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

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

II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2023/99

of 11 January 2023

imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of certain aluminium road wheels originating in Morocco

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 17 November 2021, the European Commission ('the Commission') initiated an anti-dumping investigation with regard to imports of certain aluminium road wheels ('ARW') originating in Morocco ('the country concerned') on the basis of Article 5 of the basic Regulation. It published a Notice of Initiation in the *Official Journal of the European Union* [2] ('the Notice of Initiation').

(2) The Commission initiated the investigation following a complaint lodged on 4 October 2021 by the Association of European Wheel Manufacturers ('the complainant' or 'EUWA'). The complaint was made on behalf of the Union industry in the sense of Article 5(4) of the basic Regulation. The complaint contained evidence of dumping and of resulting material injury that was sufficient to justify the initiation of the investigation.

1.2. Provisional measures

(3) On 17 June 2022, in accordance with Article 19a of the basic Regulation, the Commission provided parties with a summary of the proposed duties and details about the calculation of the dumping margins and the margins adequate to remove the injury to the Union industry. Interested parties were invited to comment on the accuracy of the calculations within three working days. No comments on the accuracy of the calculations were made.

[1] OJ L 176, 30.6.2016, p. 21.

[2] Notice of initiation of an anti-dumping proceeding concerning imports of certain aluminium road wheels originating in Morocco (OJ C 464, 17.11.2021, p. 19).

(4) On 15 July 2022 the Commission published in the *Official Journal of the European Union* Commission Implementing Regulation (EU) 2022/1221 ([3]) imposing provisional anti-dumping duties on imports of certain aluminium road wheels originating in Morocco ('the provisional Regulation').

1.3. **Subsequent procedure**

(5) Following the disclosure of the essential facts and considerations on the basis of which a provisional anti-dumping duty was imposed ('provisional disclosure'), Dika Morocco Africa S.A.R.L ('Dika'), Hands 8 S.A. ('Hands'), the European Automobile Manufacturers' Association ('ACEA') and EUWA filed written submissions making their views known on the provisional findings within the deadline provided by Article 2(1) of the provisional Regulation. In addition, after the expiry of the deadline for submitting comments on the provisional disclosure, the Government of Morocco provided a submission supporting the claims made by other parties on dumping and injury.

(6) The parties who so requested were granted an opportunity to be heard. Hearings took place with Dika, Hands, ACEA and EUWA. Additionally, further to the request of Dika, a hearing was held with the Hearing Officer in trade proceedings on 7 July 2022.

(7) The Commission continued to seek and verify all the information it deemed necessary for its definitive findings. One verification visit was held on the premises of a user. When reaching its definitive findings, the Commission considered the comments submitted by interested parties and revised its provisional conclusions when appropriate.

(8) The Commission informed, on 17 October 2022, all interested parties of the essential facts and considerations on the basis of which it intended to impose a definitive anti-dumping duty on imports of certain aluminium road wheels originating in Morocco ('final disclosure'). All parties were granted a period within which they could make comments on the final disclosure.

(9) Following final disclosure, ACEA, Dika, EUWA, Hands and the Government of Morocco submitted comments.

(10) On 21 November 2022, the Commission sent an additional final disclosure to Hands regarding certain corrections and clarifications made with regard to its dumping calculations ('additional final disclosure') and granted a period within which the company could make comments. In addition, all interested parties received a clarification of the basis for the amounts of SG&A costs used in the construction of the normal value for Hands. Hands submitted comments which were addressed in the Regulation.

(11) Parties who so requested were also granted an opportunity to be heard. Hearings took place with ACEA, Dika, EUWA and Hands.

1.4. **Claims on initiation**

(12) Following provisional disclosure no interested party submitted any claims or comments other than those referred to in Section 1.4 of the provisional Regulation. The Commission therefore confirmed its findings and conclusions as set out in recitals 6 to 28 in the provisional Regulation.

1.5. **Sampling**

(13) No comments were made in respect of the sampling. The Commission therefore confirmed recitals 29 to 34 of the provisional Regulation.

1.6. **Questionnaire replies and verification visit**

(14) As set out in recitals 35 of the provisional Regulation, the Commission sent questionnaires to three Union producers, the complainant, the two known users and the two exporting producers in the country concerned.

([3]) Commission Implementing Regulation (EU) 2022/1221 of 14 July 2022 imposing provisional antidumping duties on imports of certain aluminium road wheels originating in Morocco (OJ L 188, 15.7.2022, p. 114).

(15) As explained in recitals 36 and 37 of the provisional Regulation, questionnaire responses where either cross-checked or verified at the premises of the responding party.

(16) Verification visit pursuant to Article 16 of the basic Regulation was carried out at the premises of one user. The name of this user is not disclosed for confidential reasons in accordance with recital 5 of the provisional Regulation.

1.7. **Investigation period and period considered**

(17) As stated in recital 38 of the provisional Regulation, the investigation of dumping and injury covered the period from 1 October 2020 to 30 September 2021 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2018 to the end of the investigation period ('the period considered').

1.8. **Registration**

(18) The Commission made imports of the product concerned subject to registration by Commission Implementing Regulation (EU) 2022/934 ([4]) ('the registration Regulation').

(19) Hands claimed that the decision for registration of imports was unfounded, as the conditions were not met pursuant to Article 14(5) of the basic Regulation.

(20) The Commission recalled that the legal basis for registration is Article 14(5a) of the basic Regulation, according to which, the Commission shall register the imports of the product concerned during the period of pre-disclosure pursuant to Article 19a of the basic Regulation, unless there is sufficient evidence that the requirements of Article 10(4)(c) and (d) are not met. In this respect, the Commission established that there was no conclusive evidence showing that the registration of imports of the product concerned during the period of the pre-disclosure was not warranted in this case. Indeed, since the publication of the notice of initiation, when exporting producers were aware or should have been aware of the alleged dumping and injury, imports of the product concerned have further increased in a manner which may seriously undermine the remedial effect of the anti-dumping duties also during the pre-disclosure period. Therefore, the Commission rejected the claims.

(21) Hands claimed that by publishing the registration Regulation the Commission violated the principle of sound administration. According to the party no information regarding the Commission's intention to make imports of the product under investigation subject to registration has been communicated to them before the registration Regulation was published and the import registration came into force, whereas such registration measure does potentially adversely affect its interests. Absence of communicating necessary information about possibly making imports subject to registration to Hands in a timely, effectively and personal manner before adopting such registration measure and allowing Hands to present its views and to be heard, while Hands is directly affected by that measure, the Commission is in violation of Hands' fundamental right of defence. Consequently, the Registration Regulation is invalid and should be repealed.

(22) The Commission considered that registration is only a preparatory administrative step that may or may not lead to the retroactive imposition of duties at definitive stage. Registration in itself does not produce any adverse effect on importers and cannot be said to affect their interests ([5]). Hands itself did not point to any concrete adverse effects referring merely to 'potential' effects. The only effect of registration is that the Commission instructs the national customs authorities to register the imports into the Union of the product under investigation. Furthermore, there is no procedural requirement in Article 14(5a) or elsewhere in the basic Regulation to consult importers or other parties before registration takes place. The requirement laid down in Article 10(4)(b) of the basic Regulation that parties be given an opportunity to comment only applies when there is a decision to collect duties retroactively after registering, but not for the registration itself. This is clearly from the fact that Article 14(5a) of the basic Regulation only refers to points (c) and (d) of Article 10(4) that need to be fulfilled for registration under this provision, but it deliberately does not refer to point (b) of Article 10(4). This is in line with the effect of such registration discussed above. Therefore, the Commission is not under the obligation to give the importers an opportunity to comment before instructing customs authorities to register imports. Therefore, the claim was rejected.

([4]) Commission Implementing Regulation (EU) 2022/934 of 16 June 2022 making imports of certain aluminium road wheels originating in Morocco subject to registration (OJ L 162, 17.6.2022, p. 27).

([5]) Order of 28 September 2021, *Airoldi Metalli SpA*, T-611/20, EU:T:2021:641, paras 48 and 49.

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product concerned

(23) The Commission recalled that, as set out in recital 39 of the provisional Regulation the product concerned is aluminium road wheels of the motor vehicles of HS headings 8701 to 8705 whether or not with their accessories and whether or not fitted with tyres, originating in Morocco, currently falling under CN codes ex 8708 70 10 and ex 8708 70 50 (TARIC codes: 8708 70 10 15, 8708 70 10 50, 8708 70 50 15 and 8708 70 50 50) ('the product concerned').

