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[1] Text with EEA relevance.

II

(Non-legislative acts)

REGULATIONS

COUNCIL REGULATION (EU) 2017/135

of 23 January 2017

amending Regulation (EU) 2016/1903 fixing for 2017 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Baltic Sea

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 43(3) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Council Regulation (EU) 2016/1903 ([1]) establishes the fishing opportunities for cod in ICES subdivisions 22 to 24 ('the Western Baltic cod stock') during the periods 1 January to 31 January and 1 April to 31 December 2017.

(2) In December 2016 the Scientific, Technical and Economic Committee for Fisheries (STECF) published its scientific assessment relating to the impact of the closure of the fisheries on the Western Baltic cod stock during the period 1 February to 31 March 2017. That assessment confirms that the closure will be beneficial to that stock.

(3) The closure provided for by Regulation (EU) 2016/1903 also applies to cod-fishing by vessels of less than 15 metres in length overall in areas where the water depth is less than 20 metres. However, the STECF assessment states that limiting cod-fishing by such vessels in such areas will not contribute significantly to the recovery of the stock concerned.

(4) Furthermore, completely withholding fishing opportunities in the Western Baltic could have an undesirable effect on other Baltic cod stocks, in particular the Eastern stock, due to the possible displacement of fishing activities.

(5) In addition, allowing vessels of less than 15 metres in length overall to fish in areas where the water depth is less than 20 metres will make it possible for a limited number of fishermen to continue their fishing operations and to target species other than cod.

(6) It is therefore proportionate to grant vessels of less than 15 metres in length overall the right to fish in areas where the water depth is less than 20 metres.

(7) It is not appropriate for such fishing opportunities to be available to pair trawling vessels, irrespective of their length, because of the high fishing capacity of such vessels.

(8) In order to ensure the effective control and monitoring of the fishing area where the water depth is less than 20 metres, it is necessary to ensure that all vessels concerned are equipped with a vessel-monitoring system in accordance with Article 9(2) of Council Regulation (EC) No 1224/2009 ([2]). Therefore, Article 9(5) of that

([1]) Council Regulation (EU) 2016/1903 of 28 October 2016 fixing for 2017 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Baltic Sea and amending Regulation (EU) 2016/72 (OJ L 295, 29.10.2016, p. 1).

([2]) Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Union control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ L 343, 22.12.2009, p. 1).

Regulation, which allows Member States to exempt fishing vessels of less than 15 metres in length overall from the requirement to be fitted with a vessel monitoring system, should not apply in the Western Baltic cod stock fisheries.

(9) In order to ensure the sustainable exploitation of the Western Baltic cod stock in accordance with Regulation (EU) 2016/1139 of the European Parliament and of the Council ([1]), the year-to-year flexibility established by Article 15(9) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council ([2]) for the purposes of the landing obligation should not apply in respect of that stock.

(10) Regulation (EU) 2016/1903 should therefore be amended accordingly.

(11) The prohibition on fishing for cod in ICES subdivisions 22 to 24 established by Regulation (EU) 2016/1903 will take effect on 1 February 2017. In order to be fully effective, this Regulation should therefore apply from the same date and enter into force on the date following that of its publication,

HAS ADOPTED THIS REGULATION:

Article 1

In the Annex to Regulation (EU) 2016/1903, the entry for cod in ICES subdivisions 22 to 24 is replaced by the following:

'Species:	Cod *Gadus morhua*	**Zone:**	Subdivisions 22-24 (COD/3BC+24)
Denmark	2 444		
Germany	1 194		
Estonia	54		
Finland	48		
Latvia	202		
Lithuania	131		
Poland	654		
Sweden	870		
Union	5 597		
TAC	5 597 ([1])	Analytical TAC Article 3(2) and (3) of Regulation (EC) No 847/96 shall not apply Article 4 of Regulation (EC) No 847/96 shall not apply Article 15(9) of Regulation (EU) No 1380/2013 shall not apply	

([1]) This quota may be fished from 1 January to 31 January and from 1 April to 31 December 2017. However, fishing vessels of less than 15 metres in length overall (except pair trawling vessels) which are equipped with a vessel-monitoring system in accordance with Article 9(2) of Regulation (EC) No 1224/2009 shall also be allowed to fish this quota from 1 February to 31 March 2017 in areas where the water depth is less than 20 metres. Article 9(5) of Regulation (EC) No 1224/2009 shall not apply.'.

([1]) Regulation (EU) 2016/1139 of the European Parliament and of the Council of 6 July 2016 establishing a multiannual plan for the stocks of cod, herring and sprat in the Baltic Sea and the fisheries exploiting those stocks, amending Council Regulation (EC) No 2187/2005 and repealing Council Regulation (EC) No 1098/2007 (OJ L 191, 15.7.2016, p. 1).

([2]) Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ L 354, 28.12.2013, p. 22).

Article 2

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

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

Done at Brussels, 23 January 2017.

For the Council
The President
R. GALDES

COMMISSION IMPLEMENTING REGULATION (EU) 2017/136

of 16 January 2017

approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications (Ossau-Iraty (PDO))

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs ([1]), and in particular Article 52(2) thereof,

Whereas:

(1) Pursuant to the first subparagraph of Article 53(1) of Regulation (EU) No 1151/2012, the Commission has examined France's application for the approval of amendments to the specification for the protected designation of origin 'Ossau-Iraty' registered under Commission Regulation (EC) No 1107/96 ([2]), as last amended by Implementing Regulation (EU) 2015/194 ([3]).

(2) Since the amendments in question are not minor within the meaning of Article 53(2) of Regulation (EU) No 1151/2012, the Commission published the amendment application in the *Official Journal of the European Union* as required by Article 50(2)(a) of that Regulation ([4]).

(3) As no statement of opposition under Article 51 of Regulation (EU) No 1151/2012 has been received by the Commission, the amendments to the specification should be approved,

HAS ADOPTED THIS REGULATION:

Article 1

The amendments to the specification published in the *Official Journal of the European Union* regarding the name 'Ossau-Iraty' (PDO) are hereby approved.

Article 2

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

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

Done at Brussels, 16 January 2017.

For the Commission,
On behalf of the President,
Phil HOGAN
Member of the Commission

([1]) OJ L 343, 14.12.2012, p. 1.
([2]) Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ L 148, 21.6.1996, p. 1).
([3]) Commission Implementing Regulation (EU) 2015/194 of 5 February 2015 approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications (Ossau-Iraty (PDO)) (OJ L 33, 10.2.2015, p. 5).
([4]) OJ C 334, 10.9.2016, p. 17.

COMMISSION IMPLEMENTING REGULATION (EU) 2017/137

of 16 January 2017

approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications (Pomme de terre de l'île de Ré (PDO))

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs ([1]), and in particular Article 52(2) thereof,

Whereas:

(1) Pursuant to the first subparagraph of Article 53(1) of Regulation (EU) No 1151/2012, the Commission has examined France's application for the approval of amendments to the specification for the protected designation of origin 'Pomme de terre de l'île de Ré', registered under Commission Regulation (EC) No 1187/2000 ([2]), as amended by Implementing Regulation (EU) No 172/2014 ([3]).

(2) Since the amendments in question are not minor within the meaning of Article 53(2) of Regulation (EU) No 1151/2012, the Commission published the amendment application in the *Official Journal of the European Union* ([4]) as required by Article 50(2)(a) of that Regulation.

(3) As no statement of opposition under Article 51 of Regulation (EU) No 1151/2012 has been received by the Commission, the amendments to the specification should be approved,

HAS ADOPTED THIS REGULATION:

Article 1

The amendments to the specification published in the *Official Journal of the European Union* regarding the name 'Pomme de terre de l'île de Ré' (PDO) are hereby approved.

Article 2

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

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

Done at Brussels, 16 January 2017.

For the Commission,
On behalf of the President,
Phil HOGAN
Member of the Commission

([1]) OJ L 343, 14.12.2012, p. 1.
([2]) Commission Regulation (EC) No 1187/2000 of 5 June 2000 supplementing the Annex to Regulation (EC) No 2400/96 on the entry of certain names in the Register of protected designations of origin and protected geographical indications provided for in Council Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ L 133, 6.6.2000, p. 19).
([3]) Commission Implementing Regulation (EU) No 172/2014 of 20 February 2014 approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications [Pomme de terre de l'île de Ré (PDO)] (OJ L 55, 25.2.2014, p. 5).
([4]) OJ C 355, 28.9.2016, p. 5.

COMMISSION IMPLEMENTING REGULATION (EU) 2017/138

of 16 January 2017

entering a name in the register of protected designations of origin and protected geographical indications (Raclette de Savoie (PGI))

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs ([1]), and in particular Article 52(2) thereof,

Whereas:

(1) Pursuant to Article 50(2)(a) of Regulation (EU) No 1151/2012, France's application to register the name 'Raclette de Savoie' was published in the *Official Journal of the European Union* ([2]).

(2) By letter of 23 November 2015, the French authorities notified the Commission that a transitional period under Article 15(4) of Regulation (EU) No 1151/2012, ending on 31 December 2017, had been granted to two operators that are established on their territory and meet the conditions of that Article. During the national objection procedure, these operators, who legally marketed 'Raclette de Savoie' continuously for at least the 5 years prior to the lodging of the application, lodged an objection relating to the range of the ratio of fat to dry matter in the cheese and to the minimum share of coarse green fodder in the dairy cows' basic ration. The operators in question are: SCA des producteurs de Reblochon de la vallée de Thônes, Route d'Annecy BP 38, 74230 Thones and GAEC Le Seysselan, Vallod, 74190 Seyssel.

(3) As no statement of opposition under Article 51 of Regulation (EU) No 1151/2012 has been received by the Commission, the name 'Raclette de Savoie' should therefore be entered in the register,

HAS ADOPTED THIS REGULATION:

Article 1

The name 'Raclette de Savoie' (PGI) is hereby entered in the register.

The name specified in the first paragraph denotes a product in Class 1.3 Cheeses, as listed in Annex XI to Commission Implementing Regulation (EU) No 668/2014 ([3]).

Article 2

The protection provided under Article 1 is without prejudice to the transitional period granted by France pursuant to the Order of 29 October 2015 concerning the approval of the specification for the name 'Raclette de Savoie', published on 7 November 2015 in the *Official Journal of the French Republic* under Article 15(4) of Regulation (EU) No 1151/2012, in favour of operators meeting the conditions of that Article.

Article 3

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

([1]) OJ L 343, 14.12.2012, p. 1.
([2]) OJ C 261, 19.7.2016, p. 16.
([3]) Commission Implementing Regulation (EU) No 668/2014 of 13 June 2014 laying down rules for the application of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs (OJ L 179, 19.6.2014, p. 36).

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

Done at Brussels, 16 January 2017.

For the Commission,
On behalf of the President,
Phil HOGAN
Member of the Commission

COMMISSION IMPLEMENTING REGULATION (EU) 2017/139

of 25 January 2017

amending Regulation (EC) No 1484/95 as regards fixing representative prices in the poultrymeat and egg sectors and for egg albumin

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ([1]), and in particular Article 183(b) thereof,

Having regard to Regulation (EU) No 510/2014 of the European Parliament and of the Council of 16 April 2014 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products and repealing Council Regulations (EC) No 1216/2009 and (EC) No 614/2009 ([2]), and in particular Article 5(6)(a) thereof,

Whereas:

(1) Commission Regulation (EC) No 1484/95 ([3]) lays down detailed rules for implementing the system of additional import duties and fixes representative prices in the poultrymeat and egg sectors and for egg albumin.

(2) Regular monitoring of the data used to determine representative prices for poultrymeat and egg products and for egg albumin shows that the representative import prices for certain products should be amended to take account of variations in price according to origin.

(3) Regulation (EC) No 1484/95 should be amended accordingly.

(4) Given the need to ensure that this measure applies as soon as possible after the updated data have been made available, this Regulation should enter into force on the day of its publication,

HAS ADOPTED THIS REGULATION:

Article 1

Annex I to Regulation (EC) No 1484/95 is replaced by the text set out in the Annex to this Regulation.

Article 2

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

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

Done at Brussels, 25 January 2017.

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

([1]) OJ L 347, 20.12.2013, p. 671.
([2]) OJ L 150, 20.5.2014, p. 1.
([3]) Commission Regulation (EC) No 1484/95 of 28 June 1995 laying down detailed rules for implementing the system of additional import duties and fixing representative prices in the poultrymeat and egg sectors and for egg albumin, and repealing Regulation No 163/67/EEC (OJ L 145, 29.6.1995, p. 47).

ANNEX

'ANNEX I

CN code	Description	Representative price (EUR/100 kg)	Security under Article 3 (EUR/100 kg)	Origin (1)
0207 12 10	Fowls of the species *Gallus domesticus*, not cut in pieces, presented as "70 % chickens", frozen	118,5	0	AR
0207 12 90	Fowls of the species *Gallus domesticus*, not cut in pieces, presented as "65 % chickens", frozen	143,6 169,9	0 0	AR BR
0207 14 10	Fowls of the species *Gallus domesticus*, boneless cuts, frozen	283,3 181,7 284,9 228,5	5 39 5 21	AR BR CL TH
0207 27 10	Turkeys, boneless cuts, frozen	335,5 344,5	0 0	BR CL
0408 91 80	Eggs, not in shell, dried	350,2	0	AR
1602 32 11	Preparations of fowls of the species *Gallus domesticus*, uncooked	181,4	34	BR

(1) Nomenclature of countries laid down by Commission Regulation (EU) No 1106/2012 of 27 November 2012 implementing Regulation (EC) No 471/2009 of the European Parliament and of the Council on Community statistics relating to external trade with non-member countries, as regards the update of the nomenclature of countries and territories (OJ L 328, 28.11.2012, p. 7). The code "ZZ" represents "other origins".'

COMMISSION REGULATION (EU) 2017/140

of 26 January 2017

designating the EU reference laboratory for diseases caused by capripox viruses (lumpy skin disease and sheep and goat pox), laying down additional responsibilities and tasks for this laboratory and amending Annex VII to Regulation (EC) No 882/2004 of the European Parliament and of the Council

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules ([1]), and in particular Article 32(5) and (6) thereof,

Whereas:

(1) Regulation (EC) No 882/2004 lays down the general tasks, duties and requirements for European Union (EU) reference laboratories for food and feed and for animal health. The EU reference laboratories for animal health and live animals are listed in Section II of Annex VII to that Regulation.

(2) An EU reference laboratory for diseases caused by capripox viruses (lumpy skin disease and sheep and goat pox) does not yet exist. EU reference laboratories should cover the areas of feed and food law and animal health where precise analytical and diagnostic results are needed. The outbreaks of diseases caused by capripox viruses call for precise analytical and diagnostic results.

(3) On 30 June 2016 the Commission launched a call for applications to select and designate an EU reference laboratory in the field of diseases caused by capripox viruses (lumpy skin disease and sheep and goat pox). The selected laboratory 'Veterinary and Agrochemical Research Centre — CODA-CERVA' should be designated as EU reference laboratory in the field of diseases caused by capripox viruses (lumpy skin disease and sheep and goat pox).

(4) In addition to the general functions and duties laid down in Article 32(2) of Regulation (EC) No 882/2004, the selected laboratory should be assigned certain specific tasks and responsibilities.

(5) Section II of Annex VII to Regulation (EC) No 882/2004 should therefore be amended accordingly.

(6) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS REGULATION:

Article 1

Veterinary and Agrochemical Research Centre — CODA-CERVA, Brussels, Belgium is hereby designated as the Union (EU) reference laboratory in the field of diseases caused by capripox viruses (lumpy skin disease and sheep and goat pox).

The additional responsibilities and tasks for that laboratory are laid down in the Annex.

([1]) OJ L 165, 30.4.2004, p. 1.

Article 2

In Section II of Annex VII to Regulation (EC) No 882/2004, the following point 19 is added:

'19. EU reference laboratory for diseases caused by capripox viruses (lumpy skin disease and sheep and goat pox)

Veterinary and Agrochemical Research Centre — CODA-CERVA

Operational Directorate Viral Diseases

Unit Vesicular and Exotic Diseases

Groeselenberg 99

1180 Brussels

Belgium'.

Article 3

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

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

Done at Brussels, 26 January 2017.

For the Commission

The President

Jean-Claude JUNCKER

ANNEX

Responsibilities and tasks of the EU reference laboratory for diseases caused by capripox viruses (lumpy skin disease and sheep and goat pox)

In addition to the general functions and duties of EU reference laboratories in the animal health sector laid down in Article 32(2) of Regulation (EC) No 882/2004, the EU reference laboratory for diseases caused by capripox viruses (lumpy skin disease and sheep and goat pox) shall have the following responsibilities and tasks:

1. *To ensure liaison between the national laboratories of the Member States and to provide optimal methods for the diagnosis of diseases caused by capripox viruses (lumpy skin disease and sheep and goat pox) in livestock, specifically by:*

   (a) performing genomic characterisation, phylogenetic analysis (relationship with other strains of the same virus) and storing strains of capripox viruses to facilitate diagnostic services in the Union and, where relevant and necessary, for example, for epidemiological follow-ups or verification of diagnosis;

   (b) building up and maintaining an up-to-date collection of strains and isolates of capripox viruses and specific sera and other reagents necessary for the diagnosis of the diseases when or if available;

   (c) harmonising the diagnosis and ensuring proficiency of testing within the Union by organising and operating periodic inter-laboratory comparative trials and external quality assurance exercises on the diagnosis of those diseases at Union level and by the periodic transmission of the results of such trials to the Commission, the Member States, and the national laboratories designated for the diagnosis of those diseases;

   (d) retaining expertise on those diseases to enable their rapid differential diagnosis, in particular, with other relevant viral diseases;

   (e) carrying out research studies with the objective of developing improved methods of disease control in collaboration with the national laboratories designated for the diagnosis of those diseases as agreed with the Commission;

   (f) advising the Commission on scientific aspects related to capripox viruses and, in particular, on the selection and use of capripox viruses vaccine strains.

2. *To support the functions of the national laboratories of the Member States designated for the diagnosis of diseases caused by capripox viruses (lumpy skin disease and sheep and goat pox), in particular by:*

   (a) storing, and supplying standard sera and other reference reagents, such as viruses, inactivated antigens or cell lines, to those laboratories in order to standardise the diagnostic tests and the reagents used in each Member State, where identification of the agent and/or the use of serological tests are required;

   (b) assisting actively in the diagnosis of the diseases in connection with the suspicion and confirmation of outbreaks in Member States by receiving isolates of capripox viruses for the purposes of confirmatory diagnosis, virus characterisation, and contributing to epidemiological investigations and studies. Communicating the results of these activities without delay to the Commission, the Member States and the national laboratories designated for the diagnosis of those diseases concerned.

3. *To provide information and carry out further training, in particular by:*

   (a) facilitating the provision of training, refresher courses and workshops for the benefit of national laboratories designated for the diagnosis of diseases caused by capripox viruses and experts in laboratory diagnosis with a view to harmonise diagnostic techniques for those diseases throughout the Union;

   (b) participating in international forums concerning, in particular, the standardisation of analytical methods for those diseases and their implementation;

   (c) collaborating with the relevant competent laboratories in non-EU countries where those diseases are prevalent as regards diagnostic methods for diseases caused by capripox viruses;

(d) reviewing at the annual meeting of national laboratories designated for the diagnosis of diseases caused by capripox viruses the relevant requirements for testing laid down in the World Organisation for Animal Health (OIE) Terrestrial Animal Health Code and in the Manual of Diagnostic Tests and Vaccines for Terrestrial Animals;

(e) assisting the Commission in reviewing the OIE's recommendations laid down in the Terrestrial Animal Health Code and in the Manual of Diagnostic Tests and Vaccines for Terrestrial Animals;

(f) keeping abreast of developments in the epidemiology of diseases caused by capripox viruses.

COMMISSION IMPLEMENTING REGULATION (EU) 2017/141

of 26 January 2017

imposing definitive anti-dumping duties on imports of certain stainless steel tube and pipe butt-welding fittings, whether or not finished, originating in the People's Republic of China and Taiwan

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ([1]) ('the basic Regulation'), and in particular Article 9(4) thereof,

Whereas:

1. PROCEDURE

1.1. Initiation

(1) On 29 October 2015, pursuant to Article 5 of Council Regulation (EC) No 1225/2009 ([2]), the Commission announced by a notice ('Notice of Initiation') published in the *Official Journal of the European Union* ([3]) the initiation of an anti-dumping proceeding with regard to imports into the European Union of certain stainless steel tube and pipe butt-welding fittings, whether or not finished, originating in the People's Republic of China ('PRC') and Taiwan ('the countries concerned').

(2) The proceeding was initiated following a complaint lodged on 14 September 2015 by the Defence Committee of the Stainless Steel Butt-welding Fittings Industry of the European Union ('the complainant') on behalf of producers representing between 37 % and 48 % of the total Union production. One producer expressing its opposition has come forward.

(3) Therefore, the relevant thresholds as set out in the Article 5(4) of the basic Regulation, i.e. 'an investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Union producers of the like product, that the complaint has been made by, or on behalf of, the Union industry. The complaint shall be considered to have been made by, or on behalf of, the Union industry if it is supported by those Union producers whose collective output constitutes more than 50 % of the total production of the like product produced by that portion of the Union industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated where Union producers expressly supporting the complaint account for less than 25 % of total production of the like product produced by the Union industry.', were met at the time of the initiation of the case. Once the investigation is opened, it is not necessary that the conditions for standing are met throughout the entire investigation. The Court has confirmed this for the situation where a company withdraws its support for the complaint ([4]); the same reasoning applies by analogy in a situation where the product scope changes.

(4) At initiation stage, one of the interested party claimed that the Commission had wrongly calculated the representativity of the complainant on the total production of the Union industry. They claimed that the current complainant cannot represent 43 %-49 % of the Union production as in the previous case covering a similar product scope eight companies had represented 48 % of the Union production. The Commission noted that while the product scope of the two investigations are indeed similar the exact product scope and the period covered in the current investigation differ from the product scope and the period covered in the previous investigation. Therefore the assessments performed and the results of that assessment were different (i.e. different Union producers came forward in the investigation at hand than in the investigation initiated in 2012; and those Union

([1]) OJ L 176, 30.6.2016, p. 21.
([2]) Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ L 343, 22.12.2009, p. 51).
([3]) OJ C 357, 29.10.2015, p. 5.
([4]) Judgment of the Court (Grand Chamber) of 8 September 2015, Case C-511/13 P, *Philips Lighting Poland S.A., Philips Lighting BV v Council of the European Union, Hangzhou Duralamp Electronics Co., Ltd, GE Hungary Ipari és Kereskedelmi Zrt. (GE Hungary Zrt.), Osram GmbH, European Commission*.

producers were defined on the basis of the like product of the investigation of 2012). The note to file on standing dated 28 October 2015 establishes the total production of the like product in the Union at 8 600 tonnes for the period 1 April 2014 to 31 March 2015. For the previous investigation initiated in 2012 the note to the file on standing dated on 9 November 2012 established the total production of the like product in the Union at 21 600 tonnes.

(5) The same interested party claimed that the number of companies supporting the complaint is low, 3 out of 16 Union producers, and requested the Commission to investigate why the other Union producers remained silent. In reply to this comment, the Commission noted that the number of producers supporting a complaint does not matter at the time of the initiation of a case, only their part in the production volume of the Union industry as defined in the Article 5(4) of the basic Regulation.

(6) Moreover, the interested party questioned the inclusion of a Union producer in the definition of the Union industry as this Union producer was producing significantly higher added value fittings than the other Union producers. However, the investigation confirmed that this Union producer was also producing and selling the like product and its inclusion in the sample was justified. It only covered those volumes of that producer which fall in the scope of the investigation. Therefore, this claim was rejected.

1.2. **Parties concerned by the proceeding**

(7) The Commission officially advised the complainant, all the Union producers, importers, traders and users known to be concerned and their associations, as well as the exporting producers and the authorities of the countries concerned of the initiation of the investigation.

(8) The Commission also contacted producers in Brazil, India, Malaysia, Korea, Switzerland, Thailand and the United States of America ('the USA') which were listed in the Notice of Initiation as possible analogue countries for the purpose of establishing a normal value for the PRC.

(9) 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. All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.

1.3. **Sampling**

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

(a) Sampling of Union producers

(11) In the Notice of Initiation, the Commission stated that, in view of the large number of Union producers involved in the investigation, it would limit its analysis to a reasonable number the Union producers. At the time of the initiation, the producers mentioned in recital 2, i.e. one Union producer and a group of two subsidiaries, located in the Union producing the like product came forward.

(12) Following the publication of the Notice of Initiation, another Union producer requested to be included in the sample. The four cooperating Union producers were therefore included in the sample. The sampled Union producers accounted for around 47 % of the total estimated Union production, and the sample was considered representative of the Union industry.

(13) However, one of the sampled Union producers, i.e. Springer GmbH, subsequently informed the Commission of its decision not to cooperate. This producer was therefore not further investigated. The Commission nevertheless concluded that the three remaining Union producers in the sample, which account for ca. 43 % of the total estimated Union production, were still representative of the Union industry. That Union producer also informed the Commission that it was not only a Union producer, but also had an outward processing arrangement with a Chinese producer.

(14) In addition, the Commission assessed the impact of the exclusion of the flanged and low-roughness fittings (see section 2.2 below) on the representativity of the sample. It found that flanged and low-roughness fittings production was not substantial either regarding the sampled Union producers or regarding the total Union production and, therefore, had no impact on the representativity of the sample already selected.

