investigation showed that exports sales accounted for a small percentage of the total Union industry's production and could only have had a very limited impact on the overall situation of the Union industry.
- (129) On these grounds, it was found that the impact of the Union industry's export performance was not such as to break the causal link between the dumped imports and the material injury suffered by the Union industry. Therefore, the parties' arguments in this respect had to be rejected.

3.8. Impact of the financial and economic crisis

- (130) One interested party claimed that any injury caused to Union industry is due to the economic crisis and the contraction of demand in the Union.

- (131) The present investigation, as mentioned in recitals above, showed that the decrease of Union consumption on the free market was only 2 % during the period considered. Therefore, the impact of the economic crisis in terms of a decrease in consumption could not have been an important factor in the steep decrease in sales volume as shown in recitals 76 et seq. In terms of prices, the market saw a drop between 2008 and 2010, but the depression of sales prices suffered by the Union industry continued and even increased after 2009 in an attempt to follow the low prices of the dumped imports from Kazakhstan. The claim was therefore rejected.
- (132) On these grounds, it was found that the overall impact of the financial and economic crisis and contraction in demand was not such as to break the causal link established between the material injury suffered by the Union industry and the dumped imports.

3.9. Customer choice of suppliers

- (133) It was claimed that the injury suffered by Union industry was caused by the customers' choice to change supplier due to, inter alia, the alleged non-compliance with environmental and safety issues. No evidence was however provided and the investigation did not bring into light any factual circumstances confirming these allegations. To the contrary, the investigation showed that the market is mainly price driven and other considerations do not play any decisive role.
- (134) On these grounds, these claims were rejected.

3.10. Impact of the sales in the captive market

- (135) Following the disclosure of the information document, one interested party claimed that since the Union industry has shifted its main focus to the captive market, its resources and cash are mainly destined to the activities in this market. It was therefore alleged that the losses suffered in the free market and the injury stemming therefrom were a consequence of this situation rather than the dumped imports.
- (136) The investigation did not support the above allegations as for example investments were declining in both markets and no evidence was found that a transfer of cash or other resources from the free to the captive market occurred during the period considered. This claim had therefore to be rejected.

3.11. Compliance with environmental standards

- (137) It was claimed that the material injury was caused by the Union industry's legal obligations to comply with the strict EU environmental standards. Moreover, following the disclosure of the information document, some parties claimed that the impact of the non-compliance with environmental requirements should also be investigated, i.e. the impact of allegedly significant fines that the Union industry was obliged to pay to the Dutch authorities during the period considered.
- (138) The investigation showed that Union industry made investments in order to comply with environmental standards and reduce the emissions of dioxin throughout the entire period considered. However, as showed in Table 10, the overall investments were decreasing over the period considered. Moreover, it was found that these investments were depreciated over a number of years and had as a result only minor impact on the yearly financial results. It should be noted that while in 2008 the investments were substantially higher than in the IP, the Union industry was profitable that year. The negative injury picture of the Union industry could therefore not be attributed to the investments made in compliance with environmental standards.
- (139) As far as the alleged fines for non-compliance with environmental requirements are concerned, the investigation revealed that although the Union industry was indeed fined in one specific case by the Dutch authorities, the amount of this fine was not significant as alleged by the parties concerned and the payment was due only after the IP, which therefore, could in any event not have had an impact on the injurious situation of the Union industry during the IP.
- (140) In the light of the above, the claims in this regard were rejected.

3.12. Management decisions in 2009

- (141) Following the disclosure of the information document, it was claimed that the material injury suffered by the Union industry was caused by a management decision in 2009 to distribute dividends to shareholders which would have led to the alleged requirement by the banks to repay long term debts which in turn had a significant negative impact of the financial strength of the Union industry.
- (142) These allegations were based on information contained in the 2009 consolidated annual accounts of the Union

industry's holding company which do not relate to the phosphorus activities only. Furthermore, the conclusions drawn by the interested parties concerned were based on assumptions not necessarily reflecting an objective assessment of the situation in 2009. The investigation has not revealed that the management decisions taken in 2009 were unusual or imprudent as the same accounts show for example that the retained earnings of the company were high during the same period, despite the overall difficult market situation. It can therefore not be concluded that the decisions taken at that time had a significant negative impact on the financial strength of the company, as alleged by these parties, and furthermore an impact on the injurious situation of the Union industry in relation to its activities related to white phosphorus during the IP. On these grounds, these claims were rejected.