(24) Aluminium road wheels are traditionally sold in the Union via two distribution sales channels: to the Original Equipment Manufacturers ('OEM'), which are mainly car manufacturers, and to the Aftermarkets (or 'AM'), which includes for example distributors, retailers, repair shops, etcetera. The product concerned from Morocco was exclusively sold through the OEM channel during the period considered. In the OEM distribution channel, car manufacturers organise tender procedures for ARW and are often involved in the process of developing a new wheel, which is associated with their brand. Both Union producers and Moroccan exporters can compete in the same tenders.

2.2. Like Product

(25) In the absence of comments, the conclusions in recitals 39 to 42 of the provisional Regulation were confirmed.

3. DUMPING

3.1. Cooperation of exporting producers

(26) As explained in recitals 43 to 51 of the provisional Regulation, the Commission considered that Dika had not cooperated with the Commission in this investigation and provisionally determined its dumping margin on the basis of facts available in accordance with Article 18 of the basic Regulation.

(27) Following provisional disclosure Dika maintained that it had fully cooperated with the Commission and that it should receive an individually calculated dumping margin. It set forward the following arguments.

(28) First, Dika reiterated that it believes that the sales listings contained no errors, since the total values of the sales listings could be reconciled with the company's accounting system. In addition, the sales were listed in accordance with international financial reporting standards ('IFRS'). Moreover, Dika argued that the Commission had plenty of time to cross-check the revised sales listings provided by its related company CITIC Dicastal Co., Ltd ('CITIC') and could still do so before the imposition of definitive anti-dumping measures.

(29) The claim made by Dika was similar to that made at the provisional stage, while no new information was provided. At provisional stage the Commission had concluded that the sales listings were not provided on an invoice basis, that the difference between the invoice value and the amount actually received was not systematically reflected in the company's sales listings and that the revised listings could not be cross-checked. The fact that the company's sales were listed in accordance with IFRS standards did not change the fact the company did not provide the information requested by the Commission.

(30) Moreover, CITIC had provided several (at least four) different and incomplete versions of its sales listings in the course of the investigation. The last version, provided together with Dika's reply to the Commission's Article 18 letter of 5 May 2022, was still incomplete and contained a number of transactions where either the amount received was left empty with the note 'AR outstanding to date', or where there remained a mismatch between the amount invoiced and the amount received. Such incomplete data cannot be a reliable basis for cross-checking or verification. In addition, as also stated in recital 48 of the provisional Regulation, an additional remote cross-check ('RCC') should not be used as a way to remedy the lack of timeliness or errors established during the RCC that already took place within the set time limits. The Commission therefore rejected this claim.

(31) Second, Dika claimed that the transaction specific data on dates and amounts of payments requested by the Commission did not qualify as 'necessary information' in the sense of Article 18(1) of the basic Regulation, Article 6.8 and Annex II of the WTO Antidumping Agreement ([6]). According to Dika, the Commission did not request this information in the questionnaire or deficiency letters, nor was such information required for the dumping margin calculation. In addition, Dika claimed that in the provisional Regulation a different basis for the application of facts available was used than the one set out in the Commission's letter on the application of Article 18 dated 5 May 2022 ('Article 18 letter').

(32) The Commission disagreed with this claim. From the outset, it had asked the company to provide transaction specific data based on the invoice date. For example, section E of the anti-dumping questionnaire sent to Dika and its related company CITIC stated in the very first section that respondents should 'use invoice date as the date of sale'. However, the issue at hand is not (only) the date on which the sale took place, but rather the amount that was actually paid to the company by its clients. This is the issue which was explained in the Article 18 letter and which was set out in the provisional Regulation. Dika's assertion that the reasons set out in the letter were 'totally different' from those in the basic Regulation could not be accepted. In both cases the Commission explained that it considered the sales listings unreliable since they contained a number of mistakes and discrepancies.

(33) The sales data originally provided by the company did not correspond to the amounts actually received as payments. In addition, CITIC had clarified during the RCC that the difference between the invoice amount and the amount actually received is normally recorded in the sales listings as a discount, a rebate, a credit note or otherwise. As indicated in recital 47 of the provisional Regulation, and in recital 29 above, this was however not systematically done by the company. The sales listings could therefore not be used a reliable source to establish a normal value or export price under Articles 2(1) and 2(8) of the basic Regulation which states that the normal value 'shall normally be based on the prices paid or payable'. It logically follows that since a normal value or export price for Dika could not be established on the basis of the company's own data, a dumping margin could not be calculated either. The sales listings were therefore not only necessary, but fundamental to the investigation. Without reliable sales listings (including a full list of transactions of all product types sold and their prices), the Commission cannot arrive at a reasonably accurate finding with regard to dumping.

(34) After final disclosure, Dika reiterated its claim that since their sales listings were in accordance with IFRS standards, the Commission could not claim that the listings were incomplete and could not be verified. In addition, Dika claimed that since Article 2(8) of the basic Regulation refers to the export price being normally based on the 'prices paid or payable', the sales listings were correct since they reflected the prices payable. Finally, Dika reiterated its claim that data on payments did not qualify as 'necessary' under Article 18(1) of the basic Regulation.

(35) Whether or not the sales listings were overall reported in line with IFRS standards was irrelevant for the problems found with the reported prices. As the Commission has pointed out at several instances, the problem with the EU and domestic sales listings existed on a transaction basis. As stated by Dika during the hearing after the provisional measures and reiterated in their comments on final disclosure, in around 20 % of the transactions in the EU sales listings the payment amount did not match the reported invoice amount. The term 'price payable' refers to the total payment made or to be made by the buyer to the seller, including situations where for instance the goods have been sold, but the customer has not yet paid. This was not the case for most of the transactions in the EU sales listing. In fact, the price that was already paid by the customer, in these cases, was different from the price which was recorded as payable at the time of invoicing.

(36) As Dika and its related company stated during the RCC, the on-spot verification and the reply to the Article 18 letter, these differences would normally be recorded in the sales listings as a discount, a rebate, a credit note or otherwise, as also stated in recital 33. This was done for many transactions in the sales listings, but not systematically for all transactions. The fact that this is normally done, means that normally the price recorded as payable would become equal to the price finally paid after certain actions are performed related to the aforementioned credit notes, rebates, etc. This is how Dika itself explained it and how corrections were made in the company's SAP system after payments were made. However, in some cases the prices recorded in the domestic and EU sales listings were corrected in this manner, but in other cases they were not. The difference between the prices finally paid and the prices recorded as payable went both ways and were not accounted for, meaning in some cases the company received more than was invoiced, and in other cases less.

([6]) WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

(37) Reliable sales listings (thereby including a full list of transactions of all product types sold as well as their prices) containing accurate and verifiable data are fundamental to establish a dumping margin and hence qualify as necessary information under Article 18(1) of the basic Regulation. Since the difference between prices actually paid and recorded as payable affected a significant number of the transactions in the EU sales listing, this listing could not be used to establish a reliable export price on a transaction or product type basis. The Commission therefore rejected these claims.

(38) Third, Dika argued that, as the Commission verified the cost of production for Dika and found no discrepancies, the normal value should have been constructed for Dika on the basis of its verified cost of manufacturing. The Commission was, according to Dika, in error when concluding that the domestic and EU sales listings were crucial for the determination of a normal value and an export price, since the domestic sales listings would not have been used for the construction of a normal value in any case. Therefore, under Article 18(3) of the basic Regulation, the Commission should have used Dika's own data and calculated an individual dumping margin on that basis.

(39) Indeed, the Commission concluded in recital 60 of the provisional Regulation that Dika did not have any domestic sales listings for the construction of the normal value, as Dika's sales in Morocco were made between economic zones and the goods never entered the customs territory of Morocco. Accordingly, in absence of the application of facts available, the normal value for Dika could have been constructed. However, in order to establish a dumping margin, such normal value would need to be compared with the export price. However, the export price could not be calculated due to the unreliability of Dika's sales listings.

(40) During a hearing on 6 September 2022, Dika suggested that the Commission could establish an export price by using those transactions in the EU sales listings for which (according to the company) the invoice amounts matched the payments amounts. This would allegedly be the case for around 80 % of all transactions. For the remaining 20 %, Dika suggested that the Commission could apply the residual duty as calculated for Hands. Such an approach would, according to Dika, be in line with what the Commission did in a recent investigation concerning imports of corrosion resistant steels from Russia and Türkiye ([7]).