(15) One interested party stated that the Union producers other than ones supporting the complaint were increasing their sales during the period 2010-2015 and selling at higher prices and volume, based on Eurostat Intra Union trade statistics.

(16) The Commission analysed the potential injury caused by the imports from the countries concerned in relation to the Union industry, including all Union producers through the macro economic data (see recitals 193-207) Furthermore, the Commission noted the party based its analysis on CN codes including not only the product concerned but also products outside of the scope of this investigation. Moreover, in general the volume reported in the Intra Union trade statistics does not concern only Union production but also re-sales of imported products. Therefore, no conclusion could be drawn concerning the sales prices or the volume of the Union producers. In any event, it remains that the microeconomic data of the sample are deemed representative for the Union industry. That this data does not comprise the non-complaining producers is the consequence of the fact that those did not come forward to be included in the sample.

(b) Sampling of importers

(17) In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, all unrelated importers were requested to make themselves known to the Commission and to provide the information specified in the Notice of Initiation.

(18) Three unrelated importers provided information and agreed to be included in the sample. Together they represented 10 % of the estimated volumes imported from the PRC and Taiwan during the investigation period. Given that the Commission could examine all importers that came forward, no sampling was necessary.

(c) Sampling of exporting producers in Taiwan

(19) In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, all exporting producers in Taiwan were requested in the Notice of Initiation to make themselves known to the Commission and to provide the information specified in the Notice of Initiation. The information on the initiation of the investigation and the Notice of Initiation (which included a sampling form) were sent to the 10 Taiwanese companies identified in the complaint as exporting producers of the product concerned to the Union. In addition, the Taipei Representative Office in the European Union was requested to identify and/or contact additional exporting producers, if any.

(20) Four exporting producers in Taiwan provided the information requested in the Notice of Initiation and agreed to be included in the sample. Taking into account the number of cooperating Taiwanese exporting producers, sampling was not considered necessary.

(21) During the investigation, two of the four companies did not further cooperate. The Commission informed these companies that, according to Article 18(1) of the basic Regulation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available.

(d) Sampling of exporting producers in the PRC, MET claims and requests for individual examination

(22) In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, all exporting producers in the PRC were requested to make themselves known to the Commission and to provide information specified in the Notice of Initiation. In addition, the Mission of the People's Republic of China to the European Union was requested to identify and/or contact additional exporting producers, if any.

(23) Nine exporting producers in the PRC provided the requested information and requested to be included in the sample. In accordance with Article 17(1) of the basic Regulation, the Commission selected a sample of four companies or groups of companies, representing around 79 % of the exports of the cooperating exporting producers to the Union and an estimated 35 % of the total quantities exported from PRC to the Union during the investigation period. The criterion used to select the four companies included in the sample was the volumes of exports of the product concerned to the Union during the investigation period. In accordance with Article 17(2) of the basic Regulation, all known exporting producers concerned and the authorities of the country concerned were consulted on the selection of the sample, and no comments were received.

(24) In the course of the investigation, one of the four sampled companies did not further cooperate. The Commission informed this company that according to Article 18(1) of the basic Regulation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available.

(25) None of the cooperating exporting producers in the PRC claimed market economy treatment ('MET'). However, five exporting producers in the PRC which were not included in the sample requested individual examination under Article 17(3) of the basic Regulation. As mentioned in recital 99, these requests were not granted.

1.4. **Questionnaire replies**

(26) Questionnaires were sent to the four companies in Taiwan and the four sampled companies in the PRC, to the four sampled Union producers and to the three sampled importers.

(27) Questionnaire replies were received only from two companies in Taiwan, three in the PRC, three Union producers and three importers.

(28) After provisional disclosure, a questionnaire reply was also received from one of the potential analogue country producers located in Switzerland.

1.5. **Verification visits**

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

— union producers:

  — OSTP Sweden AB, Sweden,

  — OSTP Finland OY, Finland,

  — Erne Fittings, Austria,

— unrelated importer:

  — Arcus Nederland BV, the Netherlands,

— exporting producers in Taiwan:

  — Ta Chen Stainless Pipes Co. Ltd, Taichung,

  — King Lai Hygienic Materials Co. Ltd Tainan,

— exporting producers in the PRC:

  — Suzhou Yuli Pipeline Industry Co. Ltd and its related companies, Suzhou, Jiangsu and Shanghai,

  — Zhejiang Jndia Pipeline Industry Co. Ltd, Wenzhou,

  — Zhejiang Good Fittings Co. Ltd, Wenzhou.

(30) A verification visit was also carried out at the premises of the Swiss company Rohrbogen AG (Basel), which was considered as potential analogue country producer. This verification visit took place after provisional disclosure.

1.6. **Provisional disclosure**

(31) At the provisional stage of the investigation the Commission decided not to impose provisional anti-dumping measures. The main reason for this decision was the ongoing search for an appropriate analogue country on the basis of which normal value would be established for the Chinese exporting producers. In the absence of a dumping margin determination for the PRC, also the level of cumulated dumped imports from both countries concerned could not be established. While the data with regard to the Union industry was available for the purposes of the analysis of the various injury indicators, the volume and prices of the dumped imports are an indispensable element in the determination of injury in accordance with Article 3 of the basic Regulation. Therefore, no determination of injury, and consequently of the causal link between injury and dumped imports, was made at the provisional stage of the investigation.

(32) Interested parties received a provisional disclosure on 13 July 2016. Submissions after provisional disclosure were received from one Taiwanese exporting producer, one Chinese exporting producer, the China Chamber of Commerce of Metals, Minerals and Chemical Importers & Exporters ('CCCMC') and the complainant. All these submissions are dealt with in the following recitals.

1.7. **Final disclosure**

(33) Interested parties received the final disclosure document on 27 October 2016. The Commission invited the interested parties to submit written comments and/or to request a hearing with the Commission and/or the Hearing Officer in trade proceedings by 16 November 2016.

(34) Three Chinese exporting producers, the CCCMC, two Union importers and the complainant submitted comments after final disclosure, and a hearing with the hearing officer was requested by the Union producer that also had an outward processing arrangement and a hearing with the Commission services was requested by the CCCMC.

(35) During the hearing with the Hearing Officer, the Union producer has requested that the products that are re-imported following the outward-processing be exempted from the duties, because they are not causing injury to the Union industry as there is very little overlap with the production of the complainants and because it would not be in the Union interest to impose duties, taking into account its status as SME, the fact that it has received EU structural funds to establish its factory, and the fact that imposing duties would destroy its business. The Commission invited interested parties to express any views they may have in this regard.

(36) In addition, one Chinese exporting producer requested the correction of its name which had been misspelled, and one Union importer suggested a more precise definition of 'low roughness fittings', which was accepted by the Commission.

(37) With regard to the final disclosure, two Chinese exporting producers and CCCMC claimed that the period provided by the Commission for the submission of the comments by interested parties was inadequate and did not allow them to fully and comprehensively address all the data and reasoning, which had been presented for the first time in the final disclosure. They considered that a serious breach of the interested parties' rights of defence in this proceeding.

(38) The Commission noted that an anti-dumping proceeding initiated under Article (5) of the basic Regulation is conducted under strict deadlines. The interested parties in question have received disclosure of the Commission's decision not to impose provisional measures and of the Commission's proposal for the imposition of definitive measures and have been reasonable time to respond. Under Article 20(5) of the basic Regulation, the Commission must set a deadline for at least 10 days for comments after final disclosure. By giving 22 days the Commission has complied with this requirement. No interested party requested any extension in this respect. It is also stressed that no additional data could be disclosed at the provisional stage, not only with regard to dumping findings concerning PRC but also with regard to injury. In the absence of dumping margin determination for the PRC, the level of dumped imports from the countries concerned could not be established. While the data with

regard to the Union industry is available for the purposes of the analysis of the various injury indicators, the volume and prices of the dumped imports are an indispensable element in the determination of injury in accordance with Article 3 of the basic Regulation. Therefore, no determination of injury was made at the provisional stage of the investigation. The claim was therefore rejected.

(39) Following comments and requests of some of the interested parties after final disclosure the Commission disclosed additional data and information. This additional disclosure took place on 25 November 2016. Subsequent submissions were received from two Chinese exporting producers, the CCCMC, the Complainant and three Union importers.

(40) During the hearing with the Hearing Officer, the Complainant requested that the exemption request for an outward processing scheme submitted by one of the Union producer as explained in recital 35 above should not be granted as the Union producer in question is also importing the product concerned produced in China. Furthermore, contrary to what it had claimed, its products are in competition with the product produced by the Union industry. During the same hearing the Complainant also explained that majority of the traders in the Union store products that are double certified both under the EN/DIN and ASME/ANSI standards. Moreover contrary to the claim of one the traders products subject to different standards are interchangeable.

(41) Two Chinese exporting producers and CCCMC reiterated their claims, especially with regard to the lack of disclosure of the injury findings at the provisional stage which in their opinion could not be justified by the lack of data.

(42) In response to the above the Commission notes that conclusions on injury indicators can only be disclosed once the volume of dumped imports is determined. In this particular case at provisional stage no dumping determination had been made for the PRC. The fact that the raw data for injury indicators had been collected and does not mean that the conclusion on injury indicators could be established. The Commission provided an adequate disclosure within the meaning of Article 20 of the basic Regulation. The Commission considers that the rights of defence of these interested parties were respected.

1.8. **Investigation period and period considered**

(43) The investigation of dumping covered the period from 1 October 2014 to 30 September 2015 ('the investigation period' or 'IP').

(44) The examination of trends relevant for the assessment of injury covered the period from 1 January 2012 to the end of the investigation period ('period considered').

(45) Following the definitive disclosure, several interested parties claimed that the Commission should have examined the period 2010 — IP instead of 2012 — IP. It is the standard practice of the Commission to use 4 years period to analyse the injury trends. The parties failed to submit any evidence that would have supported the conclusion that the period considered was inappropriate.

(46) Following the additional disclosure, two Chinese exporting producers and CCCMC reiterated their claim regarding the period considered for the injury trends. As stated above it is the standard practice of the Commission to use a 4-year period for its injury assessment, on the basis of its wide discretion in trade defence investigations. Furthermore the interested parties did not submit any compelling evidence that would have required the Commission to deviate from its standard practice. Furthermore the case ([1]) the interested parties are referred to was terminated by the withdrawal of the complaint. Therefore no injury determination was made in that case. Furthermore, the product concerned of this investigation differs from the product concerned of the terminated investigation. Therefore this claim was rejected.

([1]) Commission Decision 2013/440/EU of 20 August 2013 terminating the anti-dumping proceeding concerning imports of stainless steel tube and pipe butt-welding fittings, whether or not finished, originating in the People's Republic of China and Taiwan (OJ L 223, 21.8.2013, p. 13).

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product concerned

(47) The product subject to this investigation is tube and pipe butt-welding fittings, of austenitic stainless steel grades, corresponding to AISI types 304, 304L, 316, 316L, 316Ti, 321 and 321H and their equivalent in the other norms, with a greatest external diameter not exceeding 406,4 mm and a wall thickness of 16 mm or less, with a roughness not less than 0,8 micrometres, not flanged, whether or not finished, originating in the PRC and Taiwan. The product falls under CN codes ex 7307 23 10 and ex 7307 23 90.

(48) The product concerned is manufactured essentially by cutting and forming tubes and pipes. The product concerned is used to join pipes and tubes of stainless steel and exist in different shapes such as elbows, reducers, tees and caps.

(49) The product concerned is used in a wide range of consumer industries and final applications. Examples of these are:

— petro-chemical industry,

— beverages and food processing and pharmaceuticals industries,

— shipbuilding,

— energy generation, power plants,

— constructions and industrial installations.

(50) Following the final disclosure, one of the Union importers claimed that caps should not be included in the product scope as they are not produced by cutting and forming pipes.

(51) In response to this claim it is noted that product concerned is 'essentially' but not 'exclusively' manufactured by cutting and forming tubes and pipes. It is further noted that from market perspective point of view cups are types of fittings and are presented as such in the companies' catalogues. The claim was therefore rejected.

(52) Following the definitive disclosure, several parties claimed that the imported products and the Union production are not technically interchangeable due to different technical standards, i.e. EN/DIN and ASME/ANSI, or that products produced according to EN/DIN standards should be excluded from the product scope.

(53) First, it is important to clarify that both the Union industry and the exporting producers subject to the investigation produce both types of technical standards. That holds also true for the sampled companies. Furthermore, the machines used to produce for different standards are the same, and the production process is the same.

(54) Second, the investigation and a hearing with the Union producer that also has an outward processing arrangement have shown that the physical, technical and chemical characteristics of products approved under the EN/DIN and under the ASME/ANSI standards are comparable. Whereas standards may require slight differences as to thickness and resistance, those differences vary for each product type, and for many product types, there is substantial or complete overlap.

(55) Third, both product types are in competition to each other. Whereas it is true that for certain projects, the specifications will require the use of EN/DIN or ASME/ANSI, at the point in time at which the engineers decide on the choice of the standard, both specifications compete. This is witnessed by the fact that the use of EN/DIN and ASME/ANSI standards differs between Member States based on historical patterns, but there is no barrier for new projects to use either standard everywhere in the Union.

(56) Finally, there is even direct competition after the choice of the standard where the standards completely overlap, as is the case for certain product types.

(57) The Commission also notes that despite specific requests made to the cooperating importer, the Commission did not receive any evidence demonstrating that the like product and the product concerned are not in competition.

(58) Therefore the claim was rejected.

(59) Following additional disclosure several interested parties, including an unrelated importer, confirmed the above findings of the investigation. These interested parties reiterated that ASME/ANSI and EN/DIN standard to a large extend are interchangeable. Furthermore, one interested party stated that Union pipe and tube suppliers deliver double certified products and any manufacturer of the product concerned can also acquire double certification. This interested party further stated that, in fact, the majority of the traders' stocks of the product concerned and the like product is double certified.

(60) In absence of any further comments regarding the product standards, the claim that product concerned and like product should have been separately analysed based on ASME/ANSI and EN/DIN standard was rejected.

2.2. **Products excluded from the definition of the product concerned**

2.2.1. *Low roughness fittings*

(61) Three unrelated importers, CCCMC and two Chinese exporting producers claimed that the product definition does not sufficiently distinguish between industrial and so-called 'sanitary fittings', although they have different physical characteristics. Moreover, they stated that the Union industry does not produce 'sanitary fittings' and that therefore only 'industrial fittings' should be included in this anti-dumping proceeding.

(62) During a joint hearing the three unrelated importers submitted evidence supporting their claim and demonstrated a number of key differences between 'industrial' and 'sanitary' fittings, based on physical characteristics, packaging, end use and price level.

(63) The difference needed to be redefined in terms of physical characteristics and the appropriate distinction was based on the surface roughness of the fittings. Instead of using the term 'sanitary' fittings, it is appropriate to talk about 'low roughness fittings' i.e. fittings with a roughness average (Ra) of the surface finish below 0,8 micrometer. These fittings are used in the food and beverage industry, the semiconductor industry and the pharmaceutical and health care industries.

(64) There are important differences in surface smoothness and surface finish. The end of low roughness fittings is typically square (as opposed to bevelled), and they in general have lower wall thickness and outside diameter. The existence of separate standards is not visible nor is the fact that the raw material for low roughness fittings is always cold rolled coil or cold drawn tube (as opposed to hot rolled for high roughness fittings). Finally, low roughness fittings are packaged individually in a plastic bag, whereas high roughness fittings are packaged in bulk in carton.

(65) There is no interchangeability: the industry using low roughness fittings cannot use high roughness fittings because of the hygienic requirements; on the other hand, low roughness fittings are not suitable for applications using high roughness fittings because of their lower pressure and temperature resistance requirements and higher price levels. The investigation showed that the price level of low roughness fittings is on average 2 to 3 times higher per kg. This is mainly due to the labour intensity linked to polishing and additional quality control.

(66) Since questionnaires had already been sent out at the time of the hearing, a fundamental change to the product code number ('PCN') reporting was no longer possible. However, by adding the sole physical characteristic of 'roughness' as a column in the transaction-by-transaction table and a supplementary criterion in the cost of production table in the questionnaire reply, the distinction between both types of fittings could be made. Both the Union industry and the Union importers eventually agreed that fittings with a roughness average (Ra) of the

surface roughness below 0,8 micrometre are not to be considered product concerned. Therefore the Commission services at the provisional stage of the investigation considered that these fittings should be excluded from the scope of the investigation.

(67) After provisional disclosure one of the sampled Chinese producers claimed that low roughness fittings should not be excluded from the product scope. The company in question challenged also the statements made by interested parties regarding the differences in physical characteristics, packing materials, cost/price levels, and the lack of interchangeability between low roughness fittings and high roughness fittings. However, the issue regarding the differences in the physical characteristics, packing materials and price levels between low and high roughness fittings were verified and confirmed on spot in Taiwan. Therefore this claim was rejected.

2.2.2. *Flanged fittings*

(68) A Chinese-Taiwanese exporting producer claimed that flanged fittings, meaning fittings having ends shaped as flanges, are not the product concerned based on the definition in the Notice of Initiation.

(69) It should be mentioned that the shape of the end is the determinant for the technique which may be used for the connection of the fittings to the tubes. Different techniques are used to produce butt-welding fittings and flanged fittings. Butt-welding fittings are produced using the welding technique, while in contrast the clamping and bolting technique is used in the production of flanged fittings. In addition, the explanatory notes of the CN codes of the product definition specify that the ends of the butt-welding fitting should be shaped square cut or chamfered to facilitate welding to the tubes.

(70) It has also been found that the production of flanged fitting requires additional costs, because of a larger input of raw and intermediate material and a more elaborate manufacturing process. From a production process point of view, butt-welding fittings can be considered as semi-finished products for the production of flanged fittings.

(71) The Union industry agreed with the view that flanged fittings were a different product and with its exclusion from the product scope.

(72) The Commission services already at the provisional stage considered that flanged fittings should be excluded from the scope of the investigation. No comments of interested parties were received challenging this finding, therefore this decision is sustained.

2.3. **Like product**

(73) The investigation showed that the following products have the same basic physical characteristics as well as the same basic uses:

(a) the product concerned;

(b) the product produced and sold on the domestic market of Taiwan (which was also used as the analogue country for the PRC — see recital105);

(c) the product produced and sold in the Union by the Union industry.

(74) The Commission therefore decided that these products are like products within the meaning of Article 1(4) of the basic Regulation.

3. **DUMPING**

3.1. **Taiwan**

3.1.1. *Introduction*

(75) As indicated in recital 27, only two Taiwanese companies cooperated in the investigation providing full replies to the anti-dumping questionnaires. The sales of these companies accounted for 36 % of the imports of the product concerned into the Union from Taiwan in the investigation period.

(76) One of the cooperating companies produced mainly fittings which are not covered by the revised product scope of the investigation as explained in recitals 61 to 71 (fittings with a roughness average (Ra) of the surface finish below 0,8 micrometre and/or flanged fittings). This producer did not have domestic sales of the like product during the investigation period.

(77) The second cooperating company by contrast engages in the extensive production of most of the standard types of fittings, which are covered by the scope of the investigation. The company produces only on the basis of welded pipes, only from 304 and 316 grades of steel and only elbow and tee shapes (and tee shapes only with the same diameter of main and branch pipe which are not welded but produced from one piece of pipe with its centre 'pulled down' to make a T-shape). The producer did not have domestic sales of the like product during the investigation period.

3.1.2. *Normal value*

(78) In the case of both Taiwanese exporting producers, due to the lack of domestic sales of the like product, the normal value was constructed in line with Article 2(3) and (6) of the basic Regulation by adding to the average cost of manufacturing of the relevant product the selling, general and administrative ('SG&A') expenses incurred and a reasonable profit.

(79) In the case of the first cooperating company, the amount of SG&A expenses and profit were determined, in accordance with Article 2(6)(b) of the basic Regulation, that is, on the basis of the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the producer in question in the domestic market of the country of origin, namely domestic sales of the fittings with roughness average (Ra) of the surface finish below 0,8 micrometre.

(80) In the case of the second cooperating company, due to the lack of own domestic sales of the like product or of the same general category of products, Article 2(6)(c) of the basic Regulation was applied. To this end, the Commission used in the construction of normal value the same amounts of SG&A expenses and profit used for the first company, which was the only available and verified data and referred to sales of the same general category of product on the Taiwanese market.

(81) Following the provisional disclosure, the second Taiwanese exporting producer raised certain claims against the use of the data of the first Taiwanese producer for the construction of its normal value. First, the company claimed (on the basis of the open version of the questionnaire response and the deficiency letter responses of the other producer) that the first producer cannot be considered at all an exporting producer of the product concerned as it allegedly produces and exports to the Union only types of product which were excluded from the product scope, that is, low-roughness fittings and flanged fittings. Second, the company claimed that the use of a single company's SG&A figures for the purpose of the construction of the normal value for another company contradicts the findings of the WTO Appellate Body ([1]) that a single company's SG&A cannot be used to construct normal values.

(82) In response to the above claims, the Commission established during the on spot verification at the premises of the company in question that part of the company's production and sales to the Union during the IP (namely vacuum fittings with additional surface treatment which result in surface roughness of above 0,8 micrometre) fell within the product scope of this investigation. Therefore, the company was considered as an exporting producer of the product concerned and a dumping margin for this company was calculated. It should be stressed that the company in question was not selling this type of product on the domestic market in Taiwan during the IP, which affects the methodology of construction of normal value for both Taiwanese exporting producers as explained

([1]) EU-India Bed Linen (case AB-2000-13) at paragraph 76: '…use of the phrase "weighted average", combined with the use of the words "amounts" and "exporters or producers" in the plural in the text of Article 2.2.2(ii) of the [WTO Anti-Dumping Agreement], clearly anticipates the use of data from more than one exporter or producer. We conclude that the method for calculating amounts or SG&A and profits set out in this provision can only be used if data relating to more than one exporter or producer is available.'

in recitals 79 and 80. Second, it should also be noted that the WTO Appellate Body ruling quoted by the interested party refers to the situation described in the Article 2(6)(a) of the basic Regulation; that is the use of weighted average of SG&A costs of other producers in respect to production and sales of the like product in the domestic market of the country of origin. In this case however the construction of the normal value was based on Article 2(6)(c) of the basic Regulation; that is with SG&A costs determined on the basis of 'any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin'. Taking into account the above, the Commission sustains its decision as to the source of data used for the construction of normal value. It should be noted that the Commission looked also at the alternative source of data for establishment of SG&A costs for the construction of normal value that is data provided by the cooperating analogue producer in Switzerland. The figure in question was not provided for the IP but it is confirmed that for the financial years 2014 and 2015 it was in the range of 8 % to 12 % which is comparable with the adjusted SG&A figure finally used in the calculation as indicated in recital 86.

(83) The Taiwanese exporting producer further claimed in its submission an inadequate disclosure of the critical data used for the determination of the normal value. Indeed, for business confidentiality reasons, this specific disclosure could not reveal SG&A, profit and allowances on costs figures used in the calculations. The company, knowing its own cost of manufacturing, could easily estimate the overall average adjustment made. However, it requested disclosure of the specific figures with regard to certain elements of the calculation, namely the SG&A and profit levels, levels of normal value allowances on costs and prices and VAT adjustment to normal value.

(84) In response to this request, it has to be underlined that exact figures of SG&A costs, profit and allowances on costs applied in the construction of normal value cannot be disclosed, as the data originate from one single company, which is a Taiwanese competitor of the company requesting this information, and that company requested confidential treatment because the data contains business secrets. That request is obviously justified. However, the most important figures, that is, the SG&A and profit used for the final calculation, are disclosed in ranges in recital 86 below. It should also be noted that the level of allowances on costs was very low and had an insignificant impact on the level of normal value and the dumping margin. No allowances on prices were applied as domestic prices were not used in the calculation of the normal value. Also in case of Taiwan no VAT adjustment to normal value was done.

(85) Finally, this company submitted that the level of SG&A and profit of its competitor is not representative for them. It claimed that the other producer in Taiwan operates a small scale production and sells highly specialised products, while it was involved in massive production and sales of standard products.

(86) Indeed, it was confirmed during the verification visits that the products produced and sold by the two companies are different, and thus their SG&A cost structures are also different. Therefore, the Commission decided to reduce the level of SG&A costs used for construction of normal value for this second cooperating exporting producer by the proportion of labour costs related to quality control and research and development costs. This resulted in a reduction of the SG&A adjustment to the level of 7 %-13 % expressed as a percentage of turnover, which subsequently reduced the level of its individual dumping margin. At the same time, the Commission considered that the profit margin used for the normal value construction (1 %-5 % on turnover) was reasonable. Final overall adjustment made to the costs of manufacturing in the calculation of the normal value for the exporting producer in question was 15,36 %.

3.1.3. *Export price*

(87) The two cooperating exporting producers made export sales to the Union directly to independent customers located in the Union.

(88) Export prices were established on the basis of the prices actually paid or payable for the product concerned when sold for export from the exporting country in accordance with Article 2(8) of the basic Regulation.

3.1.4. *Comparison and dumping margins*

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

(90) For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation.

(91) On this basis, adjustments were made for transport, ocean freight and insurance costs, handling, loading and ancillary costs, packing costs, credit costs, discounts and commissions which were demonstrated to affect price comparability. The total adjustments were in the range of 1 %-10 %, based on actual values reported by the Taiwanese exporting producers and verified on spot. Those figures are the ones reported for the relevant cost items by the Taiwanese companies, and have been disclosed to them for verification in the specific disclosures.