3.13. Conclusion on causation

- (143) The investigation has revealed a causal link between the injury suffered by the Union industry and the dumped imports from Kazakhstan. Other possible causes of injury, such as imports from other countries, developments of the Union industry's cost of production, production achievements, new production process, export performance of the Union industry, imports by the Union industry, impact of financial and economic crisis, customer choice of suppliers, impact of the sales in the captive market, compliance with environmental standards and management decisions were analysed and none of them was found to be such as to break the causal link established between the dumped imports from Kazakhstan and the material injury suffered by the Union industry. Nevertheless, the investigation has shown that although some of the other factors, i.e. the access to the main raw material, have contributed to some extent to the injurious situation of the Union industry, the imports from Kazakhstan still had a material impact on the injury suffered by the Union industry. As already mentioned above, they could therefore not break the causal link between these imports and the material injury suffered by the Union industry.
- (144) Several interested parties claimed that the fact the the Union industry filed bankruptcy even though only a limited amount of sales is in competition with the imports from Kazakhstan, confirms that those imports could not have been the cause of the material injury suffered by the Union industry. However, all possible other factors were analysed and as described above in recitals 106 to 142, none of these factors could break the causal link between the dumped imports and the injury suffered by the Union industry. It should also be noted that as the Union industry is vertically integrated and that therefore the price pressure from the dumped imports had also a detrimental effect in the Union industry's derivatives market. Therefore, this claim was rejected.

- (145) Based on the above analysis, which has properly distinguished and separated the effects of all known factors on the situation of the Union industry from the injurious effects of the dumped imports, it was therefore definitively concluded that there was a causal link between the dumped imports from Kazakhstan and the material injury suffered by the Union industry during the IP.

F. UNION INTEREST

1. PRELIMINARY REMARK

- (146) In accordance with Article 21 of the basic Regulation, it was examined whether, despite the conclusion on injurious dumping, compelling reasons existed for concluding that it was not in the Union interest to adopt anti-dumping measures in this particular case. The analysis of the Union interest was based on an appreciation of all the various interests involved in this proceeding, including those of the Union industry and users of the product concerned. The consequences of not taking measures were also considered on the basis of the evidence submitted.

2. INTEREST OF THE UNION INDUSTRY

- (147) The above analysis showed that the Union industry suffered material injury caused by the dumped imports from Kazakhstan which significantly undercut its prices on the Union market. The majority of the injury indicators showed a negative trend during the period considered. The Union industry lost significant market share and injury indicators relating to the financial performance of the Union industry, such as cash flow, return on investments and profitability, were seriously affected. After the IP, the downward trend continued and led the Union industry to file for bankruptcy. Negotiations are ongoing for a potential takeover aiming at resuming production in the short term.

- (148) White phosphorus is an important raw material worldwide used in numerous applications such as pharmaceuticals and agricultural chemicals, manufacture of phosphoric acid and its derivatives that are used for food and detergents, and manufacture of phosphor alloys that can be used in metallurgy. Given that white phosphorus is produced by a limited number of producers in other third countries and that it is a raw material for many downstream products produced in the Union, it was therefore considered that it is in the Union interest to have production capacity within the Union.

- (149) It is expected that the imposition of anti-dumping duties will redress the unfair trade practice found and allow the Union industry to improve its prospects for viability. Moreover, the imposition of measures would enable the Union industry to improve economies of scale by selling increased volumes and regaining at least part of the market share lost during the period considered, with a positive impact on its prospects. In this respect, it should be recalled that the Union industry has been producing and selling white phosphorus since the 1970s, despite having faced competition from third country imports that also had natural advantages in terms of access to raw material. Several interested parties claimed that the Union industry cannot be considered as a valuable supplier, given its current situation (bankruptcy) and given that, in any event, the Union industry acts as a competitor to its customers of white phosphorus in the derivatives market. In reply to this claim, it should be noted that the current situation of the Union industry does not necessarily imply a permanent production stop as negotiations for a takeover aiming at resuming production of white phosphorus are still ongoing. Moreover, the investigation established that the Union industry depends on sales in the free market in order to improve its economies of scale and stay viable. For all these reasons it was concluded that the Union industry can be a valuable supplier of white phosphorus to the Union's free market.