(41) Apart from the fact that Dika confirmed during the hearing that there were discrepancies in the sales listing for one fifth of their sales to the Union during the investigation period, the revised sales listings were not and could not be cross-checked (as explained in recitals 29 and 30) and hence could not be used for the purpose of establishing an export price. In addition, the investigation regarding corrosion resistant steels from Russia and Türkiye concerned a very different set of facts. In that case, a Russian producer claimed that it was unrelated to one of the two traders via which it sold its products to the EU. That particular trader did not cooperate in the investigation. The Commission disagreed with the Russian company's claim and considered that the relevant trader was related. However, as the trader did not cooperate in the investigation, no information was available on resale prices from that trader. The Commission therefore decided to use the information from the second cooperating trader as facts available under Article 18 of the basic Regulation.

(42) However, the set-up of the company structure and sales channels in that case is different from that in the case at hand. While in the corrosion resistant steels from Russia and Türkiye case there were two sales channels, in the current case all sales went through the same related entity, namely CITIC. There was thus no alternative reliable set of data available to the Commission for the calculation of an export price for Dika. This is a situation very different from the investigation to which Dika referred, where the export sales made via the remaining trader were cross-checked and deemed reliable. In the investigation at hand there was no export price that could be compared with the normal value, regardless of the way in which the normal value would have been calculated for Dika.

([7]) Commission Implementing Regulation (EU) 2022/1395 of 11 August 2022 imposing a definitive anti-dumping duty on imports of certain corrosion resistant steels originating in Russia and Türkiye (OJ L 211, 12.8.2022, p. 127).

(43) Article 18(3) of the basic Regulation states that 'where the information submitted by an interested party is not ideal in all respects, it shall nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding, and that the information is appropriately submitted in good time and is verifiable'. As explained in recitals 32 and 33, the deficiencies with regard to the sales listings submitted by Dika were such that no reasonably accurate finding could be made on that basis. In addition, as mentioned in recital 30, the sales listings were not verifiable since even the last version still had discrepancies and missing data and was not submitted in good time. Since no export price could be determined, it would also be without purpose to construct a normal value for Dika on any basis. This is also in line with the judgment of the General Court in steel road wheels from China, where it held that 'any determination of the normal value would have been superfluous, since no dumping margin could have been established in the absence of the possibility of establishing the export price' ([8]). The Commission therefore rejected this claim.

(44) After final disclosure, the Government of Morocco and Dika claimed that both the Commission's approach and the General Court judgment quoted in recital 43 are in violation of the requirements of the WTO Anti-Dumping Agreement under which all data provided by an exporter should be used to the extent it satisfied the requirements of Article 18(3) of the basic Regulation. In addition, Dika claimed that the quoted General Court Judgment is not applicable in view of the circumstances of this case. In contrast with the case subject to the General Court judgment, Dika was assigned an individual dumping margin and (according to Dika) it was possible to establish with certainty which products it exported to the Union.

(45) The Commission disagreed. As already set out in recital 50 of the provisional Regulation and recital 43 above, the reason for not establishing a normal value based on Dika's data simply was that it was without purpose since there was no export price with which to compare it. Whether the underlying facts in the aforementioned General Court judgment were different or not than in this case, did not invalidate the conclusion that establishing a normal value in the absence of an export price would be superfluous. This is not in violation of the WTO Anti-Dumping Agreement, since that Agreement does not require investigating authorities to perform calculations which cannot be used to establish a dumping margin. The Commission therefore rejected this claim.

(46) Dika specifically claimed that the circumstances of the case in the quoted General Court judgment are different from this case, since Dika was assigned an individual dumping margin. However, this claim was based on a misunderstanding. Dika was not assigned an individual dumping margin at any point in this investigation. As explained in recital 98 below, the Commission decided at the time of final disclosure to establish an individual duty rate for Dika by individually identifying the company and its corresponding duty rate in the relevant parts in this Regulation. This individual duty rate was set at the level of the residual duty rate, which was not based on Dika's own data. Similarly, the dumping and injury margins applicable to Dika mentioned in this Regulation were set at the level of the residual dumping and injury margins, and not based on Dika's own data. Dika's claim was therefore rejected.

(47) Dika also claimed that instead of applying the residual duty rate to Dika, the Commission should have constructed the normal value based on Dika's cost of manufacturing and the product type specific composition, which should then have been compared against the verified export price of Hands to calculate Dika's dumping margin.

(48) This methodology could not be accepted. First, because a comparison between the constructed normal value for one company and the export price of another company could not lead to an accurate dumping margin. This would mean comparing a value based on one company's data with the export price of another company. Second, even if the Commission were to apply this method, it would not have been possible to carry it out on a product type level. Although the product types sold by Dika overlapped to a large extent those sold by Hands, they did not match completely. Some product types sold by Hands were not sold by Dika, and vice versa. Such methodology would thus not result in an accurate dumping margin which would be consistent with the reality of the export transactions carried out by Dika ([9]). Moreover, such approach would be contrary to the requirement of Article 2(11) of the basic

([8]) Case T-278/20, Zhejiang Hangtong Machinery Manufacture Co. Ltd and Ningbo Hi-Tech Zone Tongcheng Auto Parts Co. Ltd v Commission [2022] ECLI:EU:T:2022:417, para. 97.

([9]) In line with Case T-278/20 quoted in recital 92 and referred to by Dika in their submission.

Regulation, which explicitly provides that, when calculating the dumping margin and regardless of the method of comparison of normal value and export price chosen, 'the prices of all export transactions' must be taken into account ([10]). Finally, this methodology would imply the disclosure of Hands' confidential data to Dika, both regarding the product types sold and the export price. This cannot be accepted as Hands is the only other known producer of ARW in Morocco and in direct competition with Dika. The Commission therefore rejected this claim.

3.2. **Normal value**

(49) As set out in recitals 52 to 65 of the provisional Regulation, the Commission constructed the normal value under Articles 2(3) and 2(6) of the basic Regulation due to the absence of domestic sales of the like product by Hands. Following provisional disclosure, EUWA claimed that there were in fact domestic sales, and indicated that it would provide evidence thereof at a hearing. However, the information subsequently provided by EUWA did not prove their statement that sales by the Moroccan companies in Morocco could be deemed domestic sales. Given the sensitivity of the corporate data involved, EUWA did not have the relevant information regarding the timing, quantities or prices of the Moroccan companies' sales, nor the exact location of the clients to whom they were allegedly sold.

(50) In addition, neither the Commission nor any interested party denied the fact that Hands had made ARW sales in Morocco. The reason for disregarding these sales as domestic sales was due to the location of both Hands and the clients in economic zones, as concluded in recital 60 of the provisional Regulation. In addition, none of these sales were made in the ordinary course of trade and could in any event not be used for establishing the normal value. On the other hand, Hands accepted that it had no domestic sales and that the normal value needed to be constructed. The Commission therefore rejected this claim.

(51) Following final disclosure, the Government of Morocco claimed that the Commission erred in considering that sales in economic zones did not constitute domestic sales. In support of this claim, the Moroccan Government stated that since ARW were sold to companies in the economic zones in order to be used in the production of new vehicles either in the EU or in Morocco and hence would be consumed either in the EU or in Morocco, such sales in economic zones in Morocco should be considered domestic sales. This would allegedly be in line with the approach of the US Department of Commerce, which considers sales in economic zones for the use in a product which would be ultimately exported outside of the United States as consumed in the domestic market.

(52) However, as already explained in recitals 53 and 54 of the provisional Regulation, this is not the approach which was adopted by the Commission in the current or previous investigations. Whether the United States adopts a different approach in their determinations is irrelevant for the case at hand. Sales between economic zones are not considered domestic sales by the Commission for the purpose of dumping calculations because at the time of the sale it is unknown whether the product would be released for free circulation in the domestic market, or destined for export (see recital 53 and 54 of the provisional Regulation). The Commission therefore rejected this claim.

(53) The Government of Morocco also argued that the Commission's approach was contradictory to its treatment of sales in exclusive economic zones of the EU which can be subject to anti-dumping duties ([11]), as well as to its practice of including inward and outward processing imports to economic zones in the import statistics used in the injury analysis in anti-dumping investigations.

([10]) See Cases C-376/15 P and C-377/15 P, Changshu City Standard Parts Factory and Ningbo Jinding Fastener Co. Ltd v Council of the European Union, ECLI:EU:C:2017:269, para. 53.