(92) It is noted that in the calculation, the Commission rejected an adjustment for currency conversion requested by one of the interested parties. The party has asked the Commission to use instead of the exchange rate on the date of invoicing the exchange rate on the day of payment. The basic Regulation stipulates that normally, the date of invoicing is used for establishing the exchange rate, but that in extraordinary situations, an earlier date can be used (date of contract for example). However, the basic Regulation does not provide any legal basis for using a date after the date of invoicing. The rational for this is that at the date of invoicing, the price is fixed and the company no longer has any influence to decide to dump or not. In any event, even if the use of a later date was possible, quod non, as explained already in the provisional disclosure, the applicant has not shown that the additional condition, namely a sustained movement in the exchange rates took place.

(93) As provided by Article 2(11) and (12) of the basic Regulation, for each cooperating company, the weighted average normal value of each type of the like product was compared with the weighted average export price of the corresponding type of the product concerned.

(94) On this basis, the weighted average dumping margins, expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

Company	Dumping margin established (%)
King Lai Hygienic Materials Co., Ltd	0,0
Ta Chen Stainless Pipes Co., Ltd	5,1

(95) For non-cooperating producers, the Commission had to rely on facts available pursuant to Article 18(6) of the basic Regulation. Non-cooperation allows the concerned exporting producers not to share their company specific data on the basis of which their actual export behaviour can be assessed and it obliges the Commission to use best facts available in their respect. The Commission, in its decision practice, distinguishes for that purpose between investigations where cooperation is high (i.e. above 80 % of reported exports to the Union), and situations where cooperation is low (80 % and less of cooperation). In the present case, the level of cooperation was substantially below 80 %. In such a situation, the Commission considers that the highest dumping rate of the cooperating producers does not constitute a good approximation for the dumping rate of the non-cooperating producers, for the following reason: it has to be suspected that one of the reasons why so many producers decided not to cooperate is that they were aware that their dumping rates would be far higher than the ones of the cooperating producers. The fact that, in the present case, cooperation was withdrawn during the investigation supports this understanding. Therefore, the Commission considers that the dumping rate of the non-cooperating producers is best reflected at the level of the highest dumping margin established for a representative product type in terms of volume, namely representing more than 10 % of exports to the Union, for the cooperating exporting producer who was found to be dumping.

(96) After adjustment of SG&A costs used for the calculation of the dumping margin for the Taiwanese cooperating exporting producer as described in recital 86, the country-wide dumping margin, expressed as a percentage of the CIF Union frontier price, duty unpaid, amounts to 12,1 %.

(97) Following the final disclosure, the complainant claimed in this regard that the residual duty for Taiwan should be based on complaint and amount to 34,8 %. The complainant claimed that most of the Taiwanese producers of the product concerned deliberately failed to cooperate in the procedure in order not to allow the Commission to

use their domestic sales for the calculation of the normal value. Therefore, according to the complainant, normal value calculation in the complaint, which was based on domestic prices in Taiwan, should be used as best fact available.

(98) In response to the above it is noted that in its calculation of the residual duty for Taiwan the Commission is using best facts available based on data collected and verified in the investigation. This claim is therefore rejected.

3.2. **People's Republic of China**

3.2.1. *Analogue country*

(99) According to Article 2(7)(a) of the basic Regulation, the normal value for the exporting producers not granted MET has to be established on the basis of the prices or constructed value in a third market country ('analogue country'). None of the cooperating exporting producers claimed MET.

(100) The complainant proposed the USA as a potential analogue country. In addition, according to available information, the production of the like product takes place in a number of other countries worldwide such as Brazil, India, Japan, Malaysia, Korea, Switzerland and Thailand. These countries were all considered as potential analogue countries.

(101) All known producers (52) of the like product in the above mentioned countries were contacted, but none of them cooperated. Only one Malaysian company agreed to cooperate but provided insufficient information. The company was not able to provide per PCN data with regard to costs and domestic prices. Therefore, its deficient data could not be used for determination of the normal value. Furthermore, it is noted that the Malaysian company in question has refused on spot verification of the data provided.

(102) At a later stage a Swiss producer came forward, as a potential analogue producer and agreed to cooperate. The company submitted the requested questionnaire reply which was verified on spot. Nevertheless, due to the rather limited range of product types produced by this company compared to the wide range of product types exported by the sampled Chinese exporting producers to the Union, the Commission decided that the data provided by the Swiss company would be inappropriate for the determination of the normal value for the Chinese exporting producers. With this regard it is noted that only 4,6 % of product types exported to the Union by Chinese producers covering 4,2 % of Chinese export volume were directly matching with product types produced by the Swiss producer. In case of Taiwan, finally used as the analogue country, the level of direct matching with product types exported to the Union by the Chinese producers was 7,7 % for the number of product types and 11,1 % for the export volume.

(103) In this situation, the Commission decided to use the other country subject to the investigation, i.e. Taiwan, as the analogue country despite arguments initially presented by the complainants claiming that Taiwanese companies mainly produced fittings types based on welded tubes as raw material (as opposed to the Chinese producers, which use mainly seamless tubes). The same argument was put forward also by the Chinese exporting producers. On the other hand, the CCCMC in its submission after provisional disclosure considered that the Taiwanese manufacturing cost data would be more appropriate for the basis of construction of the normal value than data of the Union producers, which was also considered by the Commission as an alternative in the provisional disclosure.

(104) Taiwan was considered appropriate as an analogue country because, contrary to what was claimed by the complainants and notwithstanding the different use of raw materials, the data provided allowed for a proper attribution methodology of costs in relation to the different characteristic of the product coding. Furthermore, the level of competition on Taiwanese market is high since there are at least 10 known domestic producers of the product concerned and this is also reflected in a strong presence of imports from different origins, in a situation where the level of custom duties is moderate (7,5 % to 10 %).

(105) For the reasons above, the Commission decided to use Taiwan as the analogue country for the PRC.

(106) Following the final disclosure, two Chinese exporting producers and the CCCMC claimed that the choice of Taiwan as analogue country was inappropriate as the manufacturing costs used came only from one Taiwanese company that did not have any domestic sales. The parties in question also submitted that the matching level of comparable products was too low. The claim of low matching level of comparable products was also raised by one of the Union importer. The latter company indicated also that the China could not be compared to Taiwan as the two entities have different levels of Human Development Index ('HDI') and GDP per capita.

(107) With regard to these claims, it is first recalled that the WTO ruling ([1]) implies that all product types exported by the Chinese exporting producers should be assigned a normal value. The Commission considers that the data found at the level of one analogue country exporting producer is sufficient to base the remaining product types upon as the types found allow for further construction of the missing product types. The occurrence of only one such exporting producer is by no means exceptional or a new practice. The basic Regulation further foresees that the normal value can be constructed based on the cost of production, in the absence of domestic sales. Secondly, it is recalled that the HDI and GDP levels are not factors which are taken into account in the establishment as to whether an analogue country is appropriate. In order to determine the proper analogue country, the Commission proceeds as explained in recital 104. The above claims were therefore rejected.

(108) Finally, two Chinese exporting producers and the CCCMC raised questions on allegedly a serious procedural flaw based on the fact that the Commission calculated the Chinese producers' dumping margins on the basis of the non-market economy (NME) provisions of the basic Regulation. The parties claimed that the legal authority to apply NME methodology for the determination of normal value for the Chinese exporting producers expires on 11 December 2016. Therefore, according to the parties in question, for any definitive anti-dumping measures adopted after this date, which will be the case in this proceeding, the Commission is obliged under the WTO law to apply the standard dumping calculation methodology.

(109) In this regard, the Commission notes that it has no discretion on whether or not to apply the current rules as set out in the basic Regulation. This claim was therefore rejected.

3.2.2. *Normal value*

(110) As explained in recital 103, the normal value for the exporting producers in the PRC was determined on the basis of constructed value in the analogue country, in this case Taiwan, in accordance with Article 2(7)(a) of the basic Regulation.

(111) Furthermore, due to lack of domestic sales of the like product in Taiwan, normal value was constructed in line with Article 2(3) and (6) of the basic Regulation by adding to the average cost of manufacturing of the relevant product type SG&A costs incurred and profit realised on the Taiwanese market during the investigation period.

(112) As a basis for establishing of manufacturing costs, the Commission used data of one of the cooperating Taiwanese producers (Ta Chen). It should be noted that the second Taiwanese cooperating producer (King Lai) had very limited production volume of the product concerned in the investigation period and this production related to highly specialised product types. In this small part of their production which is still considered product concerned King Lai is producing products which could be considered low-roughness fittings but with an extra surface treatment which makes their surface roughness to raise above 0,8 micrometer and thus according to the definition of recital 47 it is product concerned. These fittings have very high costs of manufacturing and taking them into account would distort calculations. Furthermore, these types of product are not exported by the Chinese sampled producers to the EU (although they might be covered by their PCNs as roughness is not one of the parameters of the PCN construction). Therefore, manufacturing costs data of this company were considered by Commission as not appropriate for the construction of normal value for the Chinese producers.

(113) With regard to the construction of the normal value, one Union importer claimed that manufacturing costs of the Taiwanese company King Lai could not be used as basis for calculation of the normal value for the Chinese companies as King Lai produces a different product which cannot be considered as industrial fitting and that it also implies a different production method and range of profits.

(114) In response to this claim, it is reiterated that the Commission did not use any manufacturing costs data of King Lai for comparison with other companies. For constructing the normal value of other companies, the Commission used only King Lai's SG&A costs and profit of the same general category of product sold on the domestic market, in accordance with Article 2(6)(c) of the basic Regulation. It is also recalled that the SG&A cost

([1]) Article 21.5 Appellate Body Report, EU — Definitive Anti-Dumping Measures on Certain Iron or Steel fasteners from China, WT/DS397/AB/RW.

used for these calculations was adjusted in order to take into account differences between the products produced by King Lai and other companies. With regard to the profit used, it is stressed that is not in a different range (1 %-5 %) than those of other companies.

(115) The same Union importer also claimed that the second Taiwanese producer, Ta Chen, whose manufacturing costs were used as the basis of calculation for the normal value of Chinese exporting producers, is a large and integrated company and, as such, is able to 'optimise costs'. Thus, the company in question cannot be compared with the small Chinese factories.

(116) In this regard, the Commission recalled that the manufacturing costs of the Chinese producers were not part of the analysis in this procedure as none of the Chinese producers had claimed MET status. Nevertheless, it should be pointed out that the allegedly 'optimised costs' of the Taiwanese producer can only result in a lower constructed normal value and therefore in lower dumping margins for the Chinese exporting producers.

(117) Taking into account that only a limited number of product types exported to the Union by the sampled Chinese exporting producers could be identified in Taiwan, the Commission has constructed the normal value of the remaining product types based on the costs of manufacturing of the most resembling product types produced in Taiwan in order to achieve a full and fair comparison, based on the costs of manufacturing adjusted for:

(a) differences in raw material used — on the basis of verified Union Industry cost data, whereby fittings produced from seamless tubes are between 2,12 and 2,97 times more expensive to produce than those from welded tubes;

(b) differences in grade of steel — on the basis of verified Union industry data, whereby a steel grade cost adjustment is made to the cost of the least expensive steel grades used for fittings produced based on welded tubes as raw material; this adjustment ranges from 1,49 to 3,60 times depending on the steel grades used;

(c) differences in shapes — on the basis of observed price differences in the sales transactions of the Chinese exporters, whereby an elbow is considered the most basic shape and the other shapes (tees, reducers, caps and specialty forms) are between 1,08 and 1,74 times more expensive.

(118) The CCCMC proposed in its submission after provisional disclosure an alternative basis for adjustments of points (a) and (b) and presented data from the Chinese markets in this respect. However, this data are, firstly, unverified and, secondly, originate in a non-market economy country. Therefore, using them would negate the analogue country methodology for the calculation of the normal value. This claim of the CCCMC was thus rejected.

(119) Following the final disclosure, the CCCMC, as well as two Chinese exporting producers, claimed it was unreasonable to adjust the Taiwanese cost data by using the Union industry cost data. The parties in question referred to the Union common practice not to do that in past cases.

(120) As mentioned above, the EU's previous practice was revised in the light of the WTO ruling referred to in recital 107. In order to construct the normal values of the missing product types, the Commission relied on Taiwanese cost data and adjusted the costs found and verified by applying proportional adjustments that were found at the level of the cost of production of the Union industry. The CCCMC failed to substantiate why this was unreasonable and/or to propose an alternative approach.

(121) Following additional disclosure CCCMC and the two Chinese exporting producers reiterated their objection to the use of Union industry data for the adjustment of costs of manufacturing used in construction of the normal value for missing product types. The parties underlined that the Commission did not provide evidence showing that differences in raw material costs in the EU market would be at the same level of that in Taiwan's market.

Furthermore, the parties repeated their claim that the Commission could use differences in Chinese export sales prices of seamless and welded fitting for the above adjustment as sales prices 'to some extent reflect the trend of differences in costs of production'.

(122) In response to the above claims it is first stressed that the Commission could not compare the level of adjustments for types of pipes used as raw materials or grades of steel to the data from Taiwanese market as the Taiwanese producer whose costs of manufacturing were used as a basis for construction of normal value simply did not use certain types of raw materials. That was the basic reason why the Commission at all considered looking for the missing cost data outside the market of the analogue country. Secondly, with regard to the use of Chinese prices, it is reiterated that none of the Chinese exporting producers had claimed MET in this procedure. Therefore, the Chinese costs of production were not available nor examined. Thus, the Commission cannot draw any conclusion 'to what extent' differences in sales prices reflect differences in costs of production of different types of fittings ([1]). Furthermore, even if such conclusions could be drawn it would apply to the costs of production in a NME country. Therefore, the above claims are rejected.

(123) These interested parties further question the adjustment whereby fittings produced from seamless tubes are between 2,12 and 2,97 times more expensive to produce than those from welded tubes. They refer to an unsubstantiated CCCMC claim made after provisional disclosure regarding price levels, whereby the difference between welded and seamless tubes is said to be less than 30 % of the price of welded tubes.

(124) In this regard, it is noted that the adjustment made by the Commission is based on the observed cost difference between fittings produced using seamless tubes and fittings produced using welded tubes, and not on the price difference between welded and seamless tubes as such. It should also be noted that none of the Chinese exporting producers requested MET. As a consequence, the Chinese exporting producers had not submitted any cost of production data and continued to do so even when putting into doubt the cost determinations and differences established by the Commission. Moreover, standard price lists are even further away from cost and price determinations as they do not give evidence of the prices effectively applied, let alone of the costs levels.

(125) To support their submissions, the interested parties provided an analysis of differences based on price levels of the producers Zhejiang Good and Zhejiang Jndia, concluding on this basis that the applicable price adjustment should be between 0,43 and 1,70, and 0,64 and 1,80 respectively.

(126) Apart from the fact that these ranges refer to prices and not costs, the fact that welded tube based fittings are sometimes sold at higher prices than seamless tube based fittings does not give evidence that the costs should be higher. The quoted price levels rather illustrate a complete absence of an economic link between the costs and the price quoted to clients, or alternatively it means that other factors have played a role, such as order size. The Commission, for reasons of confidentiality, cannot disclose the underlying figures but can reveal further factual data, whereby the adjustment from welded tube based to seamless tube based fittings used for the comparison according to the PCN description is as follows:

From W1 to S1 2,97

From W2 to S2 2,21

From W3 to S3 2,14

From W4 to S4 2,12.

Other conversions were not needed in order to construct the product types exported by the Chinese exporting producers.

([1]) It should be also noted that the prices in the Chinese steel sector are themselves distorted due to activities of SOEs and various subsidy schemes. See, inter alia, Steel: Preserving sustainable jobs and growth in Europe, COM(2016)155 final; Subsidies to Chinese Industry: State Capitalism, Business Strategy and Trade Policy by Usha C. V. Haley and George T. Haley, Oxford University Press, USA, April 25, 2013.

(127) The Commission further made adjustments converting the cost of the least expensive steel grade W1 into other grades and/or other grades based on seamless tubes, again using cost of production data of the Union industry. The Commission, again for reasons of confidentiality, cannot disclose the underlying figures but can give further factual data:

From W1 to S2 3,14

From W1 to S3 3,60

From W1 to S4 3,16

From W1 to W3 1,69

From W1 to W4 1,49.

Other conversions were not needed in order to construct the product types exported by the Chinese exporting producers.

(128) The Commission also wishes to highlight that, in its comments on these adjustment factors, the interested parties do not refer to price levels of both Chinese exporting producers as it did for the other adjustments, most probably because the figures do not put the Commission's methodology into doubt.

(129) With regards to differences in shape, the adjustments were made on the basis of the four sampled exporting producers' sales price data which is more comprehensive than the two producers the Chinese interested parties represent.

Taking the price level of elbows as the basis, the proportions are the following:

Tees 1,08

Reducers 1,22

Caps 1,29

Other shapes 1,74.

(130) In a subsequent step in the construction of the normal value, the Commission adjusted the costs of manufacturing calculated in accordance with recitals 112 to 117 by adding SG&A and profit. Due to the lack of domestic sales of the like product of both cooperating Taiwanese producers and the lack of sales of same general category of products by one of them (Ta Chen), Article 2(6)(c) of the basic Regulation had to be applied. To this end, in the construction of normal value, the Commission used the amounts of SG&A expenses and profit obtained from the other Taiwanese cooperating company (King Lai) — the only available and verified data referring to sales of the same general category of product on the Taiwanese market.

(131) It should be noted that the SG&A costs used for the calculation of the normal value for Chinese exporting producers were adjusted (reduced), as it was verified that the three Chinese sampled producers are also producing and selling mostly standard products, as explained in recital 86. The final level of the normal value adjustments for SG&A costs and profit is therefore also the same as provided in that recital.

(132) With regard to adjustments for SG&A costs, the two Chinese exporting producers and the CCCMC agree in their submission after final disclosure that reductions should be made when determining the SG&A costs used for construction of the normal value. This is because the Taiwanese exporter whose data was used in this regard does not produce the standard product. At the same time, these parties question whether the Commission made a proper assessment as to the level of this reduction.

(133) It is noted in this respect that the adjustments were made on the basis of comparison of the general SG&A structure of the Taiwanese company King Lai and the second Taiwanese company Ta Chen. This approach was taken because King Lai was the only company which had domestic sales in Taiwan (Ta Chen did not have domestic sales of the PC and any other product within the same general category of products). The adjustments are justified because the first company is a producer of highly sophisticated specialised product, while the second company produces standard products (so some parts of their SG&A costs are clearly different). On the basis of this comparison, the Commission deducted from the SG&A of King Lai R & D costs and part of labour costs related to the quality control department. There were no other significant differences between the two companies in other categories of SG&A costs. It should be underlined that in this adjustment the Commission deducted the two whole categories of SGA costs mentioned above. Thus, the Commission took a conservative approach when granting this adjustment, giving a higher, rather than lower, adjustment.

(134) The interested parties further claim that the Commission did not make a comparison of the structure of SG&A costs between Taiwanese company in question and Chinese exporting producers.

(135) In this regard, it is recalled that, since Taiwan is analogue country, it is the Taiwanese SG&A costs related to domestic sales in Taiwan which should be used. Their adjustment on the basis of comparison with SG&A costs of Chinese producers would mean using as a benchmark costs from the NME country. Nevertheless, it is stressed that, as a result of the adjustment made by the Commission, SG&A cost used for the calculation of normal value were reduced to the level which is not unreasonable in comparison with SG&A costs of the Chinese sampled companies. Actually, two out of three Chinese sampled companies have reported higher levels of SG&A costs than the one used for construction of the normal value.

3.2.3. *Export price*

(136) The cooperating exporting producers made export sales to the Union directly to independent customers or through unrelated trading companies located outside the Union.

(137) Export prices were established on the basis of the prices actually paid or payable for the product concerned when sold for export from the exporting country in accordance with Article 2(8) of the basic Regulation.

3.2.4. *Comparison and dumping margins*

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

(139) For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation.

(140) On this basis, adjustments were made for transport, ocean freight and insurance costs, handling, loading and ancillary costs, packing costs, credit costs, discounts and commissions where demonstrated to affect price comparability. The total adjustments were in the range of 5 %-16 %, based on actual values reported by the Chinese exporting producers and verified on spot. Those figures are the ones reported for the relevant cost items by the Chinese companies, and have been disclosed to them for verification in the specific disclosures.

(141) China applies a policy of reimbursing VAT only partially upon export and in this case 8 % VAT is not reimbursed. To ensure that the normal value was expressed at the same level of taxation as the export price, the normal value was adjusted upward by that part of the VAT charged on exports of large diameter seamless pipes and tubes that was not refunded to the Chinese exporting producers ([1]).

(142) The above adjustment was commented in the submissions of two Chinese exporting producers and CCCMC after final disclosure. The parties in question undescribed the principle that the non-reimbursed VAT upon export should be corrected for. However, as the normal value is considerably higher than the export price, the interested parties claim that adjustment of 8 % should be implemented on the export price, citing the absence of MET and higher dumping margins.

(143) In this regard it is noted that the Commission adjusted normal value, in line with the Judgement of the General Court in case T-423/09. This claim was therefore rejected.

(144) As provided by Article 2(11) and (12) of the basic Regulation, for each cooperating company, the weighted average normal value of each type of the like product was compared with the weighted average export price of the corresponding type of the product concerned.

([1]) That method was accepted by the General Court in its judgment of 16 December 2011, case T-423/09, *Dashiqiao v Council*, ECLI:EU:T:2011:764, paras 34 to 50.

(145) On this basis, the weighted average dumping margins, expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

Company	Dumping margin established (%)
Zhejiang Good Fittings Co., Ltd	55,3
Zhejiang Jndia Pipeline Industry Co., Ltd	48,9
Suzhou Yuli Pipeline Industry Co., Ltd (*)	30,7
Jiangsu Judd Pipeline Industry Co., Ltd (*)	30,7
Weighted average	41,9

(*) Part of Yuli-Judd Group.

(146) Weighted average dumping margin shall be applied to cooperating, non-sampled Chinese exporting producers.

(147) In relation to the above, one Union importer claimed in its submission after final disclosure that the difference between dumping margins calculated for Taiwanese company King Lai (0 %) and its related company in China (41,9 %) is unreasonable since the two companies manufacture the same kinds of fitting which are excluded from the product scope.

(148) In response to the above, it is first stressed that Taiwanese King Lai did not obtained a 0 % dumping margin because it produces fittings excluded from the product scope as seems to be this Union importer's understanding. Products excluded from the product scope were not taken into account in the dumping margin calculations for King Lai. The company, however, also produced and exported to the Union a small volume of products falling within the product scope of this investigation. Thus, a dumping margin, which was found to be negative, had to be calculated for this company. On the other hand, King Lai in China was not part of the sample and, therefore, no individual dumping margin was calculated for the company. The company thus obtained the weighted average dumping margin of the sampled Chinese companies. Nevertheless, no anti-dumping duty shall apply for the product which is not covered by the product scope of this investigation. Thus, if it is correct that King Lai in China exports to the EU a product which is not covered by the product scope of this investigation, then it will not be subject to anti-dumping duties upon importation.

(149) Due to the low level of cooperation of the Chinese exporting producers and following the reasoning of recital 95, the country-wide dumping margin for the PRC was established at the level of the highest dumping margin established for a representative product type in terms of volume, for the cooperating exporting producer who was found to be dumping.

(150) On this basis, the country-wide dumping margin, expressed as a percentage of the CIF Union frontier price, duty unpaid, amounts to 64,9 %.

3.2.5. *Individual examination requests*

(151) Five Chinese exporting producers which were not sampled requested individual examination in this proceeding. Taking into account the high number of applications, the Commission concluded that it would be unduly burdensome for the timely conclusion of the proceeding to accept any of these requests. In this regard it is noted that accepting the requests of the companies in question would more than double the number of companies which would require individual dumping margin calculations as the original sample consisted of four exporting producers. It is further noted that some of the individual examination applicants are part of the groups. According to the preliminary replies of the companies in question (sampling forms) individual examination would require analysis and verification of questionnaire replies of at least seven companies.

4. INJURY

4.1. Definition of the Union industry and Union production

(152) Based on the available information from the complaint and subsequent investigation, the like product was manufactured by at least 16 Union producers during the investigation period. The Union producers accounting for the total Union production constitute the Union industry within the meaning of Article 4(1) of the basic Regulation and will be thereafter referred to as the 'Union industry'.

(153) The total Union production during the investigation period was estimated at around 8 270 tonnes. The Commission established the figure on the verified questionnaire replies of the sampled Union producers and the estimated data provided by the complainant. As mentioned in recitals 11 to 13, sampling was applied for the determination of possible injury suffered by the Union industry. The Union producers selected in the sample represented ca. 43 % of the total estimated Union production of the like product.

(154) One party requested an explanation why the volume of the total Union production decreased by 80 tonnes between provisional and definitive disclosure. In the provisional disclosure the total Union production was estimated at around 8 350 tonnes. The recital above states that the total Union production was established at around 8 270 tonnes. The reason for the difference is that at provisional stage the Commission services wrongly estimated the production volume of one of the non-sampled Union producer. This Union producer ceased production during the investigation period. Therefore, its production was re-calculated taking into consideration of its shut down. The Commission confirmed that the total Union production was estimated at around 8 270 tonnes during the investigation period.