- (150) In addition, the Union industry has sought to develop alternative raw material sources and made some investments in a new technology, the so-called 'cradle-to-cradle-approach' to recycle white phosphorus. While this method is still in its formative stages, it could be one important element in ensuring the Union industry's viability in the long term. If successful this would allow the Union industry to benefit from a new secondary raw material source within the Union market and to reduce possible over-dependence on imports of phosphate rocks.

- (151) Following the disclosure of the information document, several interested parties questioned the relevance of the development of new technology in the Union interest analysis. These parties questioned the disappearance of the Union industry should anti-dumping measures not be imposed and argued that therefore investments in this technology would likely continue. They also claimed that the cradle-to-cradle initiative is not unique and several other companies in the Union are investing in alternative recycling technologies for phosphate which are allegedly economically more viable. Finally, it was alleged that the cradle-to-cradle technology would mainly serve the Union industry's captive market and therefore users would not benefit therefrom.

- (152) It should be noted that the developments after the IP (bankruptcy) does not seem to support the above allegations. It should be noted further that the cradle-to-cradle approach even if not unique, remains an important element to reduce the Union's dependency on imports of primary raw material and indirectly of imports of white phosphorus from third countries, to the benefit of all users, if successful. There is finally no evidence in the file from which it could have been concluded that the cradle-to-cradle approach would be economically not feasible.
- (153) On the other hand, should measures not be imposed, the viability prospects of the Union industry in the free market would become much more challenging and it would very likely be forced to close down production permanently. The likely consequence would be the discontinuation of the Union industry's production for the free market. This would entail that the Union would become entirely dependent on third country imports from a limited number of producers of white phosphorus, which is the basis for numerous downstream applications produced in the Union.
- (154) The effect of the dumped imports on the captive market of the Union industry was also considered. The investigation indicated that the imposition of measures would redress the competitive disadvantage caused by the dumped imports in the downstream market.
- (155) On the other hand, if no measures were imposed and the Union industry had to cease production permanently, the Union industry is expected to face difficulties in respect of procuring the large amount of white phosphorus needed for the production of its downstream products. Several interested parties claimed that the analysis of the interest for the Union industry should only relate to the sales in the free market. In reply to this claim it should be noted that as described in recital 53 the Union industry is vertically integrated and a substantial part of its production is indeed used in its own captive use. However, the proportion of the sales in free and captive use is not a stable parameter and the recent developments have proven that the captive use may not be sustained by itself without the free sales of white phosphorus.
- (156) In view of the above considerations, it was concluded that the imposition of anti-dumping measures on imports of the product concerned originating in Kazakhstan would be in the interest of the Union industry.
- (158) Eleven companies classified themselves as users and filled in questionnaires. These companies accounted for the vast majority of the imports of the product concerned during the IP and for a significant percentage of total Union consumption. These users represented almost the complete range of downstream products. Therefore, they constitute a representative group upon which the impact of measures imposed on imports of the product concerned could be assessed in relation to their business of finished products incorporating the product concerned.
- (159) The remaining companies were users either directly using the product concerned or using downstream products in which the product concerned is an important component. As users are mainly producing commodity or intermediate products using the product concerned that is then further transformed into finished downstream products by other users, it was considered appropriate to give all companies which made themselves known the opportunity to present their views and submit information, even if they were not direct users.

3.2. Impact on users

3.2.1. General

- (160) Essentially, the users of the product concerned can be divided into two segments: acid derivatives (notably the production of phosphoric acid) and non-acid derivatives (such as phosphorus pentasulfide, phosphorus trichloride, red phosphorus, flame retardants). In addition the downstream users were also considered.