([11]) Commission Implementing Regulation (EU) 2019/1131 of 2 July 2019 establishing a customs tool in order to implement Article 14a of Regulation (EU) 2016/1036 of the European Parliament and of the Council and Article 24a of Regulation (EU) 2016/1037 of the European Parliament and of the Council (OJ L 179, 3.7.2019, p. 12).

(54) First, the reference to exclusive economic zones is irrelevant for the case at hand. Exclusive economic zones are zones which are declared as such by a Member State pursuant to the United Nations Convention on the Law of the Sea. The economic zones referred to in the current case are not such exclusive economic zones and do not fall under the rules cited by the Moroccan government ([12]).

(55) Second, inward and outward processing imports in economic zones in the EU are included in the injury analysis because the imported goods 'do not just transit through the Union but also undergo added value processing operations, such as assembly and transformation, in the Union. Consequently, these imports do clearly compete with the products manufactured by the Union industry' ([13]). However, sales to or between economic zones could not be considered as domestic sales, since it was unknown whether the product would be released for free circulation in the domestic market, or destined for export. The Commission therefore rejected these claims.

(56) Following provisional disclosure, both Dika and Hands contested the use of Brazilian SG&A and profit for the construction of the normal value. Hands argued that the data of Brazilian companies should not be used to establish SG&A and profit to construct the normal value. The company stated that the Commission did not provide supporting evidence to show that data from Brazil would be appropriate for constructing the normal value. Instead, Hands suggested using the SG&A and profit of Korean aluminium wheel producers which would be considerably lower. Hands claimed that this would be more appropriate since Hands is ultimately owned by a Korean ARW manufacturer, and the resulting SG&A and profit would be in line with that of one of the two Brazilian companies used by the Commission.

(57) Dika claimed that the data of one of the Brazilian companies should be disregarded, as the Commission used the consolidated accounts which included the results of subsidiaries in other countries and concerning other products than ARW. Hands and Dika both claimed that the SG&A for one of the Brazilian companies had been wrongly calculated.

(58) In view of the arguments put forward concerning the use of Brazilian data for the construction of the normal value, the Commission reassessed the method it applied at provisional stage. The Commission disagreed with Hands that the Republic of Korea would be a more suitable alternative for Morocco than Brazil. The rationale behind article 2(6)(c) of the basic Regulation is to use a reasonable method to find a proxy for the SG&A and profit of the exporting producer under investigation. The chapeau of Article 2(6) of the basic Regulation, as well as subparagraphs (a) and (b) of that Article, show a clear preference for data related to production and sales in the domestic market of origin. Under Article 2(6)(c) therefore, a reasonable alternative for the domestic market would ideally be close to the domestic market, for example, in terms of economic development since that has an impact on the companies' level of costs and profits. While Brazil was considered slightly more economically developed than Morocco, Korea as a highly developed economy could not be considered as a reasonable alternative for Morocco ([14]).

(59) However, the Commission considered that instead of using data for Brazilian ARW producers, it was more reasonable to use the data available for the cooperating producer, Hands. The SG&A for Hands could not be used for the construction of the normal value under the chapeau of Article 2(6) of the basic Regulation, since Hands had no domestic sales in the ordinary course of trade. However, as a proxy for the SG&A related to Hands' domestic sales, the Commission considered that the SG&A for all sales by Hands would be a reasonable alternative. Furthermore, the investigation did not show any differences between the SG&A for domestic and the SG&A for export sales, as all relevant costs were allocated on turnover. In addition, the number of sales made in Morocco by Hands was so small,

([12]) The rules laid down in Regulation (EU) 2019/1131 quoted in footnote 11.

([13]) Commission Implementing Regulation (EU) 2021/2012 of 17 November 2021 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia (OJ L 410, 18.11.2021, p. 153), recital 136.

([14]) The World Bank database has the following classifications for 2021 based on the gross national income ('GNI') per capita: lower-middle income economy between USD 1 086 and USD 4 255, upper-middle income between USD 4 256 and USD 13 205, high income economy above USD 13 205. According to this classification, Morocco is considered as a lower-middle income economy (with a GNI for 2021 at USD 3 350), Brazil as an upper-middle income economy (with GNI for 2021 at USD 7 720) and Korea as a high income economy (with GNI for 2021 at USD 34 980). See https://databank.worldbank.org/home.aspx

that no meaningful comparison could be made. Hands' data was verified and concerned sales by a company located in Morocco, which only produces and sells ARW. In addition, that data covered the investigation period only. The Commission considers the use of Brazilian data as less reasonable since the information available dated from 2019, and covered multiple products and production sites in several countries. The SG&A thus established on the basis of Hands' own data, adjusted for items not directly related to the production of the product concerned and items that were not realized, was [12 % – 16 %].

(60) Following final disclosure, Hands reiterated its claim that Korea would the most appropriate choice to determine the level of SG&A and profit for constructing Hands' normal value since that data concerned the Korean parent company of Hands. The fact that Korea did not have a similar level of economic development as Morocco was irrelevant, according to Hands, since the economic development of an alternative country is relevant only in case of the application of Article 2(6a)(a) of the basic Regulation in case of significant distortions, which is not the case for Morocco.

(61) The Commission disagreed. Although indeed the term 'similar level of economic development' is used in Article 2(6a)(a) of the basic Regulation, this does not mean that the level of economic development cannot be a relevant factor to determine whether or not a country other than Morocco would be reasonable for determining an appropriate level of SG&A under Article 2(6)(c) of the basic Regulation. The Commission considered that using data from ARW producers in a highly developed economy would be less reasonable than using data from a country which would be more similar in terms of economic development, as explained in recital 58 above.

(62) Hands also claimed that the Commission addressed none of its claims about the Brazilian data, as used in the provisional Regulation. However, by using Hands' own data instead of Brazilian data, these claims became moot. Hands argued that the only reason for switching from the Brazilian data to Hands' own data was that it would be more convenient for the Commission. However, as the Commission explained in recital 59 above, it determined that Hands' own data was more reasonable than Brazilian data, not more convenient. Accordingly, the Commission rejected these claims.

(63) Following final disclosure, the Government of Morocco, Dika and Hands disagreed with the use of Hands' SG&A for the construction of the normal value.

(64) In their comments on final disclosure the Government of Morocco and Dika claimed that the use of Hands' SG&A was not in line with Article 2.2.2 of the WTO Anti-Dumping Agreement. Both parties noted that 'any other reasonable method' in Article 2.2.2(iii) of the WTO Anti-Dumping Agreement involves an inquiry into whether the amount for profits is approximating the profit margin to what would have been realized if the product under consideration had been sold in the ordinary course of trade in the exporting country. The parties also noted that the SG&A costs used by the Commission referred solely to export SG&A costs which, according to Dika, are by definition incapable of approximating the profit margin that would have been realized if the product under consideration had been sold in the ordinary course of trade in Morocco. Finally, Dika argued that the fact that Hands' SG&A for export was a reasonable basis for its domestic sales could not be factually checked as Hands had no domestic sales.

(65) In their comments on final disclosure Hands essentially argued using its own SG&A was contrary to the letter and rationale of Article 2(6) of the basic Regulation as Hands had no domestic sales in the ordinary course of trade. According to Hands, the Commission used the application of Article 2(6)(c) of the basic Regulation to circumvent the fact that it could not resort to the general rule of Article 2(6) of the basic Regulation which requires sales to be in the ordinary course of trade.

(66) The Commission noted that the general function of Article 2(6) of the basic Regulation (and Article 2.2.2 of the WTO Anti-Dumping Agreement) is to approximate what the profit margin as well as SG&A would have been for the like product in the ordinary course of trade in the domestic market of the exporting country. 'Any other reasonable method' in Article 2.2.2(iii) of the WTO Anti-Dumping Agreement involves an enquiry into whether the determination of the amount for profits and SG&A is the result of a reasoned consideration of the evidence available. In this respect, contrary to what Dika and Hands claimed, the Commission also noted that, in the process of considering all the available evidence, it did not use either SG&A for export sales or SG&A for domestic sales that were not in the ordinary course of trade; rather, the Commission used as a reasonable proxy the SG&A concerning all sales made by Hands.

(67) The Commission considered it reasonable within the meaning of Article 2(6)(c) of the basic Regulation (and Article 2.2.2(iii) of the WTO Anti-Dumping Agreement) to use SG&A for all Hands' sales as a proxy for what the SG&A would have been for the like product in the ordinary course of trade in the domestic market of the exporting country for several reasons.