(155) As the sampled companies is constituted of only one producer and a group of companies, all data concerning micro indicators had to be indexed to protect confidentiality under Article 19 of the basic Regulation.

4.2. Union consumption

(156) The Commission established the Union consumption on the basis of total estimated sales volume of the Union industry on the Union market and on the total import volume of the product concerned to the Union.

(157) The Union industry's sales volume of the like product was estimated on the basis the actual verified data provided by the sampled producers in their questionnaire replies and, for the non-cooperating producers, the data provided by the complainant.

(158) As explained above in recital 47, the product concerned falls under two CN codes: ex 7307 23 10 and ex 7307 23 90. However, these two CN codes include not only the product concerned but also products outside of the scope of this investigation. Therefore, the volume of imports falling outside of the scope of this investigation needed to be deducted from the total volume of imports registered under the above mentioned CN code.

(159) The complainant estimated the volume of imports of the product concerned for all origins on the basis of its market knowledge. Regarding the countries concerned, it considered that that the products under investigation represented the vast majority of the volume reported under the above mentioned two CN codes for the PRC and Taiwan, 90 % and 100 % respectively.

(160) In order to verify this estimation, the Commission used the information received during a previous investigation concerning stainless steel fittings initiated on 10 November 2012. This investigation covered all the products classified under these two CN codes including the product concerned of this investigation. From the analysis made, it appears that at least 22,3 % of the products exported by the Chinese exporting producers under these CN codes would fall outside the scope of this investigation. For Taiwan, the percentage provided by the complainant is confirmed, i.e. 100 %.

(161) In the case of the PRC, the Commission decided to adjust the import volumes on the basis of the most conservative ratio, i.e. 22,3 %.

(162) Moreover, the consumption was further adjusted for the volume of flanged/low roughness fittings (see sections 2.2.1 and 2.2.2), both excluded from the product scope of the investigation. The volume imported was estimated on the basis of the sampling replies at around 150 tonnes for the PRC and 20 tonnes for Taiwan. Therefore, these quantities were deducted from the estimated volume of imports from the PRC and Taiwan. For the Union industry, the investigation revealed that the volume produced and sold of these excluded product types is insignificant.

(163) On this basis, the Union consumption was established as follows:

Table 1

Union consumption (tonnes)

	2012	2013	2014	IP
Total Union consumption	13 766	14 350	14 671	14 145
Index (2012 = 100)	*100*	*104*	*107*	*103*

Source: Eurostat, sampling replies, verified questionnaire replies and information provided by the complainant.

(164) The Union consumption increased by 3 % between 2012 and the investigation period.

4.3. **Imports from the countries concerned**

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

(165) The Commission examined whether imports of the product concerned originating in the countries concerned should be assessed cumulatively, in accordance with Article 3(4) of the basic Regulation.

(166) The margins of dumping established in relation to the imports from the PRC and Taiwan are summarised under recital 145 and recital 94 above.

(167) With the exception of King Lai, all these margins are above the *de minimis* threshold laid down in Article 9(3) of the basic Regulation. As mentioned in recital 94, the volume of the non-dumped imports was insignificant. In any event, these non-dumped imports were excluded from the total volume of Taiwanese imports of the product concerned.

(168) The volume of imports from each of the countries concerned was not negligible within the meaning of Article 5(7) of the basic Regulation. The PRC and Taiwan held, in the investigation period, a market share of 22,9 % and 7,8 % respectively, as mentioned in recital 181.

(169) The conditions of competition between the dumped imports from the countries concerned and the like product were also similar. Indeed, the imported products competed with each other and with the product concerned produced in the Union. The products are interchangeable and were marketed in the Union through comparable sales channels, being sold to similar categories of end customers.

(170) Therefore, all criteria set out in Article 3(4) of the basic Regulation were met and imports from the countries concerned were examined cumulatively for the purposes of the injury determination.

(171) Following the definitive disclosure, several parties claimed that the Commission had insufficiently examined the conditions of competition both between Chinese and Taiwanese fittings when imported into the Union, and between imported fittings and the Union production.

(172) These parties claimed on the basis of their market knowledge that there are important differences between the fittings produced and exported from China and from Taiwan to the Union. These parties considered that there was no competition between exported products due to the physical properties of the products, the extent to which the products are capable of serving the same or similar end-uses and the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular demand.

(173) These parties claimed that the extensive adjustments made by the Commission to achieve some resemblance of price comparability between Chinese and Taiwanese products show there are major differences in characteristics relating to raw materials (seamless tubes and welded tubes), grades of steel and manufacturing process. This has an impact on the price which precludes their interchangeability on the market. Moreover, the price trend shows a price disparity between the two origins.

(174) First, the Commission takes the view that the question of competition between different product types is not decisive for the injury assessment. As long as all product types form one product, for the reason set out above in recitals 43 to 50, there is no need to split the injury assessment on the basis of the fact that allegedly, different product types constitute separate product markets from the point of view of competition law.

(175) Second, even if the question of actual competition between product types was relevant, the Commission notes that the assertion of the absence of competition is not underpinned by the evidence on file. In fact, the Commission found that the product concerned exported by the Chinese exporting producer and the Taiwanese exporting producers are indeed in competition in the Union market. These products are to a large extent interchangeable. This conclusion was supported by the average price of the product concerned. There is a clear overlap where the product concerned produced from seamless pipes is similarly priced as the product concerned produced from welded pipes ([1]). With regard to the competition with the Union industry, the investigation confirmed that the sampled Union producers produced or could produce from both raw materials and all product types. Therefore, these claims were rejected and the cumulative analysis of the effects of the imports was confirmed.

(176) Following the additional disclosure, these interested parties reiterated their claim that the imports from the countries concerned should not have been cumulatively assessed. In this regard the Commission notes that even if competition between imports from the countries concerned are analysed on PCN basis the results are the same, i.e. there is a clear price competition. Therefore, this claim was rejected.

(177) Furthermore, these parties claimed that the production of one Union producer is primarily producing fittings from special stainless steel grades, while 70 % of Chinese production is mainly 304 or 316 austenitic, standard grades, meaning that these products are not competing.

(178) Regarding these claims, the Commission noted that the competitive relationship between the product concerned and the like product was confirmed by the investigation as stated in recital 174 above in the cumulation analysis. Moreover, with regard to the steel grade one of the sampled Union producers was indeed producing the like product from standard stainless steel grades representing around 90 % of its production. If follows that Chinese products are in direct competition with the products of this Union producer. Therefore, the claim was rejected.

(179) In absence of any further comments concerning Article 3(4) of the basic Regulation, the cumulative assessment of the imports from the countries concerned was confirmed.

([1]) The comparison between similar product types sold by Chinese exporting producers and Taiwanese exporting producer, i.e. 45 product types, shows that the average seamless Chinese fittings prices is around 15 % higher compared to the average welded Taiwanese fittings. Given the much higher quality of seamless steel and the influence of that quality on the purchase decision, the products are hence in competition, even if applying a competition-law based test.

4.3.2. *Volume and market share of imports from the countries concerned*

(180) The Commission established the volume of imports on the basis of the Eurostat database, the market knowledge of the complainant and other information available to the Commission (see recitals 156 to 164). The market share of the imports was established by comparing import volumes with the Union consumption as reported in Table 1 above.

Table 2

Import volume (tonnes) and market share

	2012	2013	2014	IP
Volume of dumped imports from the countries concerned	3 395	3 877	4 508	4 340
Index (2012 = 100)	*100*	*114*	*133*	*128*
Market Share countries concerned (excluding non-dumped imports) (%)	24,7	27,0	30,7	30,7
Index (2012 = 100)	*100*	*110*	*124*	*124*
Volume of imports from the PRC	2 686	2 759	3 248	3 238
Index (2012 = 100)	*100*	*103*	*121*	*121*
PRC Market Share (%)	19,5	19,2	22,1	22,9
Index (2012 = 100)	*100*	*99*	*113*	*117*
Volume of dumped imports from Taiwan	709	1 118	1 260	1 102
Index (2012 = 100)	*100*	*158*	*178*	*155*
Taiwan Market Share (excluding non-dumped imports) (%)	5,2	7,8	8,6	7,8
Index (2012 = 100)	*100*	*151*	*167*	*151*

Source: Eurostat, verified questionnaire replies and information provided by the complainant.

(181) Imports into the Union from the countries concerned developed as follows:

(182) The above table shows that, in absolute figures, the imports from the countries concerned have increased significantly during the period considered (by 28 %). The corresponding market share of the dumped imports into the Union increased by 6 percentage points during the period considered.

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

(183) For the evolution of the import prices, in absence of alternative source, the Commission had to rely on Eurostat to establish average prices of imports. The average price of imports into the Union from the countries concerned developed as follows:

Table 3

Import prices (EUR/tonnes)

	2012	2013	2014	IP
PRC	8 285	8 078	6 916	6 936
Index (2012 = 100)	*100*	*98*	*83*	*84*
Taiwan	7 543	5 189	4 653	5 840
Index (2012 = 100)	*100*	*69*	*62*	*77*

Source: Eurostat.

(184) The average prices of the Chinese dumped imports decreased from 8 285 EUR/tonne in 2012 to 6 936 EUR/tonne during the investigation period. During the period considered (2012-IP), the decrease of the average unit price of the dumped Chinese imports was around 16 %. In the same period, the average prices of the Taiwanese dumped imports decreased from 7 543 EUR/tonne, in 2012, to 5 840 EUR/tonne during the investigation period. During the period considered, the decrease of the average unit price of the dumped Taiwanese imports was around 23 %.

(185) Following the definitive disclosure, one interested party claimed that the Commission should have assessed the effect of the decrease in nickel price on the price of the product concerned during the investigation period as the evolution of nickel price is a major factor of stainless steel price. While it is true that nickel is one of the main cost driver for the production of pipes (raw material of the product concerned), there is no direct relationship with the product concerned. Moreover, the Commission found that the price of the product concerned does not correlate with the nickel price. ([1]) Therefore, the claim was rejected.

(186) The Commission assessed the price undercutting during the investigation period by comparing:

(a) the weighted average sales prices per product type of the three Union producers charged to unrelated customers in the Union market, adjusted to an ex-works level; and

(b) the corresponding weighted average prices at CIF Union frontier level per product type of the imports from the cooperating producers of the countries concerned to the first independent customer on the Union market, with appropriate adjustments for post-importation costs 2 % and import duties 3,7 %.

(187) The price comparison was made on a type-by-type basis for transactions at the same level of trade, duly adjusted on the basis of the actual costs where necessary, and after deduction of rebates and discounts as reported by the sampled Union producers. The result of the comparison was expressed as a percentage of the Union producers' turnover during the investigation period.

(188) On the basis of the above, the dumped imports from the PRC and Taiwan were found to undercut the Union industry prices by 59,4 % and 76,1 % respectively.

([1]) Please refer to the web site of the London Metal Exchange, https://www.lme.com/en-gb/metals/non-ferrous/nickel/

4.4. **Economic situation of the Union industry**

4.4.1. *General remarks*

(189) In accordance with Article 3(5) of the basic Regulation, the examination of the impact of the dumped imports on the Union industry includes an evaluation of all economic indicators having a bearing on the state of the Union industry during the period considered.

(190) For the injury determination, the Commission distinguished between macroeconomic and microeconomic injury indicators. The Commission evaluated the macroeconomic indicators on the basis of data and information contained in the complaint and Eurostat statistics, where appropriate, so that the data relates to all Union producers. The Commission evaluated the microeconomic indicators on the basis of data contained in the questionnaire replies, duly verified, from the sampled Union producers.

(191) The macroeconomic indicators are: production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, magnitude of the dumping margin, and recovery from past dumping.

(192) The microeconomics indicators are: average unit prices, unit cost, labour costs, inventories, profitability, cash flow, investments, return on investments, and ability to raise capital.

4.4.2. *Macroeconomic indicators*

4.4.2.1. Production, production capacity and capacity utilisation

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

Table 4

Production, production capacity and capacity utilisation

	2012	2013	2014	IP
Production volume	8 967	8 780	8 304	8 272
Index (2012 = 100)	*100*	*98*	*93*	*92*
Production capacity	22 779	21 194	21 163	19 721
Index (2012 = 100)	*100*	*93*	*93*	*87*
Capacity utilisation (%)	39	41	39	42
Index (2012 = 100)	*100*	*105*	*100*	*106*

Source: Verified questionnaire replies and information provided by the complainant.

(194) The production volume remained rather stable between 2012 and 2013. Between 2013 and the investigation period, the Union industry's production volume decreased by 6 %. During the period considered, there was an overall decrease of 8 % in the production volume.

(195) At the same time, the production capacity sharply decreased by 13 %. This can be mainly attributed to the closure of one Union producer, and to a decrease in the production of another Union producer, which resulted in the decrease of around 3 600 tonnes of production capacity.

(196) The reported capacity figures refer to technical capacity, which implies that adjustments, considered as standards by the industry, for set-up time, maintenance, bottle necks and other normal stoppages have been taken into consideration. However, this is the theoretical production capacity of the Union industry.

(197) It is difficult to assess capacity utilisation for this particular industry as it can differ depending on the type of the equipment and the volume produced. One of the sampled Union producers considered that 60 % of capacity utilisation was the maximum achieved in the past. Therefore, the above theoretical production capacity is clearly overstated as compared to the real production capacity.

(198) It follows that the capacity utilisation remained low during the period considered, at around 42 %. Due to the restructuring of one of the sampled Union producers and the closure of one Union producer, the capacity utilisation increased by 3 percentage points throughout the period considered. Low capacity utilisation deteriorates the absorption of fixed costs, which is one of the causes of the low profitability of the Union industry during the period considered.

4.4.2.2. Sales volume and market share

(199) The Union industry's volume of sales in the Union to unrelated customers and its market share developed as follows:

Table 5

Sales volume and market share

	2012	2013	2014	IP
Sales volume on the Union market in tonnes	7 856	7 717	7 401	7 302
Index (2012 = 100)	*100*	*95*	*91*	*89*
Market share (%)	57,1	53,8	50,4	51,6
Index (2012 = 100)	*100*	*94*	*88*	*90*

Source: Eurostat, the complaint and verified questionnaire replies and information provided by the complainant.

(200) Over the period considered, Union industry sales volume dropped overall by 11 %, while Union consumption increased by 3 %. Sales volume of Chinese and Taiwanese dumped products increased by 945 tonnes (21 % and 55 % respectively) while the Union consumption increased by 379 tonnes. In the context of increasing consumption on the Union market, the decrease in sales and market share of the Union industry coincides with an increase of imports from the countries concerned. Moreover, due to the continuous price pressure by the dumped imports, the Union industry was forced to lower its production to avoid selling at loss-making prices.

4.4.2.3. Employment and productivity

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

Table 6

Employment and productivity

	2012	2013	2014	IP
Number of employees	581	526	532	484
Index (2012 = 100)	*100*	*91*	*92*	*83*
Productivity (tonne per employee)	*15,4*	*16,7*	*15,6*	*17,0*
Index (2012 = 100)	*100*	*108*	*101*	*110*

Source: The complaint and verified questionnaire replies and information provided by the complainant.

(202) In line with the decline in production and sales, it was also observed that the level of the Union industry's employment decreased significantly. The laying-off of employees was done in order to reduce the workforce, which represented a reduction thereto of 17 %. As a consequence, the 10 % increase in productivity of the Union industry's workforce, measured as output per person employed per year, is much higher than the increase of 3 percentage points in the capacity utilisation (see recital 193). This suggests that the Union industry tried to adapt to the changing market conditions (increasing volume of dumped imports) in order to remain competitive.

4.4.2.4. Inventories

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

Table 7

Inventories

	2012	2013	2014	IP
Closing stocks (tonnes)	2 191	1 850	2 002	1 697
Index (2012 = 100)	*100*	*84*	*91*	*77*
Closing stocks as a percentage of production (%)	24,4	21,1	24,1	20,6
Index (2012 = 100)	*100*	*86*	*99*	*84*

Source: Verified questionnaire replies and information provided by the complainant.

(204) During the period considered, the level of closing stocks decreased by 23 %. Most types of the like product produced by the Union industry are based on specific orders from users. However, the industry also has to maintain stocks of a various range of products in order to be able to compete with other producers' fast delivery time. This is also confirmed by analysing the evolution of the closing stocks as a percentage of production. This indicator remained relatively stable at 20 %-24 % of the production volume.

(205) It was concluded that the reduction in the level of stocks was mainly caused by more stringent working capital requirements imposed by the Union industry's management.

4.4.2.5. Magnitude of the dumping margin

(206) With the exception of one minor Taiwanese exporter, all dumping margins were significantly above the *de minimis* level. The impact of the magnitude of the actual high margins of dumping on the Union industry was not negligible, given the volume and prices of imports from the countries concerned.

4.4.2.6. Growth

(207) The Union consumption increased by 3 % during the period considered, while the sales volumes of the Union industry decreased by 11 %. Regardless this increase in consumption, the Union industry lost market share. On the other hand, the market share of the imports from the countries concerned increased during the period considered.

4.4.3. *Microeconomic indicators*

4.4.3.1. Prices and factors affecting prices

(208) The weighted average unit sales prices of the Union producers to unrelated customers in the Union developed over the period considered as follows:

Table 8

Sales prices in the Union

	2012	2013	2014	IP
Sales price *Index (2012 = 100)*	*100*	*95*	*96*	*95*
Unit cost of production *Index (2012 = 100)*	*100*	*101*	*103*	*98*

Source: Verified questionnaire replies.

(209) The table above shows the evolution of the unit sales price in the Union as compared to the corresponding cost of production. The average unit selling price evolved broadly in line with the cost of production. There is 2 % decrease in the cost of production from 2014 to the investigation period, affected by the reduction in the price of the main raw material, but the unit sales price decreased by 5 %.

(210) Following the definitive disclosure, one interested party claimed that the Commission failed to take into account the general market situation. In particular, there was a drop of oil prices, decreasing the product costs. However, the party did not submit any evidence supporting its claim. In particular, it remained unclear how precisely the drop in the worldwide oil price would relate to the cost of production of this particular like product. Furthermore, the Commission's injury analysis covered a period between 2012 and IP during which all raw materials, including energy, were taken in consideration. Therefore, the claim was rejected.

4.4.3.2. Labour costs

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

Table 9

Average labour costs per employee

	2012	2013	2014	IP
Average labour costs per employee *Index (2012 = 100)*	*100*	*111*	*110*	*110*

Source: Verified questionnaire replies.

(212) During the period considered, the average wage per employee went up by 10 % which is slightly above the overall increase in prices in the Union due to inflation. This should however be considered in the context of the severe cuts in employment, as explained in recitals 201 and 202.

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

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

Table 10

Profitability, cash flow, investments and return on investments

	2012	2013	2014	IP
Profitability of sales in the Union to unrelated customers (% of sales turnover) *Index (2012 = 100)*	*100*	*33*	*23*	*66*
Cash flow Index *(2012 = 100)*	*100*	*61*	*33*	*57*
Investments *Index (2012 = 100)*	*100*	*178*	*128*	*122*
Return on investment *Index (2012 = 100)*	*100*	*28*	*19*	*48*

Source: Verified questionnaire replies.

(214) The Commission established the profitability of the Union producers by expressing the pre-tax net loss of the sales of the like product to unrelated customers in the Union as a percentage of the turnover of those sales.

(215) Profitability developed negatively from [8 %-10 %] in 2012 to [2 %-4 %] in 2013 and 2014 and improved in the IP to reach [4 %-6 %]. Over the period considered, the sampled companies lost sales volume and market share, and decided to concentrate on high-price segments where dumped imports were less present. This strategy enabled them to increase their profitability during the IP.

(216) As a result, while in 2013 and 2014, the sampled companies were not able to pass on increases of cost of production to clients, during the IP the profitability of sampled companies could benefit from the decrease of its cost of production due to a higher capacity utilisation and less competitive pressure in the high-price segments of the market.

(217) The net cash flow is the ability of the Union producers to self-finance their activities. The trend in net cash flow followed a downward trend (– 43 %), mainly due to a reduction in inventories.

(218) The return on investment decreased between 2012 and 2014, and recovered in the IP following the profitability trend. The Union industry increased the level of its investments by 22 % between 2012 and the investigation period. However, this increase of 22 % should be considered in light of the absolute figures. The level of investment for the sample of the Union industry was less than one million euro in 2012 and reached one million during IP mainly for expenses related to normal maintenance and safety equipment.

(219) Several parties claimed that the drop in profitability from 2012 to 2013 should be interpreted in the light of the substantial increase in investments in the Union industry. They observed investments had increased by 78 % between 2012 and 2013. Following the second disclosure, these parties reiterated their claim and stated that the increase of 78 % should be considered as a 'huge' investment expense.

(220) In this regard, the Commission noted that the Union producers did not invest in order to improve their product method but into obligatory safety equipment and maintenance as stated above. While indeed investment increased, at the same time the return on investment decreased substantially. Furthermore investment should be compared to total sales of the like product and the investment in question represented only between 2-4 % of the total sales of the like product. Finally, investment is only one of the injury indicators and should not be analysed in isolation.

5. **CONCLUSION ON INJURY**

(221) It is concluded that most of injury indicators show a negative trend during the period considered. In particular, the injury indicators related to the production and market share of the Union producers expose the serious difficulties of the Union industry, as well as the existence of sustained undercutting. The only positive indicator, namely the slight improvement of the profitability during the IP was achieved at the expense of sales volume and market share by moving into the high-price segment. It may not be of duration, if dumped imports also enter high-price segments. Accordingly, an assessment of all macro and micro indicators reveals an overall negative trend. Therefore, it can be concluded that the Union industry suffered material injury within the meaning of Article 3(5) of the basic Regulation.

6. **CAUSATION**

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

(223) These factors are: imports from third countries, the export sales performance of the Union producers, the low capacity utilisation of the Union industry and the non-dumped imports from Taiwan.

6.1. **Effects of the dumped imports**

(224) Sales prices of the exporting producers decreased on average from 8 129 EUR/tonne in 2012 to 6 658 EUR/tonne during the investigation period (– 18,1 %). By continuously lowering their unit sales price during the period considered, the exporting producers from the countries concerned were able to significantly increase their market share from 2012 (24,7 %) to the investigation period (30,7 %).

(225) Since 2012, the continuous increase in imports from the countries concerned at prices that undercut those of the Union industry had a clear negative impact on the financial performance of the Union industry. Indeed, while the Union industry was cutting its costs by reducing employment and closing plants, the volume of dumped imports increased at constantly lowering prices, which forced the Union industry to decrease its sales volume. As a consequence, the Union industry lost market share and was not able to benefit from the increase in consumption.

(226) In view of the clearly established coincidence in time between, on the one hand, the ever-increasing level of dumped imports at continuously decreasing prices and, on the other hand, the Union industry's loss of sales volume, it is concluded that the dumped imports were responsible for the injurious situation of the Union industry.

(227) Following the definitive disclosure, one interested party claimed that the decrease of sales prices of exporting producers is explained by the drop of nickel price. However, as explained above in recital 185, there is no direct correlation between nickel price and the import prices. Therefore, the claim was rejected.

(228) Several parties claimed that the injury suffered by the Union industry cannot be attributed to the dumped imports from the countries concerned as only one of the sampled Union producer's prices decreased during the period considered and the other sampled Union producers were able to maintain their sales prices. This claim is rejected for the following reasons. The intra-EU statistics are not reliable in this case as they contain not only the product concerned but other also other type of fittings. Moreover the Union industry did not substantially decrease during the period considered (– 5 %), however at the expense of its sales volume, which decreased by 11 %, as well as its market share which decreased by 5,5 % during the same period.

(229) Following the second disclosure the interested parties claimed that, contrary to the Commission statement in recital 228 above, the data reported in Eurostat is indicative of the pricing behaviour of the Union producers and therefore, it is correct to state the Union producers' prices remained stable during the period considered. In this respect the Commission notes the following. As explained above the definition of the relevant CN code is wider than the definition of the product concerned and the like product (see recital 158 above). Furthermore, these interested parties are mistaken when they state that the Union producers are producing only the like product falling under the two CN codes in question. Indeed, the Union industry is also producing products falling outside of the product definition of this regulation and falling under the two CN codes in question. Therefore, this claim was rejected.

(230) In the absence of any further comments the Commission confirmed that dumped imports of the product concerned caused material injury to the Union industry.

6.2. **Effects of other factors**

6.2.1. *Imports from third countries*

(231) The volume of imports from third countries developed over the period considered as follows:

Table 11

Import volume from other countries (tonnes) and market share

	2012	2013	2014	IP
Volume of imports from third countries	2 515	2 755	2 762	2 503
Index (2012 = 100)	*100*	*110*	*110*	*100*
Market Share (%)	18,3	19,2	18,8	17,7
Volume of imports from Switzerland	1 217	1 340	1 476	1 503
Index (2012 = 100)	*100*	*110*	*121*	*123*
Market Share (%)	8,8	9,3	10,1	10,6

	2012	2013	2014	IP
Volume of imports from Brazil	339	350	229	278
Index (2012 = 100)	*100*	*103*	*68*	*82*
Market Share (%)	2,5	2,4	1,6	2,0
Volume of imports from India	120	146	204	201
Index (2012 = 100)	*100*	*121*	*169*	*167*
Market Share (%)	0,9	1,0	1,4	1,4
Volume of imports from Malaysia	195	322	297	314
Index (2012 = 100)	*100*	*165*	*152*	*161*
Market Share (%)	1,4	2,2	2,0	2,2
Volume of imports from other third countries	642	595	554	205
Index (2012 = 100)	*100*	*93*	*86*	*32*
Market Share (%)	4,7	4,2	3,8	1,5

Source: Eurostat, the complaint and verified questionnaire replies and information provided by the complainant.