3.2.2. Acid derivatives segment

- (161) The acid derivatives segment deals mainly with the production of thermal phosphoric acid and its derivatives in food additives. The share of the product concerned in the finished products of this segment is high in relation to overall turnover. In addition, the cost of the product concerned in relation to the cost of the finished products was found to be significant. This is due to the fact that the production process of these users requires limited additional input apart from the main raw material, which is white phosphorus.
- (162) Considering the above, it could be expected that the imposition of measures would have a substantial impact on the users in this segment. Although the investigation has shown that users in this segment enjoyed high level profits during the IP, their profitability varied considerably between 2008 and the IP, reaching much lower levels in years prior to the IP. Furthermore, it was claimed that any duty cannot be passed on to their customers. In view of the above, it is expected that an anti-dumping duty could indeed have a significant effect on the profitability of users in the acid derivative segment which could turn even into losses and ultimately threaten their existence.

3. INTEREST OF USERS

3.1. General

- (157) Following the notice of initiation, over thirty parties made themselves known and declared their interest in the proceeding. The investigation revealed that the parties who made themselves known were mainly users; some of them importing the product concerned themselves.

(163) Following the disclosure of the information document, one user claimed that the product produced by the Union industry is of a higher purity than the product normally used in the acid derivatives segment. The product concerned imported from Kazakhstan was of a lesser purity and more apt for the use in the acid derivatives segment. Therefore, the Union industry was not considered as an alternative supplier in this segment.

(164) This argument was only put forward at a very late stage of the proceeding. The party concerned did not support the above allegations with any evidence. Furthermore, they did not contest that, as concluded above in recitals 13 to 17, white phosphorus produced and sold in the Union by the Union industry and the white phosphorus produced in the country concerned and exported to the Union had the same basic physical, chemical and technical characteristics and uses. Therefore, this argument was rejected.

3.2.3. Non-acid derivatives segment

(165) The non-acid derivatives segment deals with a wider range of products varying in applications such as flame retardants, water treatment, automotive lubricant additives, pharmaceuticals and agricultural chemicals. The cost of the product concerned in relation to the total cost of the finished product varies considerably between those users depending on the downstream product manufactured.

(166) After the disclosure of the information document, some users provided a more detailed breakdown of their costs and in particular the cost of the product concerned in their overall costs. The figures provided in the questionnaire were reported on an aggregated basis and showed that white phosphorus represented from under 5 % to approximately 30 % of the cost of the finished products. However, the information provided after disclosure indicated that for some specific product types these costs could be considerably higher.

(167) Users in this segment had a larger variety of suppliers and were not exclusively sourcing white phosphorus from Kazakhstan.

(168) Users in this segment also produced a more varied range of products and the importance of finished products incorporating white phosphorus in the overall business varied therefore between below 5 % and over 75 %. The profitability of the finished product incorporating white phosphorus varied and reached up to over 10 %. It is generally observed that for the companies where the profit levels were lower the importance of the products incorporating white phosphorus in relation to the total

turnover of the overall business was also low. It follows that in such cases the impact of the imposition of measures was expected to be limited, though not negligible assuming that users in this segment would not be able to pass any price increase on to their downstream customers and that Kazakhstan will be their sole supplier.

3.2.4. Downstream users

(169) The impact of the duty on the downstream users will be further diluted as it only has a marginal impact on the cost of production. The investigation has also shown that cooperating downstream users had profit margins up to over 15 %. Furthermore, given that the direct users have claimed that they will not be able to pass on any price increase to their downstream customers, it is uncertain whether there will be an impact at all.

(170) Following the disclosure of the information document, one downstream user claimed that, in contrast to the conclusions in recital 169 above, the imposition of anti-dumping duties would effect them as their suppliers would pass on the cost increase to them. However, this company did not provide any data which could have confirmed this allegation and therefore this claim was rejected.

(171) On this basis, it was concluded that anti-dumping duties would only have a very limited impact, if any at all, on the profitability of downstream users.

3.2.5. Competition in the derivatives market

(172) A number of users claimed that should measures be imposed, they would lose competitiveness with regard to imports of derivatives from the People's Republic of China. However, no concrete evidence was provided in this regard.

(173) In this respect, it is noted that an anti-dumping duty aims to restore the level playing field in the white phosphorus market in the Union. No supporting evidence was available that imports of white phosphorus derivatives from the People's Republic of China had increased considerably over the past years or would increase in the near future. In addition, there was no evidence in the file to which conditions such imports would be made or at which price levels. On this basis, this argument was rejected.