(68) First, Hands itself did not dispute the fact that the SG&A on all its transactions would be similar to that on its domestic sales, should it have had such sales. On the contrary, by allocating total SG&A costs incurred on turnover as explained in paragraph (45) of the final disclosure document, Hands recognized that such costs are identical irrespective of the different geographical markets in which the sales are made.

(69) Second, the way Hands was actually set up and how it dealt with sales in a tender-driven market also confirmed that the reported allocation of SG&A (based on the turnover regardless of the geographical destination of the product) reflected the reality. During the investigation period no differentiation with regard to the sales process and its related costs between markets could be noted, while parts of this process were done by Hands' parent company in Korea.

(70) Third, ARW tender procedures, also those in which Hands participated, were not divided by market, but rather by client (e.g. any tenders for ARW sold to car producer X, whether finally delivered in the Union or in Morocco, were dealt with by car producer X's headquarters). Therefore, the Commission concluded that, from the point of view of Hands' SG&A, it did not matter whether a subject of a transaction was destined to be consumed in Morocco or, for example, in France. Accordingly, Hands' SG&A realised on all its transactions amounted to a reasonable proxy for what the SG&A would have been in the ordinary course of trade in Morocco.

(71) Following the additional final disclosure, Hands argued that not all SG&A were allocated on turnover as transport associated costs, for example, were based on actual costs per market. In addition, and for the same reason, a reference to the tender and bidding processes was allegedly unwarranted as this did not take into account the different delivery and transport conditions which may differ per market. Finally, Hands argued that the sales activity may differ for each market. Consequently, Hands argued that the Commission violated the basic Regulation when choosing Hands' own data as being reasonable for constructing Hands' normal value.

(72) What was not mentioned in the claim is that Hands' SG&A on all its transactions was adjusted to approximate it to what its SG&A would have been for the like product in the ordinary course of trade in the domestic market of the exporting country. As explained in the additional final disclosure, and as welcomed by Hands in its subsequent comments, transport associated costs were deducted from both the net sales and the total SG&A and therefore not taken into account in the SG&A calculations. Transport associated costs was the only cost item identified by Hands in its SG&A as specific to geographical markets. For other sales related costs, no notable difference could be discerned between markets. The fact that some other sales related costs were not directly correlated to the tender procedures, as argued by Hands, does not mean that these costs were not influenced by the organization of the tender procedures and client relations. As set out in the recitals above, the Commission determined that some costs, such as transport related costs, were market related and removed such costs. Other costs were not market related because of the tender driven market or because they were related to (salaries, financial or other) operations which, by nature and due to the set-up of the company, were not differentiated by geographical markets. Furthermore, the company itself allocated all non-transport related costs on turnover without distinction between geographical markets.

(73) In its comments on the additional final disclosure, besides making the claims with regard to the Commission's understanding on how its SG&A was reported, which are addressed above, Hands did not substantiate further its claim of violation of the basic Regulation. Notably, Hands did not provide any comments on the Commission's explanation given in recital 74, addressing this part of Hands' comments on the final disclosure. Hands also failed to explain why the SG&A figure used by the Commission, which did not include transport associated costs, was an unreasonable proxy for what its SG&A would have been for the like product in the ordinary course of trade in the domestic market of the exporting country. Finally, besides disagreeing with the Commission approach, in their comments on additional final disclosure, Hands did not point to a more reasonable alternative. Notably, neither Hands nor any other interested party provided any comments on the Commission's explanation, given in recital 75, as to why the alternatives considered during the investigation were not more reasonable than Hands' own data. The Commission therefore rejected these claims.

(74) None of the interested parties provided convincing evidence on why SG&A for all sales was not a reasonable proxy. Concerning the lack of comparable sales in the ordinary course of trade on the domestic market, the Commission noted that the very purpose of Article 2(6)(c) of the basic Regulation (as well as Article 2.2.2(iii) of the WTO Anti-Dumping Agreement) is to approximate what would such SG&A have been precisely because there are no such sales. Considering the particular situation of how Hands sold its ARWs and allocated its SG&A, as well as how the market on which it operated functions, the Commission used the right proxy.

(75) No interested party provided another more reasonable alternative. Indeed, the alternatives, IOCHPE MAXION S.A. in Brazil or Hands Corporation in Korea were not better proxies for what the SG&A would have been for the like product in the ordinary course of trade in the domestic market of the exporting country. Unlike in the case of Hands' SG&A, SG&A taken from Brazil would be far removed from the like product (relating mostly to sale of products other than ARW). This is of particular importance when one deals with a product that is sold in a very particular way, as it is the case at hand to the point that such alternatives must be disqualified. As for the alternative based on Korean data, the Commission already explained that such data may not be a reasonable alternative in view of the differences between Morocco and Korea in terms of economic development, which may have an impact on the companies' level of costs and profits.

(76) Finally, the reference to the profit margin used in the establishment of the constructed normal value made by Dika appeared irrelevant. The profit margin was not based on Hands' sales, but rather on the target profit set for the Union industry and capped by the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin, in line with Article 2(6)(c) of the basic Regulation.

(77) Hands also made several claims concerning errors in the calculation of Hands' SG&A. The Commission accepted one claim related to the deduction of sales commissions from Hands' SG&A, and rejected the remaining claims. The dumping margin was recalculated accordingly. The reasons for rejecting some of the claims were provided to Hands in the additional final disclosure. No new information was brought forward on these claims in Hands' submission following the additional final disclosure.

(78) Following the additional final disclosure, Hands also referred to its prior comments on final disclosure, where it argued that the Commission should not have used a formula to convert the SG&A ratio on turnover into an SG&A ratio per cost of goods sold, but instead have directly calculated SG&A on the actual verified cost of goods sold of Hands. However, this was based on a misunderstanding since the Commission did not calculate the SG&A on cost of goods sold, but on the cost of manufacturing. Also, Hands did not provide any explanation why the use of the cost of manufacturing, as opposed to the use of the cost of goods sold, was not appropriate. The Commission therefore rejected this claim. The relevant calculations were shown in the final disclosure and clarified in the additional final disclosure. First, the Commission identified, based on the actual costs of Hands, the total amount of SG&A costs, which was then expressed as a percentage of the total sales value. The percentage for SG&A was then, together with the percentage of profit, added to the cost of manufacturing in order to construct the normal value.

(79) Following provisional disclosure, EUWA contested the method used to construct the normal value since the resulting dumping duty would not remedy the injurious dumping suffered by the Union industry. Instead, EUWA argued that the target profit of Union producers established in recital 160 of the provisional Regulation should be applied in the dumping calculations, as this would lead to a more reasonable normal value.

(80) The Commission disagreed with EUWA that the outcome of the calculations justified the need for applying a higher profit to construct the normal value. However, the Commission decided to no longer use the Brazilian data in its calculations as explained in recitals 44 and 45 above but instead revert to Hands' own verified data to calculate SG&A in Morocco. A reasonable profit for Hands, on the other hand, could not be determined based on the verified data, since the company's sales were not profitable during the investigation period. Instead, the Commission decided to use the basic profit established for the Union industry under normal conditions of competition as a reasonable alternative for the reasons set out below.

(81) Both the Union and Moroccan ARW producers sell to the same clients in a homogeneous market, where they compete in the same tenders, and have factories with a similar set-up and in particular similar costs. They should therefore be expected to achieve comparable profits in comparable circumstances. For the calculation of the normal value under Article 2(6)(c), the Commission thus applied the basic profit of 7,9 % as established in recital 158 of the provisional Regulation, to which it applied a profit cap as required under Article 2(6)(c) of the basic Regulation.

(82) In this respect EUWA claimed that Article 2(6)(c) of the basic Regulation allows the Commission discretion to not apply the cap in view of the specific circumstances of the case. According to EUWA, the Commission did not resort to a product in the same general category as ARW for the application of the cap. The product category used by the Commission is destined to be further processed by downstream industries, which is demonstrated by the fact that ARW and the products used by the Commission are classified in the statistical nomenclature under different chapters. According the EUWA, they therefore could not be considered as falling in the same general category of products. In fact, EUWA claimed that there are no sales at all in Morocco of products in the same general category as ARW.