(232) The largest exporter of the product concerned to the Union after PRC is Switzerland with a 10 % market share, compared with PRC/Taiwan's 30,7 %. Prices of these imports were similar to the Union industry prices, i.e. 10 300 EUR/tonne.

(233) The volume and the market share of imports from all other origins remained stable during the period considered; i.e. respectively around 2 500 tonnes and 37 %. It can therefore be concluded that the impact of these imports did not break the causal link between Chinese/Taiwanese dumped imports and the material injury suffered by the Union industry.

(234) Several interested parties claimed that the Commission should have analysed the price effect of the import originating from India. Following the second disclosure, this claim was reiterated and parties further stated that average Indian prices were in free fall during the period considered. The Commission observed Indian imports have a market share of 1,4 %. The average price of the like product originating in India was around 9 500 EUR/tonne during the investigation period. While it is true that the average price of the product originating in India decreased from around 13 700 EUR/tonne in 2012 to around 9 500 EUR/tonne in the IP, they were still 27 % higher than the average price of the product concerned originating in China, and 61 % higher when compared to Taiwanese prices. Therefore, these imports did not break the causal link.

(235) Several interested parties claimed that the Commission should have analysed imports of the like product from Russia. In contrast, the complainant claimed that these imports should not be taken into consideration for the causation analysis as the products declared under the CN codes concerned are not like products.

(236) The Commission found that the import prices of Russia, reported by Eurostat for the CN codes concerned stood around 1 000 EUR/tonne for the investigation period. Hence, the Russian imports are related to different product more 7 times cheaper compared to the Chinese imports. Therefore, these imports were considered irrelevant for the causality analysis.

(237) Following the second disclosure, several interested parties claimed that the effect of imports originating in Russia and India should be cumulatively assessed. As stated in recital 236 above, imports originating in Russia were not taken into consideration during the causation analysis because the Commission found that the products originating in Russia are not covered by the definition of the product concerned and therefore are not captured by this investigation. For this reason, these imports cannot be cumulatively assessed with the imports originating in India. Therefore, this claim was rejected.

6.2.2. *Export sales performance of the Union industry*

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

Table 12

Export performance

	2012	2013	2014	IP
Export volume to unrelated customers	645	553	530	596
Index (2012 = 100)	*100*	*86*	*82*	*92*
Average price (EUR/tonne)	13 567	12 386	11 890	11 619
Index (2012 = 100)	*100*	*91*	*88*	*86*

Source: Verified questionnaire replies.

(239) According to data from the sampled Union producers, the export prices have decreased by 14 % during the period considered and export volume to unrelated customers in third countries decreased by less than 1 % of the total sales of the Union industry. However, the loss suffered during the IP was not significant, representing less than 0,8 % of the total turnover of the Union industry.

(240) It can be therefore concluded that the export activity of the Union industry does not break the causal link.

6.2.3. *Low capacity utilisation of the Union industry*

(241) In view of the low capacity utilisation of the sampled companies throughout the period considered, the Commission has also investigated whether overcapacity may have contributed to injury or even broken the causal link. At this stage, the Commission considers that this is not the case. First, as explained above in recital 197, the companies need to have an important theoretical capacity in order to be able to meet all customer demands, but it is unrealistic to use that theoretical capacity completely. Second, the Union industry has been profitable with a lower capacity utilisation rate in 2012, indicating that the injury is not caused by overcapacity. Therefore, it is concluded that the impact of such low capacity utilisation is immaterial and thus could not sever the causal link.

6.2.4. *Non-dumped imports from Taiwan*

(242) The volume of the non-dumped imports was insignificant, 300 kg during the IP, compared to the total Union consumption, 14 145 tonnes. Therefore, it is concluded that the impact of such imports on the Union industry is immaterial and thus could not sever the causal link.

6.3. **Conclusion on causation**

(243) A causal link was established between the injury suffered by the Union producers and the dumped imports from the countries concerned.

(244) The considerable price and volume pressure exerted on the Union industry by the increasing dumped imports from the countries concerned over the period considered have not allowed the Union industry to benefit from the slow recovery of the EU market. The analysis of the injury indicators above shows that the economic situation of the Union industry as a whole has been affected by an increase of low-priced dumped imports from PRC and Taiwan that undercut the Union prices. Chinese/Taiwanese exporters managed to gain significant market share (30,7 % during the IP compared to 24,7 % market share in 2012) at the expense of the Union industry. The Union industry lost 5,5 percentage points of its market share between 2012 and the IP, and 11 % of the sales volumes, while the consumption increased in the Union market.

(245) The Commission distinguished and separated the effects of all known factors on the situation of the Union industry from the injurious effects of the dumped imports. The other identified factors, i.e. the imports from third countries, the export sales performance of the Union producers, the low capacity utilisation of the Union industry and the non-dumped imports from Taiwan, were not found to break the causal link. Even when their combined effect was considered, the Commission's conclusion was not different: in the absence of the dumped imports, the Union industry would not have been negatively affected to such a significant extent. In particular, the market share would not have dropped to such levels and reasonable profitability would have been achieved.

(246) On the basis of the above, the Commission concluded at this stage that the material injury to the Union industry was caused by the dumped imports from the countries concerned and that the other factors, considered individually or collectively, did not break the causal link.

7. **UNION INTEREST**

(247) In accordance with Article 21 of the basic Regulation, the Commission examined whether there was a compelling reason to conclude that it was not in the Union interest to adopt measures in this case, despite the determination of injurious dumping. The determination of the Union interest was based on an appreciation of all the various interests involved, including those of the Union industry, importers and users.

7.1. **Interest of the union industry**

(248) The Union industry is located in 10 Member States (Austria, Czech Republic, Denmark, Finland, France, Germany, Italy, Poland, Spain and Sweden), and employs directly around 500 employees in relation to stainless steel tube and pipe butt-welding fittings.

(249) None of the known producers opposed the initiation of the investigation. As shown above, when analysing the injury indicators, the whole Union industry experienced a deterioration of its situation and was negatively affected by the dumped imports.

(250) It is expected that the imposition of definitive anti-dumping duties will restore fair trade conditions on the Union market and enabling the Union industry to recover. This would result in an improvement of the Union industry's profitability towards levels considered necessary for this capital intensive industry. The Union industry has suffered material injury caused by the dumped imports from the countries concerned. It is recalled that most of the injury indicators showed a negative trend during the period considered.

(251) In particular, injury indicators related to the production, production capacity and market share of the Union producers were seriously affected. The imposition of measure is therefore important to restore the market to non-dumped and a non-injurious levels, and in order to allow all producers to operate in the Union market under fair trade conditions. In contrast, in the absence of measures, a further deterioration of the Union industry's economic and financial situation would be very likely.

(252) Following the claim set out in recital 35 above the Commission verified the request (including an on-spot verification visit to the Union industry's headquarters). The Commission concluded that contrary to the claim submitted: (i) the products imported under the outward processing scheme are in direct competition with other Union producers' products; (ii) the imposed duty, which is the duty of 41,9 % applicable to the Chinese producer which whom the EU company has the outward-processing arrangement, should have a limited financial impact (10 %-15 %) on the Union producer's revenue generated by outward processing business; (iii) the viability of the Union producer outward processing business should not be jeopardised by the imposition of measures and, as a result, the number of employees should not decrease, and the purpose of the EU funds should not be endangered. Therefore, the claim was rejected. The Commission also recalls in that context that the Union Customs Code foresees that as a rule, trade defence duties do apply to outward processing schemes where the operation performed outside the Union confers non-preferential origin to the good, as seems to be the case here. No duty would apply, on the contrary, if and to the extent that the non-preferential origin of the goods remains the Union.

(253) It is concluded that the imposition of anti-dumping duties would be in the interest of the Union industry. The imposition of anti-dumping measures would allow the Union industry to recover from the effects of injurious dumping found.

7.2. **Interest of unrelated importers**

(254) As indicated in recital 18, only one importer submitted detailed information regarding the impact of anti-dumping duties. This importer considered that the initial effect will be a price rise with a negative impact on its performance in terms of delivery time and competitiveness. This importer further stated that it would start focusing more on other countries producing fittings like i.e. Malaysia, Vietnam and Korea. However, the process of selecting new partners elsewhere would cost time and money. In addition, it would bring discontinuity in their stock level and product quality, which in turn would have a negative impact on the quality of the service provided to customers.

(255) However, it was found that importers are able switch to other sources of supply, and thus the negative impact of the measures can be mitigated.

(256) Following the definitive disclosure, one interested party contested that finding. It claimed that the Union producers will not be able to serve the Union market. Moreover, the existing fittings producers established, for example in Malaysia and Thailand would not be able to provide the quantity and the quality to serve the Union importers.

(257) The Commission rejected that claim. The Union producers currently operate on average by using 42 % of their capacity. Hence, it is probable that they will be able to increase their production and to supply the Union market more than today. Furthermore, fittings are also produced in several other third countries such as India, Malaysia, Thailand, Korea or Japan. Therefore, the Commission considers that there is no risk of shortage of the product on the Union market.

(258) On this basis, it is concluded that the imposition of anti-dumping measures will not have substantially negative effects on importers.

7.3. **Interest of users**

(259) Users of the product concerned and the like product are found in various industrial domains. The crucial factor for the users is the availability of the product in the requested quantity and quality.

(260) As only one user cooperated in the investigation, the Commission could not quantify the impact of the measure on users broadly. However, from the reply of this cooperating user, the impact of any anti-dumping in the costs of this company will be insignificant (less than 1 % of its turnover). In any event, the EU industry has the capacity to satisfy the EU demand and that there are also other third countries that can supply the EU, if fair conditions prevail.

(261) For the reasons above, it was concluded that the imposition of anti-dumping measures will not have a substantial impact on users.

7.4. **Conclusion on Union interest**

(262) In view of the above, the Commission concluded that there are no compelling reasons against the imposition of measures on imports of the product concerned from the countries concerned.

(263) Any negative effects on the unrelated importers and users are mitigated by the availability of alternative sources of supply.

(264) Moreover, when considering the overall impact of the anti-dumping measures on the Union market, the positive effects, in particular on the Union industry, appear to outweigh the potential negative impacts on the other interest groups.

8. **DEFINITIVE ANTI-DUMPING MEASURES**

(265) On the basis of the conclusions reached by the Commission on dumping, injury, causation and Union interest, definitive measures should be imposed to allow the Union industry to recover from the injury being caused by the dumped imports.

8.1. **Injury elimination level (injury margin)**

(266) In order to determine the level of the measures, the Commission first established the amount of duty necessary to eliminate the injury suffered by the Union industry.

(267) The injury would be eliminated if the Union industry was able to cover its costs of production and to obtain a profit before tax on sales of the like product in the Union market that could be reasonably achieved under normal conditions of competition by an industry of this type in the sector, namely in the absence of dumped imports.

(268) In order to determine the target profit, the Commission considered the profits made in the unrelated sales which are used for the purpose of determining the injury elimination level.

(269) The target profit margin was provisionally set at [7-12 %], in line with profits reached from the unrelated sales of the sampled Union producers in 2012. While the Chinese and Taiwanese imports were already present in the Union market, in 2012 the prices of the dumped imports had not yet decreased substantially. Therefore, the Commission consider the profitability reached in 2012 as having been achieved under normal market conditions.

(270) The Commission calculated a non-injurious price of the like product for the Union industry by adding the above-mentioned profit margin of [7–12 %] to the cost of production of the sampled Union producers during the investigation period. The cost of manufacturing reported by one of the three Union producers was recalculated on the basis of standard costs (cost of raw material plus conversion cost plus SG&A) since the actual costs were unrepresentative due to the very low quantity produced for certain PCNs sold in the IP.

(271) The Commission determined the injury elimination level on the basis of a comparison of the weighted average import price of the cooperating exporting producers in the countries concerned, duly adjusted for importation costs and customs duties, as established for the price undercutting calculations, with the weighted average non-injurious price of the like product sold by the sampled Union producers on the Union market during the investigation period. Any difference resulting from this comparison was expressed as a percentage of the weighted average import CIF value.

(272) As a result, the underselling margins range from 75,4 % to 127,1 %, when comparing Chinese CIF prices with the Union industry's EXW prices and 104,4 % to 110,0 % when comparing Taiwanese CIF prices with the Union industry's EXW prices.

(273) Following the definitive disclosure several parties requested a more detailed injury calculation. The Commission was of the opinion that all interested parties had already received a detailed injury calculation. It had followed its standard practises to disclose all relevant findings duly taking into account the confidentiality of the source data.

(274) Several parties claimed that it is inappropriate to base the non-injurious price on the cost of production of the three sampled Union producers as there is no evidence that their cost of production is representative at the level of the whole Union industry. These parties failed to explain why the Commission should deviate from its normal practice of using the cost of production of the sampled Union producers in this particular case. Furthermore contrary to the claim the investigation established that the costs of production of the three sampled Union producer are indeed representative of the Union industry. The Commission during the investigation did not identify any issue or problem that would have indicated that the cost of production of the sampled Union producers were not representative of the like product.

(275) These interested parties further claimed that the calculation of the underselling margins is flawed as statistics show that the average price of one of the three sampled Union producer is significantly higher than the other ones. While the Commission acknowledges the fact that one of the Union producers' prices are higher than the other ones, it noted that analysing prices at CN Code level is misleading as it does not take into consideration of the underlying product mix and the fact that certain products were excluded from the product scope. Furthermore as stated above underselling calculation were performed on the basis of cost of production by product type. Thus, only the cost production of matching product types was used.

(276) Furthermore even if the Commission was to remove the cost data of this particular Union producer and would only use the cost data of the other sampled Union producers, the results would be in the same ball park. The underselling margins based on this methodology range from 60 % to 95 % when comparing Chinese CIF prices with the Union industry's EXW target prices. However granting this claim would have no effect on the final measures. Furthermore would entail comparing product types based on a completely different raw material. Therefore this claim was rejected.

(277) Several parties claimed that using standard cost instead of actual cost had led to a distorted target price as several product characteristics had not been taken into consideration. In this regard, the Commission noted that it had disregarded the manufacturing cost as reported by one sampled Union producer because — contrary to what the interested parties claim — using the actual cost of manufacturing would have led a distorted result. By using standard cost methodology the Commission was able to eliminate the distortion caused by unrepresentatively low quantities. Therefore, the Commission confirmed the appropriateness of the methodology used.

(278) Several parties claimed that the methodology used for the underselling calculation should be applied in an even manner, i.e. the same grouping of product types should be used for the product concerned and the like product. The Commission acknowledged the shortcoming of the methodology initially used and revised the underselling calculation accordingly. The Commission noted that this change only affected product types using seamless tubes or pipes as a raw material and affected only those exporting producers which use the above raw material. Therefore the new underselling margins range from 75,7 % to 112,2 % when comparing Chinese CIF prices with the Union industry's EXW target prices.

(279) Following the second disclosure, several interested parties claimed that it was inappropriate to compare the price of the exporting producers with the target price established on the basis of material grade for fittings produced from seamless tubes. Moreover, the parties reiterated that the target price should have been established for each product type instead of for each material grade.

(280) The Commission states that it try to perform the calculation as requested by the interested parties, i.e. a PCN to PCN analysis. However, it found that the results were unreliable for certain PCNs due to the significantly different quantities imported to the Union and produced by the Union producers. Therefore, it found that the methodology described in recitals 270 and 271 was more adequate and, as a result, this claim was rejected.

(281) In absence of any further comments the Commission confirmed that the underselling margins concerning Taiwan as stated in recital 272 above.

8.2. **Definitive measures**

(282) On the basis of the above, the definitive anti-dumping duty rates, expressed on the CIF Union border price, customs duty unpaid, should be as follows:

Company	Injury margin (%)	Dumping margin (%)	Definitive anti-dumping duty rate (%)
Taiwan:			
King Lai Hygienic Materials Co., Ltd	—	0,0	0,0
Ta Chen Stainless Pipes Co., Ltd	104,4	5,1	5,1
Residual Duty	110,0	12,1	12,1
The People's Republic of China			
Zhejiang Good Fittings Co., Ltd	112,2	55,3	55,3
Zhejiang Jndia Pipeline Industry Co., Ltd	105,9	48,9	48,9
Suzhou Yuli Pipeline Industry Co., Ltd (*)	75,7	30,7	30,7
Jiangsu Judd Pipeline Industry Co., Ltd (*)	75,7	30,7	30,7
Weighted Average (**)	93,1	41,9	41,9
Residual Duty (***)	127,1	64,9	64,9

(*) Part of Yuli-Judd Group.
(**) Shall be applied to cooperating not sampled companies: ALFA Laval Flow Equipment (Kunshan) Co., Ltd, Kunshan Kinglai Hygienic Materials Co.,Ltd, Wifang Huoda Pipe Fittings. Manufacture Co., Ltd, Yada Piping Solutions Co., Ltd, Jiangsu Huayang Metal Pipes Co., Ltd.
(***) Shall be applied to non-cooperating companies and Shanghai Max Fittings Co., Ltd (originally sampled company which withdrew its cooperation).

(283) The individual company anti-dumping duty rates specified in this Regulation were established on the basis of the findings of this investigation. Therefore, they reflected the situation found during this investigation with respect to these companies. These duty rates are exclusively applicable to imports of the product concerned originating in the countries concerned and produced by the named legal entities. Imports of product concerned produced by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, should be subject to the duty rate applicable to 'all other companies'. They should not be subject to any of the individual anti-dumping duty rates.

(284) A company may request the application of these individual anti-dumping duty rates if it changes the name of its entity or sets up a new production or sales entity. The request must be addressed to the Commission. The request must contain all the relevant information, including: modification in the company's activities linked to production; domestic and export sales associated with, for example, the name change or the change in the production and sales entities. The Commission will update the list of companies with individual anti-dumping duties, if justified.

(285) To minimise the risks of circumvention due to a difference in duty rates, special measures are needed to ensure the application of the individual anti-dumping duties. The companies with individual anti-dumping duties must present a valid commercial invoice to the customs authorities of the Member States. The invoice must conform to the requirements set out in Article 1(3) hereof. Imports not accompanied by that invoice should be subject to the anti-dumping duty applicable to 'all other companies'.

(286) To ensure a proper enforcement of the anti-dumping duties, the anti-dumping duty for all other companies should apply not only to the non-cooperating exporting producers in this investigation, but to the producers which did not have exports to the Union during the investigation period.

9. **FINAL PROVISIONS**

(287) In the interests of sound administration, the Commission has invited the interested parties to submit written comments and/or to request a hearing with the Commission and/or the Hearing Officer in trade proceedings within a fixed deadline.

(288) The measures provided for in this regulation are in accordance with the opinion of the Committee established by Article 15(1) Regulation (EU) 2016/1036.

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is imposed on imports of tube and pipe butt-welding fittings, of austenitic stainless steel grades, corresponding to AISI types 304, 304L, 316, 316L, 316Ti, 321 and 321H and their equivalent in the other norms, with a greatest external diameter not exceeding 406,4 mm and a wall thickness of 16 mm or less, with a roughness average (Ra) of the surface finish not less than 0,8 micrometres, not flanged, whether or not finished, originating in the PRC and Taiwan. The product falls under CN codes ex 7307 23 10 and ex 7307 23 90 (Taric codes 7307 23 10 15, 7307 23 10 25, 7307 23 90 15, 7307 23 90 25).

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

Company	Definitive anti-dumping duty rate (%)	TARIC additional code
Taiwan		
King Lai Hygienic Materials Co., Ltd	0,0	C175
Ta Chen Stainless Pipes Co., Ltd	5,1	C176
All other companies	12,1	C999
The People's Republic of China		
Zhejiang Good Fittings Co., Ltd	55,3	C177
Zhejiang Jndia Pipeline Industry Co., Ltd	48,9	C178
Suzhou Yuli Pipeline Industry Co., Ltd	30,7	C179
Jiangsu Judd Pipeline Industry Co., Ltd	30,7	C180
All other cooperating companies:		
ALFA Laval Flow Equipment (Kunshan) Co., Ltd	41,9	C182
Kunshan Kinglai Hygienic Materials Co., Ltd	41,9	C184

Company	Definitive anti-dumping duty rate (%)	TARIC additional code
Wifang Huoda Pipe Fittings Manufacture Co., Ltd	41,9	C186
Yada Piping Solutions Co., Ltd	41,9	C187
Jiangsu Huayang Metal Pipes Co., Ltd	41,9	C188
All other companies	64,9	C999

3. Where any exporting producer in the People's Republic of China provides sufficient evidence to the Commission that:

(a) it did not export to the Union the product described in Article 1(1) during the investigation period (1 October 2014 to 30 September 2015);

(b) it is not related to any of the exporters or producers in the People's Republic of China which are subject to the measures imposed by this Regulation; and

(c) it has actually exported to the Union the product concerned after the investigation period or it has entered into an irrevocable contractual obligation to export a significant quantity to the Union, the Table in Article 1(2) may be amended by adding the new exporting producer to the cooperating companies not included in the sample and thus subject to the weighted average duty rate of the companies in the sample.

4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

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

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

Done at Brussels, 26 January 2017.

For the Commission
The President
Jean-Claude JUNCKER

COMMISSION IMPLEMENTING REGULATION (EU) 2017/142

of 26 January 2017

amending for the 258th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations [1], and in particular Article 7(1)(a) and Article 7a(5) thereof,

Whereas:

(1) Annex I to Regulation (EC) No 881/2002 lists the persons, groups and entities covered by the freezing of funds and economic resources under that Regulation.

(2) On 19 January 2017, the Sanctions Committee of the United Nations Security Council decided to amend one entry in its list of persons, groups and entities to whom the freezing of funds and economic resources should apply. Annex I to Regulation (EC) No 881/2002 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Annex I to Regulation (EC) No 881/2002 is amended in accordance with the Annex to this Regulation.

Article 2

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

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

Done at Brussels, 26 January 2017.

For the Commission,
On behalf of the President,
Acting Head of the Service for Foreign Policy Instruments

[1] OJ L 139, 29.5.2002, p. 9.

ANNEX

The identifying data for the following entry under the heading 'Natural persons' in Annex I to Regulation (EC) No 881/2002 are amended as follows:

'Malik Muhammad Ishaq (alias Malik Ishaq). Address: Pakistan. Date of birth: approximately 1959. Place of birth: Rahim Yar Khan, Punjab Province, Pakistan. Nationality: Pakistani. Other information: (a) Physical description: heavy build with black eye colour, black hair colour and medium brown complexion with a heavy black beard; (b) Photo available for inclusion in the INTERPOL-UN Security Council Special Notice. Date of designation referred to in Article 2a(4)(b): 14.3.2014.' is replaced by the following:

'Malik Muhammad Ishaq (alias Malik Ishaq). Address: Pakistan. Date of birth: approximately 1959. Place of birth: Rahim Yar Khan, Punjab Province, Pakistan. Nationality: Pakistani. Other information: (a) Physical description: heavy build with black eye colour, black hair colour and medium brown complexion with a heavy black beard; (b) Photo available for inclusion in the INTERPOL-UN Security Council Special Notice. Killed in Pakistan on 28.7.2015. Date of designation referred to in Article 7d(2)(i): 14.3.2014.'

COMMISSION IMPLEMENTING REGULATION (EU) 2017/143

of 26 January 2017

establishing the standard import values for determining the entry price of certain fruit and vegetables

THE EUROPEAN COMMISSION,

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

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

Having regard to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors ([2]), and in particular Article 136(1) thereof,

Whereas:

(1) Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XVI, Part A thereto.

(2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

Article 2

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

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

Done at Brussels, 26 January 2017.

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

([1]) OJ L 347, 20.12.2013, p. 671.
([2]) OJ L 157, 15.6.2011, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code (1)	Standard import value
0702 00 00	IL	197,9
	MA	130,3
	SN	268,2
	TR	158,7
	ZZ	188,8
0707 00 05	MA	80,2
	TR	205,8
	ZZ	143,0
0709 91 00	EG	168,8
	ZZ	168,8
0709 93 10	MA	276,3
	TR	243,9
	ZZ	260,1
0805 10 22, 0805 10 24, 0805 10 28	EG	43,6
	MA	45,0
	TN	60,1
	TR	74,6
	ZZ	55,8
0805 21 10, 0805 21 90, 0805 29 00	EG	83,8
	IL	136,4
	JM	109,0
	MA	83,0
	TR	86,8
	ZZ	99,8
0805 22 00	IL	139,7
	MA	77,0
	ZZ	108,4
0805 50 10	EG	85,5
	TR	75,8
	ZZ	80,7
0808 10 80	CN	145,5
	US	124,9
	ZZ	135,2
0808 30 90	CL	307,7
	CN	92,7
	TR	154,0
	ZA	84,4
	ZZ	159,7

(1) Nomenclature of countries laid down by Commission Regulation (EU) No 1106/2012 of 27 November 2012 implementing Regulation (EC) No 471/2009 of the European Parliament and of the Council on Community statistics relating to external trade with non-member countries, as regards the update of the nomenclature of countries and territories (OJ L 328, 28.11.2012, p. 7). Code 'ZZ' stands for 'of other origin'.