3.2.6. Employment

(174) Certain interested parties claimed that the number of workers employed in the user industry as a whole outweighs that of the Union industry and that therefore the imposition of anti-dumping measures would be against the overall Union interest.

- (175) It is noted that the Union interest analysis is not limited to a simple comparison of the number of employees of the Union industry on the one hand and the users industry on the other hand. Therefore, the fact that users have a higher number of employment on its own is not sufficient to conclude that measures would be against the overall Union industry. Rather, the impact of the imposition or non-imposition of measures on the business activities and profitability of the users concerned on the one hand and the Union industry on the other hand is investigated. Therefore, this argument was rejected.

3.2.7. Conclusion

- (176) The above analysis has shown that the imposition of measures would affect users in both segments, however to a lesser extent in the non-acid derivatives segment. In particular, white phosphorus constitutes a major part of the production cost of the acid derivatives segment and therefore any duty would have a significant effect on their costs and profitability. The investigation has also shown that the existence of the users in this segment would be at stake should measures be imposed.

4. THE EUROPEAN UNION'S RAW MATERIAL INITIATIVE

- (177) Certain interested parties claimed that the imposition of measures would be in contradiction to the European Union's 'raw materials initiative' ⁽¹⁾ put in place to promote amongst others the sustainable supply of raw materials as well as resource efficiency. The raw materials initiative is, however, not a bar to the imposition of anti-dumping measures that aim at restoring a level playing field and thus addresses unfair competition caused by dumping practices.
- (178) In any event, it would appear that in a market which is characterised by few producers worldwide, maintaining the existence of Union production of an important raw material would be fully in line with the objective to ensure sustainable supply of raw materials to the Union market.

5. COMPETITION ISSUES

- (179) Certain interested parties claimed that the imposition of measures would lead to the abuse of a dominant position by the Union industry since the Union market would be closed to supply from other sources. This claim was supported by the allegation that in the past the Union industry had used the introduction of the Chinese export restrictions to raise their prices in the Union market. No factual evidence of abuse of dominant position was, however, provided.
- (180) From recital above, it is recalled that the Union industry's market share decreased considerably over the period

considered. On the contrary, the market share of the exporting producer in the free market increased substantially which is currently by far the largest supplier in the Union market.

- (181) Furthermore, the undercutting levels calculated in this investigation (71) were higher than the level of dumping found, (recital 48 above) which indicated that even with the imposition of anti-dumping measures, by applying the lesser duty rule, the price levels of the imports from Kazakhstan are likely to remain below the sales prices of the Union industry. It is therefore not likely that imports would cease as a consequence of the measures.
- (182) It is also recalled that white phosphorus from the People's Republic of China and Vietnam was imported into the Union market throughout the period considered, despite the export restrictions in place in the People's Republic of China, and will likely continue.
- (183) Following the disclosure of the information document, several interested parties claimed that the imposition of duties would increase the cost of the users while the Union industry in the derivatives market (captive use) would not be affected to the same extent by the duty. This would create a competitive advantage for the Union industry in the derivatives market and likely, lead to a dominant position of the Union industry in the downstream market. However, as it was already described above in recital 181, the undercutting levels calculated in this investigation were higher than the level of dumping found, which indicated that even with the imposition of anti-dumping measures, by applying the lesser duty rule, the price levels of the imports from Kazakhstan are likely to remain below the sales prices of the Union industry in free and captive market. As a result, the claim that the imposition of measures would lead to the abuse of a dominant position by the Union industry in the derivatives market, has to be rejected.

- (184) Given the above considerations, it could therefore be concluded that the imposition of anti-dumping measures would not have a distorting effect on the Union market.

6. TRADE BALANCE BETWEEN KAZAKHSTAN AND THE UNION

- (185) The cooperating exporting producer claimed to be a major importer of equipment and machinery for the production of the product concerned from the Union. In this regard, it was argued that if anti-dumping measures were imposed, this would affect the trade balance between the Union and Kazakhstan as the cooperating exporting producer would stop importing such equipment from the Union.

⁽¹⁾ COM(2008) 699 final.

- (186) The object of imposing trade defence measures is to redress unfair trade practices and has no relation with the purchase of machinery and equipment for the manufacturing of the product concerned. This argument must therefore be considered irrelevant in the context of this anti-dumping investigation.