(83) EUWA then argued that there is no obligation for the Commission to apply the cap in a situation where there are no sales of products of the same general category in the domestic market of the country of origin. In addition, it argued that the application of the cap is merely intended to avoid the application of excessively high profit levels in the normal value calculations. EUWA stated that, in its view, a profit level of 8,3 % (the non-injurious target profit established in the provisional Regulation) would not be excessive, while a profit capped at of 4,16 %, as applied by the Commission, was insufficient.

(84) The Commission rejected this claim as the application of the cap is required by the basic Regulation, and is also supported by several WTO Dispute Settlement Body panel reports ([15]). There is thus, contrary to EUWA's claim, no discretion for the Commission to decide not to apply the cap.

(85) In fulfilling its obligation to apply a profit cap, however, the Commission does have a wide margin of discretion in determining that cap. EUWA commented on the appropriateness of the general category applied by the Commission in the provisional Regulation, but did not propose any alternative, let alone a more appropriate one. The mere fact that the profit cap is insufficiently high in the view of the Union industry, does not mean that the cap itself is not reasonable, appropriate or correct. Therefore, in the absence of more suitable alternatives put forward by the parties, the Commission maintained the profit cap of 4,16 % as established in recital 64 of the provisional Regulation.

(86) After final disclosure, EUWA reiterated its claim that a too low level of profit (the profit cap) was used in the construction of the normal value. However, as EUWA did not provide any new information or propose any alternative method to establish the profit cap, the Commission rejected this claim.

3.3. **Export price**

(87) The details of the calculation of the export price were set out in recitals 66 to 68 of the provisional Regulation. Absent any comments regarding this methodology the Commission confirmed its provisional conclusions.

3.4. **Comparison**

(88) Following provisional disclosure no interested party commented on the methodology used to compare the export price with the constructed normal value. Hence, the Commission confirmed recitals 69 and 70 of the provisional Regulation.

([15]) WTO, Report of the Panel, WT/DS480/R, 25 January 2018, par. 7.51, and WT/DS405/R, 28 October 2011, par. 7.300.

3.4.1. *Dumping margin*

(89) The Commission revised the dumping margins following claims from interested parties as described in recitals 57 to 59 and 77. In addition to these claims, both Dika and EUWA contested the Commission's method used to establish the residual duty.

(90) Following provisional disclosure, Dika claimed that the residual duty was set too high. By using the highest dumping margins as facts available the Commission penalized Dika for its non-cooperation. According to Dika, this is prohibited by Article 18 of the basic Regulation as well as corresponding WTO provisions.

(91) However, the Panel in another WTO dispute (Canada – Welded Pipe) stated that 'There may be a fine line between, on the one hand, incentivizing cooperation and preventing circumvention and, on the other hand, punishing non-cooperating exporters' ([16]). In this regard, one cannot 'go beyond what was appropriate and necessary to achieve the objectives of encouraging cooperation and preventing circumvention' ([17]). In the Commission's view, that is precisely the objective of the method that was used in the provisional Regulation. Recital 73 of that Regulation explained that the Commission applied the highest dumping margin found for product types sold in representative quantities by Hands, which account for around 50 % of all of Hands' exports to the Union.

(92) In selecting product types accounting for 50 % of the exports to the Union by Hands, the Commission applied a reasonable method based on an assessment of all the available information. This is also in line with previous investigations and what the General Court held in its judgment regarding steel road wheels from China: 'although the applicants describe the residual dumping margin as 'punitive', it is common ground that that margin was determined by the Commission not in an arbitrary or punitive manner, but after it had found that sampling had failed and properly applied Article 18 of the basic regulation to the applicants. That residual margin was established on the basis of a not insignificant proportion of the exports of the single exporting producer, so that the use of such a classification with regard to that margin, however high, is not justified' ([18]). A representativity of 50 % of the export volumes, as described in recital 57 above, is similar to or higher than that used in other anti-dumping investigations ([19]).

(93) The Commission had calculated the residual duty on the basis of an established methodology using verified data, in line with previous investigations as explained in recital 58 above. In addition, the data used to establish the residual duty was representative in view of the information provided by the product types imported from the Moroccan companies. The fact that the result is lower than what the EUWA would have liked, or than the duty set on imports from China, does not invalidate that method.

(94) The Commission therefore rejected both Dika's claim that the residual duty was punitive and too high, and EUWA's claim that the residual duty was too low and a bonus for non-cooperation.

(95) Following final disclosure, Dika reiterated its claim that the method to establish the residual duty was punitive and that the Commission did not explain how it determined that the methodology used was appropriate or using the best fitting information for establishing the duty rate for Dika. In addition, Dika claimed that this method is outlawed by a WTO Panel in *China – GOES* where it was stated that 'the recourse to facts available is not intended to lead to excessive margins of dumping in order to encourage cooperation by interested parties.' The Government of Morocco made similar claims.

([16]) WTO, Report of the Panel, WT/DS482//R, 25 January 2016, par. 7.143.

([17]) Ibid.

([18]) Case T-278/20, Zhejiang Hangtong Machinery Manufacture Co. Ltd and Ningbo Hi-Tech Zone Tongcheng Auto Parts Co. Ltd v European Commission [2022] ECLI:EU:T:2022:417, para. 134.

([19]) For example, a residual duty of 29 % established in recital 186 of Commission Implementing Regulation (EU) 2019/1693 of 9 October 2019 imposing a provisional anti-dumping duty on imports of steel road wheels originating in the People's Republic of China (OJ L 259, 10.10.2019, p. 15), or 50 % in recital 290 of Commission Implementing Regulation (EU) 2021/2239 of 15 December 2021 imposing a definitive anti-dumping duty on imports of certain utility scale steel wind towers originating in the People's Republic of China (OJ L 450, 16.12.2021, p. 59).

(96) However, the residual duty as established in the current case did not lead to any 'excessive margins of dumping'. The method used to establish the residual duty was considered reasonable as it was based on the dumping margins of product types which accounted for 50 % of Hands' exports and were therefore highly representative. In addition, these product types accounted for almost 25 % of Dika's exports. The Commission therefore rejected this claim.

(97) Following provisional disclosure, Dika also claimed that individual dumping and injury margins should be calculated for the company, since Articles 9(5) of the basic Regulation and 6.10 of the WTO Anti-dumping Agreement indicate that such individual margins should be calculated for each supplier irrespective of its degree of cooperation.

(98) Although the calculation of individual margins on the basis of the company's own data was not possible, as explained above in recitals 26 to 48, Dika is a Moroccan producer known to the Commission, which will be subject to a company-specific anti-dumping duty at the level of the residual duty. The Commission therefore accepted the claim in so far as it decided to establish an individual duty rate for Dika by individually identify the company and its duty rate in the relevant parts in this Regulation.

(99) In its comments on final disclosure, Dika also reiterated its request to receive dumping and injury margin calculations as well as price undercutting and price suppression calculations for Dika. In the absence of such disclosure, Dika argued, Dika was prevented from submitting a price undertaking offer and of the possibility to meaningfully comment on the Commission findings.

(100) However, for the same reasons as set out in recital 46 and 48 and as also explained to Dika following such disclosure requests after both provisional and final disclosure, a specific disclosure to Dika was not possible. Since no individual dumping or injury margin was calculated for Dika there was no calculation to be disclosed. In addition, the calculations to determine the residual duty (applicable to Dika) were based on the verified data of Hands, which could not be disclosed to Dika for confidentiality reasons. The provisional Regulation, the information provided to Dika following provisional disclosure ([20]), the final disclosure document and the current Regulation contained all facts and considerations on which the Commission based its proposal and decision to impose provisional and definitive measures on ARW from Morocco as well as the methodology used to calculate the residual duty applicable to Dika. The Commission therefore rejected this claim.

(101) The definitive dumping margins expressed as a percentage of the cost, insurance and freight (CIF) Union frontier price, duty unpaid, are as follows:

Company	Definitive dumping margin
HANDS 8 S.A.	9,01 %
DIKA MOROCCO AFRIKA S.A.R.L	17,54 %
All other companies	17,54 %

4. **INJURY**

4.1. **Definition of the Union industry and Union production**

(102) In the absence of any related claim or comment, the conclusions in recitals 75 and 76 of the provisional Regulation were confirmed.

([20]) Dika requested and received (per email on 22 July 2022) information regarding the reasonable SG&A and profit used in the provisional Regulation, the profit cap, compliance costs, IRI (investments, R & D and innovation) as well as Eurostat data on TARIC level.