COMMISSION IMPLEMENTING REGULATION (EU) 2017/144

of 26 January 2017

on the issue of licences for importing rice under the tariff quotas opened for the January 2017 subperiod by Implementing Regulation (EU) No 1273/2011

THE EUROPEAN COMMISSION,

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

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

Whereas:

(1) Commission Implementing Regulation (EU) No 1273/2011 ([2]) opened and provided for the administration of certain import tariff quotas for rice and broken rice, broken down by country of origin and split into several subperiods in accordance with Annex I to that Implementing Regulation.

(2) January is the first subperiod for the quotas provided for under Article 1(1)(a) to (d) of Implementing Regulation (EU) No 1273/2011.

(3) The notifications sent in accordance with point (a) of Article 8 of Implementing Regulation (EU) No 1273/2011 show that, for the quotas with order number 09.4112 — 09.4116 — 09.4117 — 09.4118 — 09.4119 — 09.4154 and 09.4166, the applications lodged in the first 10 working days of January 2017 under Article 4(1) of that Implementing Regulation cover a quantity greater than that available. The extent to which import licences may be issued should therefore be determined by fixing the allocation coefficient to be applied to the quantities requested under the quotas concerned, calculated in accordance with Article 7(2) of Commission Regulation (EC) No 1301/2006 ([3]).

(4) Those notifications also show that, for the quotas with order number 09.4127 — 09.4128 — 09.4148 — 09.4149 — 09.4150 — 09.4152 and 09.4153, the applications lodged in the first 10 working days of January 2017 under Article 4(1) of Implementing Regulation (EU) No 1273/2011 cover a quantity less than that available.

(5) The total quantity available for the following subperiod should also be fixed for the quotas with order number 09.4127 — 09.4128 — 09.4148 — 09.4149 — 09.4150 — 09.4152 — 09.4153 — 09.4154 — 09.4112 — 09.4116 — 09.4117 — 09.4118 — 09.4119 and 09.4166, in accordance with the first subparagraph of Article 5 of Implementing Regulation (EU) No 1273/2011.

(6) In order to ensure sound management of the procedure of issuing import licences, this Regulation should enter into force immediately after its publication,

HAS ADOPTED THIS REGULATION:

Article 1

1. For import licence applications for rice under the quotas with order number 09.4112 — 09.4116 — 09.4117 — 09.4118 — 09.4119 — 09.4154 and 09.4166 referred to in Implementing Regulation (EU) No 1273/2011 lodged in the first 10 working days of January 2017, licences shall be issued for the quantity requested, multiplied by the allocation coefficient set out in the Annex to this Regulation.

([1]) OJ L 347, 20.12.2013, p. 671.
([2]) Commission Implementing Regulation (EU) No 1273/2011 of 7 December 2011 opening and providing for the administration of certain tariff quotas for imports of rice and broken rice (OJ L 325, 8.12.2011, p. 6).
([3]) Commission Regulation (EC) No 1301/2006 of 31 August 2006 laying down common rules for the administration of import tariff quotas for agricultural products managed by a system of import licences (OJ L 238, 1.9.2006, p. 13).

2. The total quantity available for the following subperiod under the quotas with order number 09.4127 — 09.4128 — 09.4148 — 09.4149 — 09.4150 — 09.4152 — 09.4153 — 09.4154 — 09.4112 — 09.4116 — 09.4117 — 09.4118 — 09.4119 and 09.4166 referred to in Implementing Regulation (EU) No 1273/2011 is set out in the Annex to this Regulation.

Article 2

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

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

Done at Brussels, 26 January 2017.

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

ANNEX

Quantities to be allocated for the January 2017 subperiod and quantities available for the following subperiod under Implementing Regulation (EU) No 1273/2011

(a) Quota of wholly milled or semi-milled rice covered by CN code 1006 30 as provided for in Article 1(1)(a) of Implementing Regulation (EU) No 1273/2011

Origin	Order number	Allocation coefficient for the January 2017 subperiod	Total quantity available for April 2017 subperiod (kg)
United States	09.4127	— (1)	23 609 399
Thailand	09.4128	— (1)	9 723 686
Australia	09.4129	— (2)	1 019 000
Other origins	09.4130	— (2)	1 805 000

(1) Applications cover quantities less than or equal to the quantities available: all applications are therefore acceptable.
(2) No quantity available for this subperiod.

(b) Quota of husked rice covered by CN code 1006 20 as provided for in Article 1(1)(b) of Implementing Regulation (EU) No 1273/2011

Origin	Order number	Allocation coefficient for the January 2017 subperiod	Total quantity available for July 2017 subperiod (kg)
All countries	09.4148	— (1)	1 610 500

(1) Applications cover quantities less than or equal to the quantities available: all applications are therefore acceptable.

(c) Quota of broken rice covered by CN code 1006 40 00 as provided for in Article 1(1)(c) of Implementing Regulation (EU) No 1273/2011

Origin	Order number	Allocation coefficient for the January 2017 subperiod	Total quantity available for July 2017 subperiod (kg)
Thailand	09.4149	— (1)	51 446 110
Australia	09.4150	— (1)	15 205 790
Guyana	09.4152	— (2)	11 000 000
United States	09.4153	— (1)	8 931 576
Other origins	09.4154	15,766653 %	6 000 002

(1) Applications cover quantities less than or equal to the quantities available: all applications are therefore acceptable.
(2) No allocation coefficient applied for this subperiod: no licence applications were notified to the Commission.

(d) Quota of wholly milled or semi-milled rice covered by CN code 1006 30 as provided for in Article 1(1)(d) of Implementing Regulation (EU) No 1273/2011

Origin	Order number	Allocation coefficient for the January 2017 subperiod	Total quantity available for July 2017 subperiod (kg)
Thailand	09.4112	0,740094 %	0
United States	09.4116	1,705665 %	0
India	09.4117	0,966338 %	0
Pakistan	09.4118	0,722582 %	0
Other origins	09.4119	0,793650 %	0
All countries	09.4166	0,574956 %	17 011 014

DECISIONS

COMMISSION DECISION (EU) 2017/145

of 25 January 2017

on the maintenance with a restriction in the *Official Journal of the European Union* of the reference of harmonised standard EN 14904:2006 'Surfaces for sport areas — Indoor surfaces for multi-sports use: Specification' in accordance with Regulation (EU) No 305/2011 of the European Parliament and of the Council

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC ([1]), and in particular Article 18(2) thereof,

Whereas:

(1) Pursuant to Regulation (EU) No 305/2011, harmonised standards foreseen in Article 17 are to fulfil the requirements of the harmonised system set out in or by means of this Regulation.

(2) In March 2006, the European Committee for Standardisation (CEN) adopted the harmonised standard EN 14904:2006 'Surfaces for sport areas — Indoor surfaces for multi-sports use: Specification'. The reference of the standard was subsequently published in the *Official Journal of the European Union* ([2]).

(3) On 21 August 2015 Germany launched a formal objection in respect of the harmonised standard EN 14904:2006. The formal objection referred to Note 1 of Annex ZA.1 to that standard, concerning the assessment methods and criteria for other dangerous substances than formaldehyde or pentachlorophenol (PCP), and demanded the withdrawal of the reference of the standard from the *Official Journal of the European Union* or, alternatively, a restriction excluding Note 1 of Annex ZA.1 to that standard from the scope of that reference.

(4) According to Germany, that standard does not contain any harmonised methods for assessing the performance of the construction products in question in relation to the essential characteristic of dangerous substances, when it comes to other dangerous substances than formaldehyde or pentachlorophenol (PCP). In fact, Note 1 of Annex ZA.1 to the standard states that additional requirements relating to dangerous substances, including national laws, may apply to the products falling within the scope of the standard, and that all those must be complied with where applicable. Germany highlighted that the only specific clauses relating to dangerous substances in that standard (Clauses 5.5 and 5.6) concern formaldehyde and pentachlorophenol (PCP).

(5) Germany considered this shortcoming to constitute a violation of Article 17(3) of Regulation (EU) No 305/2011, as the standard at hand did not entirely satisfy the requirements set out in the relevant mandate as foreseen in Article 18.

(6) Moreover, Germany emphasised the importance of an appropriate treatment of releases of such other dangerous substances, in particular volatile organic compounds (VOCs), within the harmonised standards notably for the products in question.

([1]) OJ L 88, 4.4.2011, p. 5.
([2]) Commission Communication in the framework of the implementation of Council Directive 89/106/EEC (OJ C 304, 13.12.2006, p. 1). Most recent publication: Commission communication in the framework of the implementation of Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (OJ C 398, 28.10.2016, p. 7).

(7) For these reasons, Germany demanded to withdraw the reference of this standard, or alternatively to restrict it by excluding Note 1 of Annex ZA.1 from its scope, so as to permit Member States to put in place national provisions for the assessment of the performance in relation to the essential characteristic at hand, as regards the release of other dangerous substances than formaldehyde or pentachlorophenol (PCP).

(8) When assessing the admissibility of the claims brought forward, it should be stated that if the alternative demand of Germany were to be understood as constituting a separate demand aiming to allow Member States to put in place national provisions setting additional requirements, such a claim would not focus on the contents of EN 14904:2006, and should therefore be considered inadmissible. However, as the wording of the demand clearly is directed to the restriction of the scope of reference to that standard, the linked statements of Germany about the consequences of such a restriction should be regarded only as parts of the argumentation offered within the formal objection and thus not considered separately.

(9) According to Article 17(3) of Regulation (EU) No 305/2011, harmonised standards are to provide the methods and the criteria for assessing the performance of the products covered by them in relation to their essential characteristics. Quite as Germany has asserted, Note 1 of Annex ZA.1 to EN 14904:2006 only presents a reference to national requirements in place. In this respect, EN 14904:2006 does not comply with the requirements set out in Article 17(3) of Regulation (EU) No 305/2011.

(10) Furthermore, the jurisprudence of the Court of Justice ([1]) indicates that Member States are not entitled to put in place national provisions for the assessment of the performance in relation to any essential characteristics above and beyond what has been contained in the harmonised standards, when it comes to the marketing or the use of the construction products covered by them. The contents of EN 14904:2006 are thus also in conflict with those principles.

(11) Therefore and in view of the fact that Regulations are directly applicable, Note 1 of Annex ZA.1 to EN 14904:2006 should not be applied, independently of the outcome of this formal objection procedure.

(12) Nevertheless, since the jurisprudence of the Court of Justice ([2]) confirms the exhaustive nature of the harmonised system established in or by means of Regulation (EU) No 305/2011, the invalidity of Note 1 of Annex ZA.1 to EN 14904:2006 does not imply that Member States could adopt national provisions for the assessment of the performance in relation to the essential characteristic of dangerous substances, as regards the release of other dangerous substances than formaldehyde or pentachlorophenol (PCP).

(13) On the basis of the contents of EN 14904:2006 as well as the information submitted by Germany, by the other Member States, by CEN and by industry, and after consulting the committees established by Article 64 of Regulation (EU) No 305/2011 and by Article 22 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council ([3]), it should be noted that no substantial objections were expressed against the continued publication of the reference of that standard in the *Official Journal of the European Union*. The exclusion of Note 1 of Annex ZA.1 from the scope of the reference published in the *Official Journal of the European Union* has been met with concerns based on an interpretation of the jurisprudence of the Court of Justice as allowing the Member States, if they take the view that the safety of a product is insufficiently ensured, to lay down requirements restricting the free circulation of those products. However, the Court of Justice itself has already stated that such an interpretation would put into question the effectiveness [('effet utile')] of the harmonisation in this field ([4]).

(14) The alleged incompleteness of that standard should thus not be considered a sufficient reason for accepting the first demand of Germany, the complete withdrawal of the reference to the standard EN 14904:2006 from the *Official Journal of the European Union*. That demand should therefore be rejected.

(15) For the alternative demand of restricting the reference by excluding Note 1 of Annex ZA.1 from its scope, it should firstly be reminded that, as already demonstrated, that clause is not to be applied, independently of the outcome of this formal objection procedure. However, for reasons of clarity, it is necessary to explicitly exclude that invalid clause from the reference.

([1]) Cf. in particular the ECJ judgement on case C-100/13 (*Commission v Germany*), para 55 ff.
([2]) Cf. the ECJ judgement on case C-100/13 (*Commission v Germany*), para 62.
([3]) Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ L 316, 14.11.2012, p. 12).
([4]) Cf. the ECJ judgement on case C-100/13 (*Commission v Germany*), para 60.

(16) The reference of EN 14904:2006 should therefore be maintained, but it is necessary to introduce a restriction excluding Note 1 of Annex ZA.1 to that standard from its scope,

HAS ADOPTED THIS DECISION:

Article 1

The reference of harmonised standard EN 14904:2006 'Surfaces for sport areas — Indoor surfaces for multi-sports use: Specification' shall be maintained with a restriction.

The Commission shall add the following restriction in the list of references of harmonised standards published in the *Official Journal of the European Union*: 'Note 1 of Annex ZA.1 to standard EN 14904:2006 is excluded from the scope of the reference published'.

Article 2

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

Done at Brussels, 25 January 2017.

For the Commission

The President

Jean-Claude JUNCKER

RECOMMENDATIONS

COMMISSION RECOMMENDATION (EU) 2017/146

of 21 December 2016

regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) On 27 July 2016, the Commission adopted a Recommendation regarding the rule of law in Poland ([1]), setting out its concerns on the situtation of the Constitutional Tribunal and recommending how these should be addressed.

(2) The Recommendation of the Commission was adopted under the Rule of Law Framework ([2]). The Rule of Law Framework sets out how the Commission will react should clear indications of a threat to the rule of law emerge in a Member State of the Union and explains the principles which the rule of law entails. The Rule of Law Framework provides guidance for a dialogue between the Commission and the Member State in order to prevent the emergence of a systemic threat to the rule of law that could develop into a 'clear risk of a serious breach' which would potentially trigger the use of the 'Article 7 TEU Procedure'. Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission can initiate a dialogue with that Member State under the Rule of Law Framework.

(3) The European Union is founded on a common set of values enshrined in Article 2 of the Treaty on European Union ('TEU'), which include the respect for the rule of law. The Commission, beyond its task to ensure the respect of EU law, is also responsible, together with the European Parliament, the Member States and the Council, for guaranteeing the common values of the Union.

(4) Case law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the European Commission for Democracy through Law ('Venice Commission'), provides a non-exhaustive list of these principles and hence defines the core meaning of the rule of law as a common value of the Union in accordance with Article 2 TEU. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law ([3]). In addition to upholding those principles and values, State institutions also have the duty of loyal cooperation.

(5) In its Recommendation of 27 July 2016, the Commission explained the circumstances in which it decided, on 13 January 2016, to examine the situation under the Rule of Law Framework and in which it adopted, on 1 June 2016, an Opinion concerning the rule of law in Poland. The Recommendation also explained that the exchanges between the Commission and the Polish Government were not able to resolve the concerns of the Commission.

(6) In its Recommendation, the Commission found that there was a systemic threat to the rule of law in Poland and recommended that the Polish authorities take appropriate action to address this threat as a matter of urgency.

(7) In particular the Commission recommended that the Polish authorities: (a) implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* can take up their judicial functions in the Constitutional Tribunal, and that the three judges nominated by the 8th term of the *Sejm* without a valid legal basis do not take

([1]) Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland (OJ L 217, 12.8.2016, p. 53).
([2]) Communication '*A new EU Framework to Strengthen the Rule of Law*', COM(2014) 158 final.
([3]) See COM(2014) 158 final, section 2, Annex I.

up their judicial functions; (b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016 and ensure that the publication of future judgments is automatic and does not depend on any decision of the executive or legislative powers; (c) ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, including the judgments of 3 and 9 December 2015 and the judgment of 9 March 2016, and takes the Opinion of the Venice Commission fully into account; and ensure that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined by requirements; (d) ensure that the Constitutional Tribunal can review the compatibility of the new law adopted on 22 July 2016 on the Constitutional Tribunal before its entry into force and publish and implement fully the judgment of the Tribunal in that respect; (e) refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal.

(8) The Commission invited the Polish Government to solve the problems identified in the Recommendation within 3 months, and to inform the Commission of the steps taken to that effect. The Commission noted that it remained ready to pursue a constructive dialogue with the Polish Government.

(9) On 30 July 2016, the President of the Republic signed the Law of 22 July 2016, which was published in the Official Journal on 1 August 2016.

(10) On 11 August 2016, the Constitutional Tribunal rendered a judgment on the Law of 22 July 2016 ([1]). The judgment held that a number of provisions of that law, all of which were also identified as a concern by the Commission in its Recommendation, were unconstitutional. The grounds of unconstitutionality were notably the principles of the separation and balance of powers ([2]), the independence of courts and tribunals from other branches of power ([2]), the independence of judges ([3]) and the principle of integrity and efficiency of the public institutions ([4]). However, the Polish Government did not recognise the validity of this judgment and did not publish it in the Official Journal.

(11) On 16 August 2016, the Polish Government published 21 judgments of the Tribunal rendered in a period from 6 April 2016 to 19 July 2016. The publication of these judgments appears to have been based on Article 89 of the Law of 22 July 2016 which provided that 'The Tribunal's rulings issued in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015 before 20 July 2016 shall be published within 30 days from the entry into force of this Act, with the exception of rulings concerning normative acts that have ceased to have effect.' This provision was among those declared unconstitutional by the Constitutional Tribunal in its judgment of 11 August 2016. Moreover, neither the judgments of 9 March 2016 and of 11 August 2016 nor the 16 judgments rendered since 11 August 2016 have been published by the Government.

(12) On 18 August 2016, the Polish Prosecutor's Service informed about the launching of a criminal investigation against the President of the Constitutional Tribunal for not allowing three judges who had been appointed by the new legislature in December 2015 to take up their function.

(13) On 14 September 2016, the European Parliament adopted a Resolution on the situation in Poland ([5]), inter alia calling on the Polish Government to cooperate with the Commission pursuant to the principle of sincere cooperation as set out in the Treaty, and urging it to use the 3 months afforded by the Commission to engage with all parties represented in the *Sejm* in order to find a compromise which would solve the ongoing constitutional crisis, fully respecting the Venice Commission opinion and the Commission's Recommendation.

(14) On 30 September 2016, a group of members of the *Sejm* submitted a new legislative proposal on the status of judges of the Constitutional Tribunal. The proposal contains provisions on the rights and obligations of judges of the Tribunal, the arrangements for appointing judges of the Tribunal, their mandate and termination of office and questions on immunity, personal integrity and liability to disciplinary action.

([1]) K 39/16.
([2]) Articles 38(3)-(6), 61(6), 83(2), 84-87 and 89 of the Law of 22 July 2016.
([3]) Articles 26(1)(1)(g) and 68(5)-(7) of the Law of 22 July 2016.
([4]) Articles 38(3)-(6), 61(3), 61(6), 68(5)-(7), 83(2) of the Law of 22 July 2016.
([5]) European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774(RSP)).

(15) On 14 October 2016, the Venice Commission adopted its opinion on the Law of 22 July 2016 ([1]). The opinion noted that the Law contains some improvements as compared to the Law of 22 December 2015 which had been the subject matter of the opinion of the Venice Commission of March 2016. However, it considered that these improvements are too limited in scope, because other provisions of the Law as adopted would considerably delay and obstruct the work of the Tribunal, possibly make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning. Such other provisions include for example those on postponing a case for up to 6 months upon request by four judges, on allowing the Prosecutor-General to block a hearing by his or her absence, or on suspending all institutional cases for 6 months, followed by re-registration. The opinion also criticised the system of proposing candidates for the post of President of the Tribunal to the President of the Republic, which could lead to a situation that a candidate is appointed who does not enjoy the support of a substantial number of judges. Furthermore, without any constitutional or legal basis, the chancellery of the Prime Minister has purported to control the validity of judgments of the Tribunal by refusing to publish its judgments. The opinion also underlined that the problem of the appointment of judges has not been solved as recommended and that the implementation of the provision in the Law of 22 July 2016 requiring the Tribunal's President to assign cases to the December judges would be contrary to the Tribunal's judgments, which are universally binding and thus bind all state authorities, including the Tribunal and its President. The opinion concluded that by adopting the law, the Polish Parliament assumed powers of constitutional revision which it did not have when it acted as the ordinary legislature. It considered that the Polish Parliament and the Government continued to challenge the Tribunal's position as the final arbiter of constitutional issues and attributed this authority to themselves: they created new obstacles to the effective functioning of the Tribunal, and acted to further undermine its independence. By prolonging the constitutional crisis, they obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights, according to the opinion. The Polish government decided not to participate in the sitting of the Venice Commission on 14 October 2016 as it considered that the opinion of the Venice Commission was one-sided and did not take into account the Government's position.

(16) On 26 October 2016, a group of members of the *Sejm* submitted a new legislative proposal regarding the organisation and proceedings before the Constitutional Tribunal. The proposal contains detailed provisions on the organisation and proceedings before the Constitutional Tribunal, including new rules on the election of the President and Vice-President of the Tribunal. The proposal complements the legislative proposal on the status of judges of the Constitutonal Tribunal, submitted to the *Sejm* on 30 September 2016 (see above); both legislative proposals are closely interlinked and intend to replace the Law of 22 July 2016.

(17) On 27 October 2016, within the time limit of 3 months set in the Recommendation, the Polish Government replied to the Commission Recommendation. The reply disagrees on all points with the position expressed in the Recommendation and does not announce any new measures to alleviate the rule of law concerns addressed by the Commission.

(18) On 31 October 2016, the UN Human Rights Committee adopted Concluding observations on the seventh periodic report of Poland. It expressed concerns about the negative impact of legislative reforms, including the amendments to the Law on the Constitutional Tribunal of November and December 2015 and July 2016, and the disregard of the judgments of the Constitutional Tribunal; the functioning and independence of the Tribunal and the implementation of the Covenant. The Committee also expressed its concerns about the refusal of the Prime Minister to publish the judgments of March and August 2016 of the Tribunal and efforts of the government to change the Tribunal's composition in ways which the Tribunal has regarded as unconstitutional, and about the legal proceedings initiated against the President of the Tribunal for alleged abuse of power. The Committee concluded that Poland should ensure respect for and protection of the integrity and independence of the Constitutional Tribunal and its judges and ensure the implementation of all its judgments. The Committee urged Poland to immediately publish officially all the judgments of the Tribunal, to refrain from introducing measures that obstruct its effective functioning and to ensure a transparent and impartial process for the appointment of its members and security of tenure, which meets all requirements of legality under domestic and international law.

(19) On 7 November 2016, the Constitutional Tribunal rendered a judgment on the constitutionality of the provisions of the Law of 22 July 2016 regarding the selection of the President and Vice-President of the Tribunal ([2]). It should be noted that due to the refusal of three judges of the Tribunal to participate in the case ([3]) and in view

([1]) Opinion no 860/2016, CDL-AD(2016)026.
([2]) K 44/16.
([3]) See ordinance of the President of the Constitutional Tribunal of 7 November 2016.

of the fact that the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* had not taken up their judicial functions in the Tribunal, the Constitutional Tribunal had to change its composition from the full bench into a bench of five judges. Since 11 August 2016 the Constitutional Tribunal has not been able to sit in full bench to render judgments. On 10 November 2016 the hearing of a case in full bench had to be adjourned as the quorum for the full bench could not be reached. In addition, on 30 November and on 8 December 2016, the General Assembly was unable to adopt a resolution on presenting candidates to the post of the President of the Constitutional Tribunal as the quorum prescribed by law could not be reached.

(20) On 1 December 2016, the Senate adopted the Law of 30 November 2016 on the legal status of judges of the Constitutional Tribunal ('Law on the status of judges').

(21) On 2 December 2016, the Senate adopted the Law of 30 November 2016 on organisation and proceedings before the Constitutional Tribunal ('Law on organisation and proceedings').

(22) On 14 December 2016, the European Parliament held a debate on the situation of the rule of law in Poland. During this debate, the Commission urgently called on the Polish authorities not to put into force the new laws before the Constitutional Tribunal has had the occasion to examine their constitutionality.

(23) On 15 December 2016, the Senate adopted the Law of 13 December 2016 implementing the Law on organisation and proceedings and the Law on the status of judges ('Implementing Law').

(24) On 19 December 2016, the President of the Republic signed the three laws referred to above which were published in the Official Journal. On the same day, the President of the Republic appointed judge Julia Przylębska, a judge elected by the new Sejm, to the position of acting President of the Constitutional Tribunal.

(25) On 20 December 2016, judge Julia Przylębska admitted the three judges nominated by the 8th term of the Sejm without a valid legal basis to take up their function in the Tribunal and convened a meeting of the General Assembly for the same day. In view of the short notice, one judge was unable to participate and requested to postpone the meeting for the next day. Judge Julia Przyłębska refused and seven other judges also did not participate in the meeting. Only six judges, including the three judges unlawfully nominated, took part in the meeting and elected two candidates, Julia Przyłębska and Mariusz Muszyński, who were presented as candidate to the President of the Republic.

(26) On 21 December 2016, the President of the Republic appointed judge Julia Przyłębska to the post of President of the Constitutional Tribunal.

HAS ADOPTED THIS RECOMMENDATION:

1. The Republic of Poland should duly take into account the Commission's analysis set out hereafter and take the measures figuring in section 7 of this Recommendation so that the problems identified are solved within the time limit set.