7. GENERALISED SCHEME OF PREFERENCES

- (187) Following the disclosure of the information document, several interested parties claimed that the impact on users will be further enhanced as the imports of the product concerned, in addition to a possible anti-dumping duty, will also be subject to the normal custom duty as from 1 January 2014.
- (188) It is noted that indeed, under the new Generalised Scheme of Preferences of the European Union (GSP) which is expected to enter into force on 1 January 2014, Kazakhstan will no longer be listed as a beneficiary country. Therefore, as of 1 January 2014, and until that situation persists, imports of Kazakhstan of white phosphorus will be subject to the normal duty rate of 5,5 %.
- (189) However, future developments cannot be taken into consideration in the analysis as their precise impact on import prices and quantities and the effect of such developments on the Union market cannot be evaluated a priori. Therefore, no firm conclusions can be drawn on this basis. Thus, this claim was rejected.

8. CONCLUSION ON UNION INTEREST

- (190) Should measures not be imposed, there is a strong likelihood that production of white phosphorus within the Union and the production of derivatives by the Union industry will not resume. On the other hand, as also claimed by some interested parties, the imposition of measures may not provide sufficient relief to the Union industry, as imports from Kazakhstan, even when subject to duties, would remain more competitive in terms of prices than the Union industry sales and would therefore not guarantee that the Union industry could overcome its current fragile situation.
- (191) In contrast, it was found that users in the acid derivatives segment would be severely affected by the measures, and in some cases even their viability might be at stake, as they could not absorb the cost increase and continue to be competitive in the downstream market. This might lead to the closure of downstream producers in this segment
- (192) Moreover, while the investigation found that the impact of measures in the non-acid derivatives segment was expected to be overall less pronounced compared to the acid derivatives segment, some specific users in this segment might be more significantly affected depending on the specific downstream product produced by them. Overall, the impact of the duty in this segment could not be regarded as negligible.

- (193) It should be noted that the cooperating users providing the necessary information in this proceeding, represented almost the totality of imports from the country concerned and a very high proportion of the consumption of white phosphorus in the free market. They were strongly against the imposition of any anti-dumping duties because of the impact on their costs which they showed could not or could not fully be reflected in their selling prices and which would therefore lead to a downward trend of their economic and financial situation with possible closures of production.

- (194) This is mainly due to the fact that white phosphorus is a resource which is, for almost all the users that came forward, regarded as a highly important raw material in their production process, representing a considerable part of their total production cost as mentioned above in recitals 161 and 166. Any anti-dumping duty has therefore a direct and important impact on their costs, while costs increases cannot be passed on to the downstream industries.

- (195) As mentioned above in recital 190, the benefit to the Union industry of the imposition of an anti-dumping duty remains questionable. This is due to the currently transitional situation of the Union industry and the uncertainty of its future development as well as the fact that import prices from Kazakhstan may very likely remain significantly below the Union industry's sales prices even if anti-dumping measures will be imposed. Under these circumstances, it was considered that the likely negative effect of any anti-dumping duty on the downstream industries outweighs the expected positive effects of the duty on the Union industry.

- (196) On the basis of the above, on balance, it was concluded that the negative impact of measures on the users is more significant than the overall benefit to the Union industry. Therefore, in this case, it is considered that despite the conclusions on injurious dumping, it can be clearly concluded that it is not in the Union interest to adopt anti-dumping measures.

G. PROPOSAL FOR TERMINATION OF THE PROCEEDING

- (197) In view of the conclusions reached above with regard to dumping, injury, causation and Union interest, in accordance with Article 9 and Article 21 of the basic Regulation, the proceeding should be terminated without the imposition of measures.
- (198) All parties concerned were informed of the final findings and the intention to terminate the proceeding and were given the opportunity to comment. Their comments were considered but they have not altered the conclusions reached above,

HAS ADOPTED THIS DECISION:

Article 1

The anti-dumping proceeding concerning imports of white phosphorus, also called elemental or yellow phosphorus originating in the Republic of Kazakhstan is hereby terminated.

Article 2

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

Done at Brussels, 13 February 2013.

For the Commission

The President

José Manuel BARROSO