4.2. **Union consumption**

(103) ACEA claimed that the conversion ratio used as described in recital 78 of the provisional Regulation for establishing Union consumption was incorrectly established for Morocco based on information provided by Hands and User A regarding imports from Morocco. User A was one of the two users cooperating with the investigation, whose request for anonymity was accepted by the Commission. The conversion ratio should be 13,5 kg per unit, according to ACEA. For Türkiye, ACEA calculated that the conversion ratio should be 9,3 kg per item. This calculation was based on information provided by an ACEA member which did not cooperate with the investigation ('the non-cooperating user') and never submitted a questionnaire reply.

(104) For the establishment of its conversion ratio, the Commission used the questionnaire replies submitted by Hands, Dika and the three sampled Union producers. The weighted average weight per item for Moroccan wheels was thus established based on the information reported by the two producers, i.e. Hands and Dika. The conversion ratio established was 11,3 kg per item. Moreover, the Commission noted that ACEA did not provide any supporting evidence regarding the conversion ratio allegedly provided to it by Hands. In any event, this ratio did not match with the information provided by Hands in its verified questionnaire reply. Therefore, the claim was rejected.

(105) After final disclosure, ACEA claimed that the conversion ratio should not include Dika's data as the company's exports sales data was rejected under Article 18 of the basic Regulation.

(106) The Commission excluded the data from Dika for the establishment of the conversion ratio. The result was that the value of 11,3 kg per item remained unchanged. This is explained by the relatively low weight of Dika's figures in the overall dataset which included not only Hands but also the three sampled Union producers. Dika represented only [10 % – 15 %] of the overall number of items considered. Therefore, the conversion ratio calculated at provisional stage was confirmed.

(107) Concerning Türkiye, the Commission noted that the conversion ratio calculated by ACEA was based on a total weight of around 1 680 tonnes, which represented only around 1,7 % of the total imports from Türkiye (around 94 000 tonnes during the investigation period). The Commission, therefore, did not consider this calculation sufficiently accurate.

(108) After final disclosure, ACEA referred to an exhibit collected on spot from User B and also submitted additional information from User B backing its claim. User B was one of the two users cooperating with the investigation, whose request for anonymity was accepted by the Commission. ACEA estimated, based on the data from User B and the data originating from the non-cooperating user, that the weight per item used as a conversion ratio by the Commission should be lower than 11,3 kg.

(109) The Commission examined the information submitted originating from User B. User B provided a list of [30-45] product types where the total quantity and the weight per product type were mentioned. The Commission noted that only for one product type a supporting document was submitted indicating its weight. As for the additional information provided by ACEA with respect to User B, the Commission was unable to verify it due to its late submission. Regarding the information provided by the non-cooperating user, which consisted of a summary spreadsheet, the Commission was unable to verify it due to the overall lack of cooperation by that user, and thus could not be considered for the purpose of this investigation. In any case, the revised total conversion ratio calculated by ACEA was based on total weight of around 3 900 tonnes, representing only around 4 % of the total imports from Türkiye.

(110) Therefore, the Commission found that the different volumes used by ACEA, both before and after final disclosure, for the establishment of the conversion ratio could not be considered representative for the overall imports. In addition, as indicated in the recital 78 of the provisional Regulation, the market trend is going towards larger wheels diameter resulting in an increase of the weight per item. This trend was confirmed by the conversion ratio calculated based on the questionnaires replies. Therefore, the claim was rejected.

(111) Consequently, in the absence of other comments, recitals 77 to 80 and 137 of the provisional Regulation were confirmed.

4.3. **Imports from the country concerned**

4.3.1. *Prices of the imports from the country concerned and price undercutting*

(112) As indicated in recital 110 above, the claim regarding the volume was rejected and thus the imports prices were confirmed.

(113) Therefore, in absence of other claims concerning the total import values, the recitals 81 to 86 of the provisional Regulation were confirmed.

(114) After final disclosure, ACEA reiterated that the Commission ignored the conditions of competition in the Union ARW market by ignoring the fact that OEM wheels are made-to-order and by focusing on actual sales made by the Union and Moroccan ARW producers during the investigating period, instead of analysing price competition and lost sales that occurred in tenders. By contrast, in a previous investigation ([21]) concerning ARW imports, the Commission applied the approach requested by ACEA. Consequently, ACEA claimed that all price analyses, including undercutting and underselling, should be carried out at the level of the tenders.

(115) The Commission addressed a similar argument in recital 192 below regarding underselling calculations. Indeed, the selection of individual tenders could not substitute the analysis made by the Commission, as this analysis was based on the complete and duly verified actual sales data, i.e. transaction sales listing and price comparison on a per type basis submitted by the sampled Union and exporting producers. This listing provided actual values on the quantity sold and invoiced during the investigation period, which, as explained in recital 136, often ultimately depart from those provided in the terms of a tender. Unlike the latter, the actual sales data takes account of discounts and rebates, deferred or not, which were actually issued and concerned the investigation period. Consequently, tender-base analysis would not reflect accurately the conditions of competition on the ARW market. Furthermore, ACEA did not contest that ARWs produced in Morocco have the same basic physical, chemical and technical characteristics as well as the same basic uses as the ARWs produced by the Union industry. Thus, unlike tender-based analysis, the comparison per product type correctly reflected the competition in prices and volumes between the imports from Morocco and the sales of the Union industry for the purposes of establishing price undercutting and price underselling. As indicated in its comments, ACEA explained that the tender contracts reflect and approximate number of wheels to be supplied, while the exact number is agreed typically within few weeks before the delivery, and that the success of a given car model depends on consumers and thus the volume of production of ARWs. Within each car model, several types of ARWs may be offered and car manufacturers cannot predict the total sales of each type throughout the production life of that car model. Even if the Commission were to consider the price effects at the level of the tenders, it observed that the data received on tenders was incomplete as it originated only from two cooperating users and could not be fully cross-checked with the data provided by the Union industry. In addition, one of the biggest users did not cooperate with the investigation and the partial data received on its behalf from ACEA could not be verified. Therefore, the claim was rejected.

(116) After provisional disclosure, ACEA claimed that ARWs of the same specifications are not substitutable as each ARW is built following a car manufacturer order for a specific car model. The design as well as properties and finishing are all defined by the purchaser. Each wheel being unique to the car-manufacturer that ordered it: there is no substitutability between ARWs destined to different car manufacturers.

(117) The Commission considered that all ARWs, either originating from the Union industry or from Morocco or from other third countries, share the same basic physical, chemical and technical characteristics within the meaning of the Article 1(4) of the basic Regulation. As found during the investigation and clarified by ACEA after final disclosure, all certified producers to certain car manufacturers may compete and supply exactly the same type of wheels to the car manufacturers. For example, a document provided by ACEA indicated that, multiple certified producers located in the Union, Morocco, Türkiye and other third countries competed for the same type of ARW. If needed, various types of wheels can be mounted to a certain car model and not only the ARWs set in the tenders. Therefore, the claim was rejected.

([21]) Commission Regulation (EU) No 404/2010 of 10 May 2010 imposing a provisional anti-dumping duty on imports of certain aluminium road wheels originating in the People's Republic of China (OJ L 117, 11.5.2010, p. 64), recitals 175 to 179.

(118) After final disclosure, ACEA reiterated its claim that there is no interchangeability between different types of wheels as the subject of investigation is OEM wheels and that OEM by definition refers to a wheel that is produced by a manufacturer for a specific car brand and bears its trademark protected by intellectual property rights. ARWs are an integral part of the general aspect and design of a car and need to be consistent between each and every car of a specific model.

(119) ACEA also claimed that the Commission did not have evidence that various types of wheels can be mounted to a certain car model and not only the ARWs determined in the tenders. ARWs are an integral part of the general aspect and design of a car and need to be consistent between each and every car of a specific model. Consumers will typically lose their warranty if they replace ARWs with non-OEM parts. ACEA substantiated its claim on warranty based on two documents issued by two car manufacturers.

(120) The Commission observed that ACEA did not claim or provide additional evidence that all ARWs, either originating from the Union industry or from Morocco or from other third countries, did not share the same basic physical, chemical and technical characteristics in the meaning of the Article 1(4) of the basic Regulation. The Commission also considered that, although there might be some technical limitations not allowing all types of wheels to be mounted to all types of car models, there is a certain degree of interchangeability between ARWs used for different car models. For example, a car manufacturer may decide to revamp a car model by working on the external parts of a car, which may include the ARWs design model. However, most of the technical specifications of the car platform remain identical. Thus, if necessary, a car manufacturer may mount to this car the older ARW design model. ARWs producers are therefore required to keep the older mould years after the end of production in their premises. This was confirmed by those sampled Union producers, which were granted the tender for providing ARWs for a certain car model and subsequently for the redesigned same car model.