1. **SCOPE OF THE RECOMMENDATION**

2. The present Recommendation complements the Recommendation of 27 July 2016. It examines which of the concerns raised in that recommendation have been addressed, sets out the remaining concerns and lists a number of new concerns of the Commission with regard to the rule of law in Poland which have arisen since then. On this basis, it makes recommendations to the Polish authorities on how to address these concerns. These concerns relate to the following issues:

   (1) the appointment of judges of the Constitutional Tribunal and the lack of implementation of the judgments of the Constitutional Tribunal of 3 and 9 December 2015 and of 11 August 2016 relating to these matters;

(2) the lack of publication and of implementation of a number of judgments of the Constitutional Tribunal since March 2016, including the judgments of 9 March and 11 August relating to legislative acts on the Constitutional Tribunal;

(3) the effective functioning of the Constitutional Tribunal and the effectiveness of Constitutional review of new legislation, in particular in view of newly adopted legislation concerning the Constitutional Tribunal, in particular the Law on the status of judges, the Law on organisation and proceedings and the Implementing Law;

(4) the rules applicable to the selection of candidates for the post of President and Vice-President of the Constitutional Tribunal and to the appointment of an acting President of the Constitutional Tribunal in the Law on organisation and proceedings and the Implementing Law.

2. **APPOINTMENT OF JUDGES OF THE CONSTITUTIONAL TRIBUNAL**

3. In its Recommendation of 27 July 2016 ([1]), the Commission recommended that the Polish authorities implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which requires that the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* can take up their judicial functions in the Constitutional Tribunal, and that the three judges nominated by the 8th term of the *Sejm* without a valid legal basis do not take up their judicial functions.

4. As regards the law of 22 July 2016 on the Constitutional Tribunal the Commission noted that this law is contrary to the judgments of the Constitutional Tribunal of 3 and 9 December. Article 90 ([2]) requires the President of the Constitutional Tribunal to assign cases to all judges who have taken the oath before the President of the Republic but have not yet taken up their duties as judges. This provision seems targeted at the situation of the three judges which were unlawfully nominated by the 8th term of the *Sejm* in December 2015. It would enable these judges to take up their function while using the vacancies for which the previous legislature of the *Sejm* had already lawfully nominated three judges, as has been held in the judgments of 3 and 9 December 2015.

5. In its judgment of 11 August 2016 the Constitutional Tribunal found Article 90 of the Law of 22 July 2016 unconstitutional and the Venice Commission in its opinion of 14 October 2016, confirmed that that provision is not a solution in line with the principle of the rule of law ([3]).

6. However, the Polish Government continues to refuse to recognise the validity of the judgment of 11 August 2016 and to publish it in the Official Journal (see section 3 below).

7. In addition, the new Law on the status of judges reintroduces a provision ([4]) similar to Article 90 of the Law of 22 July 2016 which was declared unconstitutional in the judgment of 11 August 2016. Likewise, provisions aiming at deploying a similar effect can be found in the Law on organisation and proceedings ([5]) and in the Implementing Law ([6]).

8. In its reply of 27 October 2016 the Polish Government considers that the judgments of 3 and 9 December 2015 of the Tribunal did not specify which judges were to take up their function and considers that the new legislature of the *Sejm* has lawfully nominated the five judges in December 2015. This reasoning raises serious rule of law concerns as it denies any effect of the two December judgments and contradicts the reasoning of the Tribunal as consistently reiterated, including in the judgment of 11 August 2016. The reply implies that, with or without the judgments of the Tribunal, the situation would remain the same.

([1]) Section 2.
([2]) See also Article 6(7).
([3]) Opinion no 860/2016, CDL-AD(2016)026, paragraph 106.
([4]) See Article 5.
([5]) See Articles 6(1) and 11(5).
([6]) See Articles 18(2) and 21(2).

9. The reply concedes that in the operative part of the judgment of 3 December 2015, the Constitutional Tribunal addressed the duty of the President of the Republic to immediately take an oath from a judge elected to the Tribunal by the *Sejm*. It takes however the view that that judgment cannot bind other authorities to apply provisions in the manner specified in a given case. This interpretation limits the impact of the judgments of 3 and 9 December 2015 to a mere obligation for the Government to publish them but would deny them any further legal and operational effect, in particular as regards the obligation for the President of the Republic to take the oath of the judges in question. This interpretation goes against the principle of loyal cooperation between state organs which is, as underlined in the opinions of the Venice Commission, a constitutional precondition in a democratic state governed by the rule of law.

10. The Commission furthermore notes that also the Venice Commission considers that a solution to the current conflict over the composition of the Constitutional Tribunal 'must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal' and 'therefore calls on all State organs and notably the *Sejm* to fully respect and implement the judgments' ([1]).

11. In conclusion, the Commission considers that the Polish authorities should respect and fully implement the judgments of the Constitutional Tribunal of 3 and 9 December 2015. These judgments require that the State institutions cooperate loyally in order to ensure, in accordance with the rule of law, that the three judges that were nominated by the 7th term of the *Sejm* can take up their judicial functions in the Constitutional Tribunal, and that the three judges nominated by the 8th term of the *Sejm* without a valid legal basis do not take up their judicial functions. The relevant provisions of the Law of 22 July 2016 on the Constitutional Tribunal raise serious concerns in respect of the rule of law and have been found unconstitutional by the judgment of 11 August 2016 of the Constitutional Tribunal. Also this judgment should be respected, published and implemented by the Polish authorities. In addition, provisions ([2]) aiming at producing a similar result included in the Law on the status of judges, the Law on organisation and proceedings and in the Implementing Law are also inconsistent with these judgments and must not be applied.

3. LACK OF PUBLICATION AND IMPLEMENTATION OF THE CONSTITUTIONAL TRIBUNAL JUDGMENT OF 9 MARCH 2016 AND OF THE JUDGMENTS RENDERED SINCE 9 MARCH 2016

12. In its Recommendation of 27 July 2016, the Commission recommended that the Polish authorities publish and implement fully the judgment of the Constitutional Tribunal of 9 March 2016 and its subsequent judgments and ensure that the publication of future judgments is automatic and does not depend on any decision of the executive or legislative powers.

13. On 16 August 2016, the Polish Government, on the basis of Article 89 of the Law of 22 July 2016, published 21 judgments of the Constitutional Tribunal rendered in a period from 6 April 2016 to 19 July 2016. However, the two judgments of 9 March and 11 August 2016 have still not been published by the Polish Government, contrary to what had been requested in the Commission's Recommendation. Furthermore, none of the 16 judgments of the Constitutional Tribunal rendered after 11 August 2016 have so far been published.

14. Article 89 of the Law of 22 July 2016 was declared unconstitutional by the Constitutional Tribunal in its judgment of 11 August 2016 because of its inconsistency with the principles of the separation and balance of powers and the independence of courts and tribunals from other branches of power.

15. The reply of the Polish Government of 27 October confirms that the Government still considers to have the power to check the lawfulness of judgments of the Tribunal and that the automatic publication of judgments cannot be ensured.

16. Article 114(1) and (2) of the Law on organisation and procedure provides that 'Adjudications are published in the appropriate official journal, in accordance with the principles and in the manner laid down in the Constitution and the act of 20 July 2000 on the publication of the normative acts and certain other legal acts […]'. Moreover it is provided that 'The President of the Tribunal orders publication of the adjudications.' This provision is as such a step in the right direction.

([1]) Opinion no 833/2015, CDL-AD(2016)001, paragraph 136.
([2]) See footnotes paragraph 7.

17. However, Article 19 of the Implementing Law provides that 'Judgments of the Tribunal and decisions of the Tribunal adopted in breach of the Constitutional Tribunal Act of 25 June 2015 […] or the Constitutional Tribunal Act of 22 July 2016 and issued prior to the date of entry into force of the Act referred to in Article 1 shall be published in the relevant official gazettes after their publication has been ordered by the acting President of the Tribunal, unless they concern regulatory instruments that have ceased to apply.' A similar provision was already held unconstitutional by the Tribunal in its judgment of 11 August 2016. The Commission's Recommendation underlined that the indication that judgments have been rendered illegally is contrary to the principle of the separation of powers as it is not for the *Sejm* to determine the lawfulness of judgments ([1]). Also the Venice Commission confirmed this position in its two opinions ([2]). In addition, the exclusion from publication of judgments relating to normative acts which ceased to be applicable, as provided in Article 19 of the Implementing Law, excludes in particular the judgments of 9 March, 11 August and 7 November 2016. As long as the President of the Constitutional Tribunal has not been appointed this provision prevents the full publication of all judgments. Furthermore, there is no guarantee that Article 114(2) of the Law on organisation and procedure will ensure that the future President of the Tribunal publishes all the judgments which have been adopted prior to his term of office.

18. In conclusion, the fact that the Polish Government has so far refused to publish in the Official Journal the judgments of 9 March 2016 and 11 August 2016 relating to legislative acts on the Constitutional Tribunal, and all other judgments rendered by the Constitutional Tribunal since 11 August 2016, creates uncertainty as to the legal basis for the Tribunal's judicial activity and as to the legal effects of its decisions. This uncertainty undermines the effectiveness of constitutional review and raises serious concerns in respect of the rule of law. Compliance with final judgments is an essential requirement inherent in the rule of law. The refusal to publish a binding and final judgment denies the latter's automatic legal and operational effect and breaches the principles of legality and separation of powers.

4. REVIEW OF THE LAW ON THE CONSTITUTIONAL TRIBUNAL AND EFFECTIVENESS OF CONSTITUTIONAL REVIEW OF NEW LEGISLATION

19. In its Recommendation of 27 July 2016, the Commission considered in detail the Law of 22 July 2016 and its impact, taking into account the effect of the provisions both individually and collectively, as well as the previous case law of the Constitutional Tribunal and the opinion of the Venice Commission. The Commission recommended that the Polish authorities ensure that any reform of the Law on the Constitutional Tribunal respect the judgments of the Constitutional Tribunal, including those of 3 and 9 December 2015 and of 9 March 2016, and take the opinion of the Venice Commission of 11 March 2016 fully into account. In particular, the Commission recommended that the Polish authorities ensure that requirements such as those relating to the attendance quorum, the handling of cases in chronological order, the possibility for the Public Prosecutor-General to prevent the examination of cases, the postponement of deliberations or transitional measures affecting pending cases and putting cases on hold do not, either separately or through their combined effect undermine the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution.

20. In their reply of 27 October 2016, the Polish Government fail to acknowledge that the majority of concerns expressed by the Commission and by the Venice Commission were not taken into account in the Law of 22 July 2016. The reply contests that the Tribunal is prevented from exercising an effective review by referring to the fact that the Tribunal has been able to issue rulings during the so-called constitutional crisis. However, this argument is irrelevant because the Tribunal has been able to do so precisely by not applying the procedural requirements at stake (judgment of 11 August 2016) and the Government is refusing to publish these same rulings of the Tribunal in an attempt to prevent them from taking legal effect.

21. The reply also presents brief explanations on the compliance of the legislation mentioned above with fundamental rights. The Commission observes that these explanations by the Government do not remove the need for a genuinely effective constitutional review by the Constitutional Tribunal.

([1]) See paragraph 23 of the Recommendation.
([2]) Opinion no 860/2016, paragraph 101; Opinion no 833/2015, paragraphs 43, 142 and 143.

22. The reply also denies the fundamental role of the Constitutional Tribunal in ensuring the rule of law in Poland. The Commission contests that statement. The Constitutional Tribunal is indeed one of the main guarantors of the rule of law in Poland, in particular as it is bestowed with the task of ruling on the constitutionality of Polish laws. It clearly appears from the Polish constitution that the Constitutional Tribunal is competent to rule on the conformity of statutes and international agreements to the constitution, on the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute, on the conformity of legal provisions issued by central State organs to the constitution, ratified international agreements and statutes, on the conformity to the constitution of the purposes or activities of political parties, and on complaints concerning constitutional infringements ([1]). The Constitutional Tribunal shall also settle disputes over authority between central constitutional organs of the State ([2]). The fact that according to the constitution the Tribunal of State is to hear cases of violations of the constitution or of a statute committed by certain persons ([3]), and that the President of the Republic shall ensure observance of the constitution ([4]), does not affect this fundamental role of the Tribunal.

23. The Commission notes that the Law on organisation and proceedings no longer contains the following provisions of the Law of 22 July 2016 identified as a concern in the Recommendation: Article 26(1)(1g) on the referral of cases to the full bench ([5]), Article 38(3) on the handling of cases in chronological order ([6]), Article 68(5)-(8) on the postponement of deliberations ([7]), Article 61(6) on the possibility of the Public Prosecutor-General to prevent the examination of cases ([8]) and Articles 83-86 on the transitional provisions for pending cases ([9]). The Commission notes that the mere publication of the judgment of the Constitutional Tribunal of 11 August 2016 which had already declared these provisions unconstitutional would have been sufficient to address these issues without a new law being necessary.

24. Despite these improvements, the Commission notes nevertheless that certain concerns remain. In particular, the number of judges required to participate in a full bench remains at eleven while it was set at nine in the 1997 Act on the Constitutional Tribunal and in the Law of 25 June 2015. As pointed out in the Recommendation ([10]) this represents a constraint on the decision-making process of the Constitutional Tribunal, in particular in the current circumstances where the Constitutional Tribunal has only 12 judges (since the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* have not taken up their judicial functions). The risk identified in the Recommendation that the attendance quorum for a full bench might on occasion not be reached has already materialised ([11]).

25. Moreover, the Law on the organisation and proceeding, the Law on the status of judges and the Implementing Law contain other provisions which have aggravated certain concerns identified in the Recommendation (see section 2 on the appointment of judges and section 3 on the publication of judgments), or have introduced new concerns relating to the situation of judges (see section 4.1) and to the appointment of the President, the Vice-President and the acting President of the Tribunal (see section 5).

4.1. **The concerns relating to the situation of judges**

4.1.1. *Disciplinary proceedings*

26. Article 26 of the Law on the status of judges provides: 'The commission by a judge of the Tribunal of the misconduct referred to in Article 24(1) may be reported to the President of the Tribunal by […] the President of

([1]) Article 188 of the constitution.
([2]) Article 189 of the constitution.
([3]) Article 198 of the constitution refers to the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the Prime Minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces.
([4]) Article 126 of the constitution.
([5]) See section 4.2.1 of the Recommendation.
([6]) See section 4.2.3 of the Recommendation.
([7]) See section 4.2.7 of the Recommendation.
([8]) See section 4.2.6 of the Recommendation.
([9]) See section 4.2.8 of the Recommendation.
([10]) See paragraph 43 of the Recommendation.
([11]) See recital 19 above.

the Republic of Poland on the motion of the Prosecutor-General, after consulting the First President of the Supreme Court.' ([1]) Article 27(5) provides: 'If the disciplinary officer does not find grounds for initiating disciplinary proceedings at the request of an authorised entity, he or she shall issue an order refusing to initiate proceedings. The authority which submitted the report referred to in Article 26 may complain to the disciplinary court of first instance within 7 days of service of this order.' Pursuant to Article 27(6) that court shall examine the complaint no more than 14 days after the date on which it was submitted. If the order refusing to initiate disciplinary proceedings is repealed, the disciplinary court's instructions as to further proceedings shall be binding on the disciplinary officer.

27. In its Rule of Law Recommendation, the Commission underlined as regards the Law of 22 December 2015 that the President of the Republic should not have the power to initiate disciplinary proceedings and noted that the removal of such a provision in the Law of 22 July 2016 was an improvement. The Commission also recalls that the provision of the Law of 22 December 2015 which involved other State institutions in disciplinary proceedings concerning judges of the Tribunal was declared unconstitutional by the Tribunal in its judgment of 9 March 2016 and was criticised by the Venice Commission in its opinion of 11 March 2016. The Commission is therefore concerned by the reintroduction of a provision which gives the power to initiate disciplinary proceedings to the President of the Republic. The fact that such proceedings could be initiated by institutions outside the judiciary, as well as the fact that such institutions may complain to the disciplinary court of first instance if the disciplinary officer does not find grounds for initiating disciplinary proceedings, could have an impact on the independence of the Tribunal.

4.1.2. *Possibility of early retirement*

28. Article 10 of the Implementing Law provides: '1. Judges of the Tribunal whose term of office started before the date of entry into force of the [Law on the status of judges] may, within 1 month of its entry into force, submit to the President of the Tribunal a declaration to the effect that they are retiring as a result of the introduction during their term of office of the new rules governing the performance of the duties of a judge of the Tribunal laid down in Articles 11(3), 13 and 14 of this Act ([2]). 2. The retirement of a judge under paragraph 1 shall take effect on the first day of the month after the month in which the declaration was submitted. The retirement shall be confirmed by an order of the President of the Tribunal.'

29. This provision appears to be an incentive for early retirement because it would allow judges of the Tribunal — by way of exception — to take full benefit of the advantages of the status of a retired judge, including receiving a retirement pension, without having completed the term of their mandate. For a judge who would no longer want to continue working under the new rules, such early retirement possibility would be more advantageous than simply resigning. Offering such advantageous regime represents an interference by the legislative power with the independence of the Tribunal as it aims at encouraging the current judges of the Tribunal to resign in advance of the end of their term of office and at influencing their decision in that respect.

4.1.3. *Other provisions*

30. The Law on the status of judges introduces new requirements for judges of the Tribunal concerning financial participation in companies ([3]), declarations of assets ([4]) and declarations on the economic activity of their spouses ([5]). In addition, the Law stipulates far reaching consequences in case of non-compliance: failure to perform the obligations concerned shall be equivalent to resigning from the office of judge of the Tribunal. These provisions could raise questions of proportionality and as noted by the Supreme Court, questions of constitutionality ([6]). For these reasons, an effective constitutional review of these provisions is particularly important.

([1]) Article 24(1) provides: 'Judges of the Tribunal shall be subject to disciplinary proceedings conducted by the Tribunal for infringing the law, compromising the dignity of the office of judge of the Tribunal, violating the Code of Ethics for Judges of the Constitutional Tribunal or other unethical conduct that could undermine trust in their impartiality or independence'.

([2]) Article 11(3) of the Law on the status of judges refers to the rules on financial participation of judges of the Tribunal in companies; Article 13 refers to the obligation for judges of the Tribunal to submit a declaration of his or her spouse's activity; Article 14 refers to the obligation for judges of the Tribunal to submit an asset declaration.

([3]) Article 11(3).

([4]) Article 14.

([5]) Article 13.

([6]) See opinion of the Supreme Court on the draft law on the status of judges of 12 October 2016.

31. The Commission also notes that the Law on the organisation and proceedings changes significantly the internal organisation of the Constitutional Tribunal, replacing the Office of the Constitutional Tribunal by two new bodies: a Registry and an Office of the Legal Service of the Tribunal ([1]).The Implementing Law provides that the Office of the Constitutional Tribunal will be abolished by 31 December 2017 ([2]) and that no guarantees are given to the present employees to remain employed by the Tribunal after that date ([3]). In the current context of the ongoing disputes concerning the Constitutional Tribunal, together with the concerns expressed in section 5 of this Recommendation on the appointment of a new President and an acting President of the Tribunal, such reorganisation could lead to further instability of the Tribunal and affect the effectiveness of the constitutional review.

4.2. **Vacatio legis**

32. Key provisions of the Implementing Law will enter into force without vacatio legis ([4]), the day after publication of the law. Also key provisions of the law on organisation and proceedings and on the status of judges will enter into force without vacatio legis, on the day after the date of publication, including provisions enabling the unlawfully appointed 'December judges' to take up their function ([5]). The provisions of the Law of 22 July 2016 on the Constitutional Tribunal will cease to apply on the day after the date of publication of the Implementing law ([6]).

33. The Constitutional Tribunal will as a consequence not be able to scrutinise the constitutionality of these key provisions before their entry into force. A constitutional review in such circumstances could no longer be seen as effective. In this respect it is recalled that in its Opinion of 11 March 2016, the Venice Commission stressed that the Constitutional Tribunal must have a possibility of reviewing an ordinary statute that regulates the functioning of the Tribunal before the statute enters into force.

4.3. **Consequences of the lack of effectiveness of Constitutional review on new legislation**

34. A number of particularly sensitive new legislative acts have been adopted by the *Sejm*, often through accelerated legislative procedures, such as, in particular, a media law ([7]), a new Civil Service Act ([8]), a law amending the law on the Police and certain other laws ([9]) and laws on the Public Prosecution Office ([10]), and a new law on the Ombudsman and amending certain other laws ([11]). The Commission asked the Polish Government about the state of play and content of these legislative reforms in its letters of 1 February 2016 and 3 March 2016, but so far this information has not been provided. A number of other sensitive draft legislative acts have been adopted by the *Sejm*, such as the Law on the National Council of Media ([12]) and a new anti-terrorism law ([13]).

([1]) Article 16-32 provide detailed provisions on the Registry and the Office of the Legal Service of the Tribunal.
([2]) Article 11.
([3]) Article 13.
([4]) Article 23 states that the following Articles shall enter into force on the day after the date of publication: Articles 1-3, 12 and 16-22. The following Articles shall enter into force on 1 January 2018: Articles 4-5 and 8. The other Articles of the draft law will enter into force 14 days after the date of its publication. Articles that shall enter into force on the day after the date of publication, inter alia, concern the appointment of an 'acting President of the Constitutional Tribunal', the integration of the three unlawfully elected 'December judges' and the new election procedure for candidates for the post of President of the Constitutional Tribunal.
([5]) See Article 1 and 2 of the Implementing Law. Other provisions of the two laws will enter into force 14 days after the date of publication. Only Articles 16-32 of the Law on organisation and proceedings will enter into force on 1 January 2018.
([6]) See Article 3 and 23. Only Articles 18(1), (4) and (5) of the Law of 22 July on the organisational and administrative working conditions in the Constitutional Tribunal and the Office of the Constitutional Tribunal shall remain in force until 1 January 2018.
([7]) Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016, item 25.
([8]) Law of 30 December 2015 amending the Law on Civil Service and certain other acts, published in Official Journal on 8 January 2016, item 34.
([9]) Law of 15 January 2016 amending the Law on Police and other laws, published in Official Journal on 4 February 2016, item 147.
([10]) Law of 28 January 2016 on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 177; Law of 28 January 2016 — Regulations implementing the Act — Law on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 178.
([11]) Law of 18 March 2016 on the Ombudsman and amending certain other laws. The law was signed by the President of the Republic on 4 May 2016.
([12]) Law of 22 June 2016 on the National Council of Media. The law was signed by the President of the Republic on 27 June 2016.
([13]) Law of 10 June 2016 on anti-terrorism. The law was signed by the President of the Republic on 22 June 2016. The Commission is furthermore aware that a new law amending the Law on the National Judicial Council and certain other laws has been submitted on 5 May 2016 by the Minister of Justice to the National Legislative Centre.

35. The Commission considers that as long as the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review, there will be no effective scrutiny of compliance with the Constitution, including fundamental rights, of legislative acts such as those referred to above.

36. The Commission notes for example that new legislation (notably the media legislation ([1])) raises concerns relating to freedom and pluralism of the media. More specifically, the new media legislation modifies the rules for the appointment of the Management and Supervisory Boards of the public service broadcasters, putting them under the control of the Government (the Treasury Minister), rather than an independent body. The new legislation also provides for the immediate dismissal of the existing Supervisory and Management Boards. In that respect the Commission questions in particular the possibilities of judicial redress for the persons affected by the law. On 13 December 2016, the Constitutional Tribunal rendered a judgment sitting in a bench of five judges ([2]) in which it held certain provisions of the legislation to be unconstitutional.

37. Legislation such as the new Civil Service Act ([3]) is equally important from the perspective of the rule of law and fundamental rights. In that respect the Commission has asked the Polish Government about the possibilities of judicial redress for the persons affected by the law in its letters of 1 February and 3 March 2016 ([4]). The Polish Government has so far not replied to the Commission on this point.

38. The law amending the law on the Police and certain other laws ([5]) may also raise questions relating to its compliance with fundamental rights, including privacy and data protection. On 28 and 29 April 2016, a delegation of the Venice Commission visited Warsaw to discuss the amendments to the Law on the Police and certain other laws, and delivered an opinion in its session of 10 and 11 June 2016 ([6]). The opinion states, inter alia, that the procedural safeguards and material conditions set in the Law are still insufficient to prevent its excessive use and unjustified interference with the privacy of individuals.

39. Furthermore, the new anti-terrorism legislation may raise questions relating to its compliance with fundamental rights ([7]) and is the subject of constitutional review.

40. Also, the Law of 13 December amending the law on the assemblies ([8]) may raise questions relating to its compatibility with fundamental rights, in particular the freedom of assembly as enshrined in the European Convention on Human Rights ([9]).

41. On 14 December 2016, the Press Bureau of the Chancellery of the *Sejm* issued a statement regarding changes to the conditions under which the media can work in the *Sejm* and Senate about which concerns were expressed on the respect of freedom of expression and information. On 16 December 2016, the budgetary Law for 2017 was voted by the *Sejm* under controversial circumstances, in particular as it was alleged that the quorum was not reached, a member of the *Sejm* was excluded from voting and media were blocked from recording the vote. There is a need for an effective judicial review, including where applicable constitutional review, of these measures and of the conditions under which they have been adopted.

42. In conclusion, the Commission considers that as long as the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review, there will be no effective scrutiny of the compliance of legislative acts with fundamental rights. This raises serious concerns in respect of the rule of law, notably as a number of particularly sensitive new legislative acts have been adopted recently by the *Sejm* for which constitutional review should be available.

([1]) Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016, item 25, and Law of 22 June 2016 on the National Council of Media. The law was signed by the President of the Republic on 27 June 2016.
([2]) K13/16.
([3]) Law of 30 December 2015 amending the Law on Civil Service and certain other acts, published in Official Journal on 8 January 2016, item 34.
([4]) Letter of 1 February 2016 from First Vice-President Timmermans to Minister of Justice Mr Ziobro; Letter of 3 March 2016 from First Vice-President Timmermans to Minister of Foreign Affairs Mr Waszczykowski.
([5]) Law of 15 January 2016 amending the Law on Police and other laws, published in Official Journal on 4 February 2016, item 147.
([6]) Opinion no 839/2016. CDL-AD(2016)012.
([7]) Law of 10 June 2016 on anti-terrorism. The law was signed by the President of the Republic on 22 June 2016.
([8]) Law of 13 December 2016 amending the Law on the Assemblies not yet signed by the President of the Republic.
([9]) Article 11.

5. APPOINTMENT OF THE PRESIDENT, VICE PRESIDENT AND ACTING PRESIDENT OF THE TRIBUNAL

43. The new Law on the organisation and proceedings contains new provisions relating to the selection of the candidates for the post of President and Vice-President of the Tribunal to be presented by the General Assembly to the President of the Republic. The new Implementing Law also contains provisions concerning the selection of candidates for the post of President of the Tribunal and provisions enabling the President of the Republic to task a judge who will perform temporarily the duties of the President of the Tribunal ('acting President of the Tribunal').

44. The Commission recalls that Article 194(2) of the constitution provides that the President and Vice-President of the Constitutional Tribunal are appointed by the President of the Republic 'from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal'. The term of office of the President of the Tribunal ended on 19 December 2016. The term of office of the current Vice-President of the Tribunal will end on 26 June 2017. The two laws mentioned in the previous paragraph have already been adopted and signed by the President of the Republic. Moreover, they were adopted with great speed (the draft Implementing Law was submitted to the *Sejm* on 24 November 2016) without a vacatio legis which would enable an effective constitutional review. At the moment of their adoption, the Tribunal had already started the process of selecting candidates for the post of President of the Tribunal to be proposed to the President of the Republic as required by the Law of 22 July 2016 ([1]). However, the General Assembly was unable to adopt a resolution on presenting candidates to the post of the President of the Constitutional Tribunal as the quorum prescribed by law could not be reached ([2]).

5.1. The selection procedure for the President and Vice-President of the Tribunal

45. The Implementing Law and the Law on organisation and proceedings contain new rules on the procedure for submitting candidates for the post of President and Vice-President of the Tribunal. The procedure of the Implementing Law ([3]) is specifically designed for the present procedure of election of the President of the Tribunal and applies in the situations described in its Article 16(1) (see section 5.3 below). The Law on organisation and proceedings ([4]) provides for a procedure which will generally apply for future election procedures for the post of President and Vice-President of the Tribunal and which is broadly similar to the procedure set out in the Implementing Law.

46. The new procedure for the selection of candidates for President of the Tribunal requires the three 'December judges' unlawfully nominated by the new legislature of the *Sejm* to participate in the process ([5]). The Commission considers that such requirement renders the entire selection process unconstitutional (see section 2 below). Similarly, the fact that the lawfully elected 'October judges' cannot participate in the process can equally have an impact on the outcome, and therefore vitiates the process.

47. In addition, the new procedure does not ensure that only candidates are proposed to the President of the Republic which have the support of the majority of the General Assembly of the Tribunal ([6]). According to the judgment of the Tribunal of 7 November 2016, Article 194(2) of the constitution must be understood as providing that the President of the Tribunal shall be appointed by the President of the Republic from amongst candidates which have obtained a majority vote in the General Assembly of the Tribunal. This renders the new procedure incompatible with the judgment of the Constitutional Tribunal of 7 November 2016. In its opinon of 14 October 2016, the Venice Commission also underlined the importance that the selection process ensures that only candidates with substantial support in the Tribunal can be elected as candidate to be proposed to the President of the Republic ([7]).

48. The same concerns relate to the procedure for submitting candidates for the post of Vice-President of the Tribunal ([8]); this procedure is identical to the procedure for submitting candidates for the post of President as provided in the Law on organisation and proceedings.

([1]) In its judgment of 7 November 2016, the Tribunal examined the constitutionality of the provisions in the Law of 22 July 2016 relating to the selection of candidates for the post of President of the Tribunal. See paragraph 46.
([2]) See recital 19.
([3]) Article 21.
([4]) Article 11.
([5]) Article 21(2) of the Implementing Law; Article 11(5) of the Law on organisation and proceedings.
([6]) Article 21(7)-(12) and Article 22 of the Implementing Law; Article 11(7)-(15) of the Law on organisation and proceedings.
([7]) Opinion no CDL-AD(2016)026, paragraphs 30 and 124.
([8]) Article 11(15) of the Law on organisation and proceedings.

5.2. **Role of the Vice-President of the Tribunal**

49. The Commission also notes that the Implementing Law and the Law on organisation and proceedings contain a number of provisions which negate the function of the Vice-President of the Constitutional Tribunal. Article 12(3) of the Law on organisation and proceedings allow the President of the Constitutional Tribunal to authorise another judge besides the Vice-President to execute certain competencies on the management of the work of the Tribunal. Article 37 provides that the President of the Tribunal can designate another judge to replace him at full bench hearings (the Vice-President is not mentioned). Furthermore, if the term of the President of the Tribunal ends, certain key functions are assumed by the judge with the 'greatest aggregate seniority' (Article 11(2)), or by the 'most junior' judge (Article 11(4)) and not by the Vice-President. In addition, Article 8(2) provides that the President of the Tribunal must be present at the General Assembly in order for a decision it issues to be legitimate (except in case of election of a new President of the Tribunal as above), whereas according to the law of 22 July 2016 it is the President or Vice-President of the Tribunal who is required to be present at the General Assembly. Also, the Law no longer foresees that the Vice-President can preside the General Assembly, contrary to the Law of 22 July 2016. In addition, Article 17(1) of the Implementing Law provides that for the period after the publication of the law until the formal appointment of the new President of the Tribunal, the Tribunal shall be headed by the judge whom the President of the Republic has tasked with performing the duties of the President of the Tribunal (see section 5.3 below).

50. The combined effect of these provisions denies the specific position of the Vice-President as the deputy of the President of the Constitutional Tribunal. The position of Vice-President of the Tribunal is recognised in the constitution. Even if the constitution does not specify the role of the Vice-President, the provisions referred to in the previous paragraph undermine the position of Vice-President and potentially raise an issue of constitutionality which requires an effective constitutional review.

5.3. **The appointment of an 'acting President of the Tribunal'**

51. Article 17(1) of the Implementing Law provides: 'If it is necessary to implement the procedure for submitting candidates for the post of President of the Tribunal referred to in Article 21, for the period between the day after the date on which this Act is published and the appointment of the President of the Tribunal, the Tribunal shall be headed by the judge of the Tribunal whom the President of the Republic, by way of a decision, has tasked with performing the duties of the President of the Tribunal.' Article 21 establishes a specific procedure for the selection of the candidates for the post of President of the Tribunal to be presented by the General Assembly to the President of the Republic (see above).

52. Article 17(2) provides: 'The President of the Republic shall select the judge of the Tribunal tasked with performing the duties of the President of the Tribunal from among the judges of the Tribunal with the longest period of service in the ordinary courts or in central government posts involving application of the law.' Article 17(3) provides that the new procedure established in the Law on organisation and proceedings for selecting the candidates for the post of President of the Tribunal would not apply in this case.

53. Article 16(1) of the implementing Law provides: 'If, on the day of publication of this Act, the General Assembly: 1) has not been convened by the President of the Tribunal, or 2) has been convened by the President of the Tribunal in a manner incompatible with the requirements of the Act referred to in Article 3, or 3) has not submitted candidates for the post of President of the Tribunal to the President of the Republic, or 4) has submitted candidates for the post of President of the Tribunal to the President of the Republic, but the President of the Republic has not appointed the President of the Tribunal, or 5) has selected candidates for the post of President of the Tribunal in violation of the Act referred to in Article 3, — the procedure for submitting candidates for the post of President of the Tribunal shall be carried out in accordance with the rules laid down in Article 21 of this Act.'

54. Article 16(2) provides: 'In the cases referred to in paragraph 1(1)-(5), all actions and instruments implemented within the framework of the procedure for submitting candidates for the post of President of the Tribunal to the President of the Republic shall be repealed.'

55. The acting President of the Tribunal is given a wide range of powers as long as there is no new President of the Tribunal. In particular, according to Article 18 of the Implementing Law the acting President shall enable the unlawfully elected 'December judges' to perform their duties as judge (see section 2 above) and lead the new selection process and exercise fully the powers of the President of the Tribunal as long as there is no formally appointed new President ([1]).

56. These provisions which allow the President of the Republic to directly appoint an acting President raise serious concerns as regards the principles of the separation of powers and the independence of the judiciary as protected by the Polish constitution. In particular, the constitution does not provide for the function of acting President of the Tribunal. Moreover, the power given to the President of the Republic to appoint an acting President of the Tribunal appears to be contrary to Article 194(2) of the constitution which provides that the President and Vice-President of the Tribunal shall be appointed by the President of the Republic 'from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal', while the procedure in the Implementing Law denies any such role to the General Assembly. The judgment of the Tribunal of 7 November 2016 confirms that candidates for the post of President of the Tribunal should be proposed by the General Assembly.

57. Furthermore, the criteria to be used by the President of the Republic to choose the acting President appear arbitrary. The choice should be made from amongst the judges of the Tribunal with the longest period in ordinary courts or in central government posts. These criteria appear arbitrary as someone with no meaningful experience in the judiciary but only in central government could be selected, while someone with a long experience in the Tribunal itself but not in ordinary courts could not be selected.

These provisions also disregard any prior steps in the selection process taken by the Tribunal before the entry into force of the new law. Article 16(3) of the Law of 22 July 2016 required the Tribunal to initiate the selection process of the candidate between the 30th and the 15th day before the end of the term of office of the incumbent. Article 16(2) of the Implementing Law repeals any steps taken by the Tribunal to fulfil this obligation. Such interference by the legislative power with any possible decision taken previously by the Tribunal raises concerns as regard the independence of the judiciary and the principle of loyal cooperation between state organs.

5.4. **The appointment of a President of the Tribunal on 21 December 2016**

58. On 19 December 2016, the President of the Republic appointed judge Julia Przylębska, to the position of acting President of the Constitutional Tribunal. On 20 December 2016, judge Julia Przylębska admitted the three judges nominated by the 8th term of the Sejm without a valid legal basis to take up their function in the Tribunal and convened a meeting of the General Assembly for the same day. In view of the short notice, one judge was unable to participate and requested to postpone the meeting for the next day. Judge Julia Przyłębska refused and seven other judges also did not participate in the meeting. Only six judges, including the three judges unlawfully nominated, took part in the meeting and elected two candidates, Julia Przyłębska and Mariusz Muszyński, who were presented as candidate to the President of the Republic. On 21 December 2016, the President of the Republic appointed judge Julia Przyłębska to the post of President of the Constitutional Tribunal.

59. The Commission considers that this procedure which led to the appointment of a new President of the Tribunal is fundamentally flawed as regards the rule of law. As explained above, the procedure was led by an acting President whose appointment raises serious concerns as regards the principles of the separation of powers and the independence of the judiciary as protected by the Polish constitution. Furthermore, the fact that the procedure allowed the three 'December judges' unlawfully nominated by the new legislature of the *Sejm* to participate in the process rendered the entire selection process unconstitutional (see section 2 below). Similarly, the fact that the lawfully elected 'October judges' could not participate in the process equally had an impact on the outcome, and therefore vitiated the process. Moreover, the very short notice for the convocation of the General Assembly and the

([1]) Article 18 of the Implementing Law provides that the acting President of the Tribunal shall direct the work of the Constitutional Tribunal, represent the Constitutional Tribunal externally, attribute cases to judges of the Tribunal who have taken the oath, perform actions in labour-law cases involving employees of the Office of the Tribunal and exercise other powers and duties vested in the President or the acting President of the Tribunal by the Implementing Law.

refusal to postpone the meeting raise serious concerns. Finally, the election of candidates by six judges only is incompatible with the judgment of the Tribunal of 7 November 2016 according to which Article 194(2) of the constitution must be understood as providing that the President of the Tribunal shall be appointed by the President of the Republic from amongst candidates which have obtained a majority vote in the General Assembly of the Tribunal.

60. For these reasons, the Commission considers that these provisions on the appointment of an acting President of the Tribunal and of an President of the Tribunal, and their implementation on 19, 20 and 21 December 2016 seriously threaten the legitimacy of the Constitutional Tribunal and consequently the effectiveness of the constitutional review.

6. **FINDING OF A SYSTEMIC THREAT TO THE RULE OF LAW**

61. For the reasons set out above, the Commission considers that whereas some of the issues addressed in its recommendation of 27 July 2016 have been addressed, important issues remain unresolved, and new concerns have arisen in the meantime. The Commission is therefore of the opinion that the situation of a systemic threat to the rule of law in Poland presented in its Recommendation of 27 July 2016 remains. In particular:

(1) As regards the composition of the Constitutional Tribunal, its judgments of 3 and 9 December 2015 have still not been implemented; as a result, the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* cannot take up their judicial functions in the Constitutional Tribunal. A solution is all but forthcoming as the three new laws adopted in November and December 2016 ([1]) require that the three judges nominated by the 8th term of the *Sejm* without a valid legal basis take up their judicial functions. Moreover, the absence of the three judges lawfully nominated in October 2015 by the 7th term of the *Sejm,* taken together with the attendance requirements which remain high, have at different occasions threatened the effectiveness of the Tribunal because of a lack of quorum for the adoption of resolutions by the General Assembly or of judgments in full bench.

(2) As regards the publication of judgments, the judgment of the Constitutional Tribunal of 9 March 2016 has still not been published in the Official Journal. In addition, the Polish Government refuses to publish the judgment of 11 August 2016 concerning the Law of 22 July 2016 on the Constitutional Tribunal and all other judgments rendered after that date, including the judgement of 7 November 2016 concerning the provisions of the Law of 22 July 2016 on the selection of the candidates for the post of President of the Tribunal. As a result, the uncertainty continues on the legal basis on which the Tribunal must act and on the legal effects of its judgments. The Commission notes that the Law on the organisation and proceedings contains a provision which gives the power to the President of the Tribunal to order publication of the judgments ([2]). However, the Implementing Law still precludes the publication of certain judgments rendered by the Tribunal, including the judgments referred to above ([3]).

(3) As regards the effectiveness of the constitutional review, the Commission considers that even if certain improvements can be noted as compared to the Law of 22 July 2016, the three new laws adopted in December 2016 contain a number of provisions which do not respect earlier judgments of the Constitutional Tribunal and added new concerns as compared to those identified in the Recommendation of 27 July 2016.

(4) These new concerns relate in particular to the disciplinary proceedings, the possibility of early retirement, the new requirements for judges of the Tribunal, the significant changes to the internal organisation of the Tribunal, the selection procedure for candidates to the post of President and Vice-President of the Tribunal, the role of the Vice-President of the Tribunal and the appointment of an acting President of the Tribunal.

(5) The Commission considers in particular that the combined effect of the provisions on the appointment of an acting President of the Tribunal, the selection procedure for the candidates to the post of President and the

([1]) Article 5 of the Law on the status of judges, Articles 6(1) and 11(5) of the Law on the organisation and proceeding and Articles 18(2) and 21(2) of the implementing Law.
([2]) Article 114(2).
([3]) Article 19.

refusal to swear in the judges elected by the 7th *Sejm* while providing for the taking up of office of the three judges nominated by the 8th term of the *Sejm* without a valid legal basis, seriously threaten the legitimacy of the Constitutional Tribunal and consequently the effectiveness of the constitutional review. In addition, as long as the the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* cannot take up their judicial functions in the Constitutional Tribunal, the Commission considers that the selection process of the new President of the Tribunal remains fundamentally flawed.

(6) The Commission also notes that the timing of the adoption of these three laws and the lack of an appropriate vacatio legis for a number of key provisions denies the possibility to the Constitutional Tribunal to review their constitutionality before their entry into force.

(7) In addition, actions and public statements by the Polish authorities undermining the legitimacy and efficiency of the Constitutional Tribunal continue to occur, including the launching of a criminal investigation against the President of the Constitutional Tribunal. The Commission recalls the principle of loyal cooperation between state organs which is, as underlined in the opinions of the Venice Commission, a constitutional precondition in a democratic state governed by the rule of law.

62. The Commission is particularly concerned by the consequences of this situation of a systemic threat to the rule of law:

(1) The fact that the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review adversely affects its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law in Poland. Where a constitutional justice system has been established, its effectiveness is a key component of the rule of law. Under the current circumstances, the constitutionality of Polish laws ([1]) can no longer be effectively guaranteed.

(2) The trust in the Polish legal system, in its integrity and coherence is seriously damaged by the refusal of the Polish Government to publish the judgments of the Constitutional Tribunal. This is confirmed by the fact that the Supreme Court considered it necessary to issue a resolution ([2]) stating that judgments of the Constitutional Tribunal are binding even if they are not published. Similar statements have been expressed by the Chief Council of the Supreme Administrative Court ([3]) and other authorities, in particular the National Council of the Judiciary of Poland, ([4]) the National Bar Association, ([5]) and the National Solicitor Association ([6]).

(3) Respect for the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law, and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States.

63. The Commission observes that within a period of 1 year six consecutive legislative acts have been enacted regarding the Constitutional Tribunal. Such legislative activism without proper consultation of all the stakeholders concerned and without a spirit of loyal cooperation required between state authorities, is detrimental to the stability, integrity and proper functioning of the Constitutional Tribunal.

7. **RECOMMENDED ACTION**

64. The Commission recommends that the Polish authorities take appropriate action to address this systemic threat to the rule of law as a matter of urgency.

([1]) According to Article 188 of the constitution, the Constitutional Tribunal is to rule on the conformity of statutes and international agreements to the constitution, on the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute, on the conformity of legal provisions issued by central State organs to the constitution, ratified international agreements and statutes, on the conformity to the constitution of the purposes or activities of political parties, and on complaints concerning constitutional infringements. According to Article 189 of the constitution, the Constitutional Tribunal shall also settle disputes over authority between central constitutional organs of the State.

([2]) Resolution of 26 April 2016 of the General Assembly of the Supreme Court of Poland.

([3]) Resolution of 27 April 2016 of the Chief Council of the Supreme Administrative Court.

([4]) Statement of 7 April 2016 of the National Council of the Judiciary of Poland.

([5]) Resolution of 12 March 2016 of the National Bar Association.

([6]) Statement of 12 March 2016 of the National Solicitor Association.

65. In particular the Commission recommends that the Polish authorities take the following actions already requested in its Recommendation of 27 July 2016:

(a) implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which requires that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up the post of judge without being validly elected; for this reason, the President of the Republic is required to urgently take the oath of the three judges elected by the previous legislature;

(b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016 and the judgment of 11 August 2016 concerning the Law of 22 July 2016 on the Constitutional Tribunal and other judgments rendered after that date and future judgments;

(c) ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, takes the Opinions of the Venice Commission fully into account and ensures that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined;

(d) refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal.

66. In addition to these actions, the Commission recommends that the Polish authorities:

(e) ensure that the Constitutional Tribunal can as a matter of urgency effectively review the constitutionality of the Law on the status of judges, the Law on organisation and proceedings and the Implementing Law, and that the judgments concerned are published without delay and implemented fully;

(f) ensure that no appointment of the new President of the Constitutional Tribunal take place as long as the judgments by the Constitutional Tribunal on the constitutionality of the new laws have not been published and implemented fully, and as long as the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* have not taken up their judicial functions in the Tribunal;

(g) ensure that as long as a new President of the Constitutional Tribunal has not been lawfully appointed, he is replaced by the Vice-President of the Tribunal and not by an acting President, or by the person appointed as President of the Tribunal on 21 December 2016.

67. The Commission underlines that the loyal cooperation which is required amongst the different state institutions in rule of law related matters is essential in order to find a solution in the present situation.

68. The Commission invites the Polish Government to solve the problems identified in this recommendation within 2 months of receipt of this recommendation, and to inform the Commission of the steps taken to that effect.

69. The Commission also recalls that Recommendations adopted under the rule of Law Framework do not prevent the mechanisms set out in Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU ([1]).

70. On the basis of this Recommendation, the Commission stands ready to pursue a constructive dialogue with the Polish Government.

Done at Brussels, 21 December 2016.

For the Commission
Frans TIMMERMANS
First Vice-President

([1]) Section 4.1 of the Communication '*A new EU Framework to Strengthen the Rule of Law*', COM(2014) 158 final.

ACTS ADOPTED BY BODIES CREATED BY INTERNATIONAL AGREEMENTS

DECISION No 1/2016 OF THE EU-BOSNIA AND HERZEGOVINA STABILISATION AND ASSOCIATION COUNCIL

of 9 December 2016

replacing Protocol 2 to the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, concerning the definition of the concept of 'originating products' and methods of administrative cooperation [2017/147]

THE EU-BOSNIA AND HERZEGOVINA STABILISATION AND ASSOCIATION COUNCIL,

Having regard to the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part [1], and in particular Article 42 thereof,

Having regard to Protocol 2 to the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, concerning the definition of the concept of 'originating products' and methods of administrative cooperation,

Whereas:

(1) Article 42 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part ('the Agreement') refers to Protocol 2 to the Agreement ('Protocol 2'), which lays down the rules of origin and provides for cumulation of origin between the European Union, Bosnia and Herzegovina, Turkey and any country or territory participating in the European Union's Stabilisation and Association Process.

(2) Article 39 of Protocol 2 provides that the Stabilisation and Association Council established in Article 115 of the Agreement may decide to amend the provisions of the Protocol.

(3) The Regional Convention on pan-Euro-Mediterranean preferential rules of origin [2] ('the Convention') aims to replace the protocols on rules of origin currently in force among the countries of the pan-Euro-Mediterranean area with a single legal act. Bosnia and Herzegovina and other participants in the Stabilisation and Association Process from the Western Balkans were invited to join the system of pan-European diagonal cumulation of origin in the Thessaloniki agenda, endorsed by the European Council of June 2003. They were invited to join the Convention by a decision of the Euro-Mediterranean Ministerial Conference of October 2007. The Convention has equally included the Republic of Moldova in the pan-Euro-Mediterranean zone of cumulation of origin.

(4) The European Union and Bosnia and Herzegovina signed the Convention on 15 June 2011 and 24 September 2013 respectively.

(5) The European Union and Bosnia and Herzegovina deposited their instruments of acceptance with the depositary of the Convention on 26 March 2012 and 26 September 2014 respectively. Consequently, pursuant to Article 10(3) of the Convention, the Convention entered into force in relation to the European Union and Bosnia and Herzegovina on 1 May 2012 and on 1 November 2014 respectively.

(6) Protocol 2 should therefore be replaced by a new protocol making reference to the Convention,

[1] OJ L 164, 30.6.2015, p. 2.
[2] OJ L 54, 26.2.2013, p. 4.

HAS ADOPTED THIS DECISION:

Article 1

Protocol 2 to the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, concerning the definition of the concept of 'originating products' and methods of administrative cooperation is replaced by the text set out in the Annex to this Decision.

Article 2

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

Done at Brussels, 9 December 2016.

For the Stabilisation and Association Council

The Chairman

D. ZVIZDIĆ

ANNEX

PROTOCOL 2

CONCERNING THE DEFINITION OF THE CONCEPT OF 'ORIGINATING PRODUCTS' AND METHODS OF ADMINISTRATIVE COOPERATION

Article 1

Applicable rules of origin

1. For the purpose of implementing this Agreement, Appendix I and the relevant provisions of Appendix II to the Regional Convention on pan-Euro-Mediterranean preferential rules of origin [1] ('the Convention') shall apply.

2. All references to the 'relevant Agreement' in Appendix I and in the relevant provisions of Appendix II to the Convention shall be construed as references to this Agreement.

Article 2

Dispute settlement

1. Where disputes arise in relation to the verification procedures of Article 32 of Appendix I to the Convention that cannot be settled between the customs authorities requesting the verification and the customs authorities responsible for carrying out that verification, they shall be submitted to the Stabilisation and Association Council.

2. In all cases the settlement of disputes between the importer and the customs authorities of the importing country shall take place under the legislation of that country.

Article 3

Amendments to the Protocol

The Stabilisation and Association Council may decide to amend the provisions of this Protocol.

Article 4

Withdrawal from the Convention

1. Should either the European Union or Bosnia and Herzegovina give notice in writing to the depositary of the Convention of their intention to withdraw from the Convention according to Article 9 thereof, the European Union and Bosnia and Herzegovina shall immediately enter into negotiations on rules of origin for the purpose of implementing this Agreement.

2. Until the entry into force of such newly negotiated rules of origin, the rules of origin contained in Appendix I and, where appropriate, the relevant provisions of Appendix II to the Convention, applicable at the moment of withdrawal, shall continue to apply to this Agreement. However, as of the moment of withdrawal, the rules of origin contained in Appendix I and, where appropriate, the relevant provisions of Appendix II to the Convention shall be construed so as to allow bilateral cumulation between the European Union and Bosnia and Herzegovina only.

[1] OJ L 54, 26.2.2013, p. 4.

Article 5

Transitional provisions — cumulation

Notwithstanding Articles 16(5) and 21(3) of Appendix I to the Convention, where cumulation involves only EFTA States, the Faroe Islands, the European Union, Turkey, the participants in the Stabilisation and Association Process and the Republic of Moldova, the proof of origin may be a movement certificate EUR.1 or an origin declaration.

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