(121) Regarding the claim on warranty, the Commission first observed that one of the warranty disclaimers provided did not contain any requirement on the types of wheels to be used. Second, the evidence provided concerned only the warranty period but not the entire usable life of a car. Third, the fact that there is also an After Market channel of sales of ARWs pointed to the fact that the requirement for using OEM parts for repairs was not constantly applied after the end of the warranty period and was technically and legally allowed. Finally, one of the two documents provided by ACEA concerned the USA market, whereas for the other one it was unclear whether it concerned the Union market. Therefore, the claim was rejected.

(122) After final disclosure, ACEA claimed that the product type specifications (the so called 'product control number' or 'PCN') did not capture all characteristics of a specific ARW project and all financial aspects of a particular tender.. As a result, the product control number did not ensure comparability of wheels that are being compared and thus undermined the accuracy of the respective volume and price analysis.

(123) The Commission considered that the definition of the product control number captured the main characteristics of an ARW: the production process (standard cast wheels without flow-forming or flow formed wheels or forged or two or three part wheels), the diameter and the weight, if with heat treatment or not, the type of finish, if with insert or not and if fitted with tyre or not. None of the cooperating parties commented on the product control number definition during the proceedings. ACEA did not explain which additional characteristic should be includedMoreover, as indicated above in recital 115, the Commission concluded that the tenders did not provide the necessary information for the establishment of the price and volume effects of the dumped imports. Therefore, the claim was rejected.

(124) After final disclosure, ACEA argued that there is no support in the non-confidential file or in the disclosure document regarding the significant price undercutting and price suppression found. The Commission observed that recitals 90 and 91 of the provisional Regulation contained the Commission's analyses and quantification of price undercutting as well as its findings regarding price suppression. Moreover detailed calculation of price undercutting was disclosed to the cooperating exporting producers, who could comment on the accuracy of that calculation. Consequently, the Commission rejected the claim.

(125) In the absence of other claims concerning undercutting and price effects, recitals 87 to 91 of the provisional Regulation were confirmed.

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

4.4.1. *General remarks*

(126) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 92 to 96 of the provisional Regulation.

4.4.2. *Macroeconomic indicators*

4.4.2.1. Production, production capacity and capacity utilisation

(127) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 97 to 99 of the provisional Regulation.

4.4.2.2. Sales volume and market share

(128) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 100 to 102 of the provisional Regulation.

4.4.2.3. Employment and productivity

(129) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 103 and 104 of the provisional Regulation.

4.4.2.4. Growth

(130) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 105 to 107 of the provisional Regulation.

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

(131) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 108 to 110 of the provisional Regulation.

4.4.3. *Microeconomic indicators*

4.4.3.1. Prices and factors affecting prices

(132) Regarding recital 113 of the provisional Regulation, ACEA claimed that prices certainly play a role but other considerations are equally important in the selection of an ARW supplier. Moreover, ACEA claimed that there is a fundamental error to allege that the Union producers have to align themselves with prices from Moroccan producers during the tendering process.

(133) The Commission observed that there is an imbalance in the bargaining power between the car manufacturers and the ARW producers. There is a limited number of car manufacturers, which further diminished in January 2021 with the creation of the Stellantis group. The bargaining power of the car manufacturers is demonstrated by the conditions observed in the tenders, which are in their favour. For example, the car manufacturers do not guarantee the quantities needed to be supplied and thus to be produced by the ARW producers and do not provide the possibility to revise upwards the selling price (save for the aluminium costs which are indexed) during the lifetime of the project. These conditions impact negatively the ARW producers as they are unable to optimise the workload of the production plants and, as a result, to achieve optimal economy of scale to maximise their profitability. The car manufacturers' favourable position is reinforced by the overcapacity observed in the ARW market as explained in recital 122 due to the establishment of the Moroccan producers.

(134) Moreover, during the investigation, the Commission received information from the car manufacturers that the price played a key role. User B explained that the main criterion is still the price and that after receipts of the offers, there is a negotiation process, primarily focused on prices, where the producers can improve their offers. EUWA explained that there are commonly price negotiations during the tender process in order to have price adjustments, which can go either way. Similarly, User A explained that other factors such as quality, R & D and supply abilities are very similar among ARW suppliers and therefore the price is the key criterion to determine the choice of the ARW supplier. Furthermore, during a hearing with ACEA, the non-cooperating user confirmed in its presentation that there are several rounds of negotiations with suppliers where their technical capacities, quality rating, logistics, production capability, etc. are verified but, most importantly, producers have to present their most competitive offer in terms of price. In addition, as established in recitals 90 and 91 of the provisional Regulation, the Union industry could not increase its prices despite the increase in its costs in the context of significant price undercutting and price suppression, which showed that the Moroccan exporting producers exercised price pressure on the Union producers during the investigation period. Therefore, the claim was rejected.

(135) ACEA claimed that the provisional Regulation incorrectly suggested that contracts are re-negotiated each year and that the Union ARW producers can somehow increase their prices in order to reflect the increase of the prices of the raw materials. ACEA explained that the pricing mechanism under ARW purchase contracts were based on a formula where only the evolution of the costs of the aluminium ingot was a variable element. Thus, the sales invoices did not reflect market conditions but rather contractual terms.

(136) The Commission confirmed that usually contracts did not provide for any possibility to increase prices over the lifetime of a project to cover costs, save for the cost of aluminium ingots, and improve supplier's profitability. In recital 113 of the provisional Regulation, the Commission did not argue that the possibility of ARW producers to increase their selling prices within the lifetime of a project exists, but rather explained that the ARW producers were unable to increase their prices when negotiating new tenders during the investigation period. In addition, the Commission collected evidence from the users and Union producers showing that the car manufacturers negotiated various types of discounts and rebates during the lifetime of a project, such as discounts calculated on the yearly overall turn-over, etc. Therefore, it is not accurate to argue that the prices are fixed (with the exception of the aluminium indexation) for the full lifetime of a project. Rather, prices could vary because of the aluminium indexation, but could not be increased further in order to take into account other costs such as labour, energy, raw materials or overheads costs. Furthermore, the actual selling prices may go further down throughout the lifetime of the project due to the various discounts and rebates that were applied. For one user, the amount of rebates or discounts obtained from an ARW producer was found to be significant. Therefore, the prices are not only determined based on the initial contract. The claim was therefore rejected.

(137) After final disclosure, ACEA reiterated its claim that prices were only determined based on the initial contract as productivity discounts were fixed in the contract and no productivity discounts were granted outside the contractual arrangements. Moreover, ACEA claimed that the Commission did not have positive evidence on the file which demonstrated that prices were not only determined in the initial contract. Finally, ACEA claimed that the evidence collected from the users did not support this conclusion, and that, in particular, the evidence indicated in the recital above was an anecdotal credit note issued by a third country supplier issued for wheels originating in a third country.

(138) First, the Commission noted that none of the sampled Union producers or the cooperating users submitted comments on the final disclosure, and thus did not put into question the assessment described in recital 136 which was based on the verified evidence collected from them.

(139) Second, based on ACEA's comments and documents provided, the Commission noted that ACEA in their comments referred to the confidential version of the mission reports of the cooperating users, member of ACEA, and thus to the evidence collected during the verification visits of these users. This was evident from the various referrals by ACEA in its submissions to the confidential mission reports of the users in question. In particular, the Commission referred to accounting ledgers extracted from User B system where a list of different types of rebates/discounts could be found. During the verification visit, User B explained that price reductions are directly applied on the selling price. Therefore, any other types of rebates/discounts booked in the accounts should be considered as additional rebates/discounts.

(140) Moreover, the Commission collected evidence from the sampled Union producers showing that the users requested various types of rebates/discounts, such as annual savings, etc. The Commission considered that more detailed information could not be disclosed as the information collected from both the users and the Union industry concerned specific individual transactions which constitute data that is not capable of being summarised within the meaning of Article 19(2) of the basic Regulation. Therefore, the claim was rejected.

(141) After final disclosure, ACEA claimed that sufficient evidence was provided demonstrating that ARW suppliers are awarded their supply volumes in tenders and that no supply volumes are awarded outside of the tenders. In any case, according to the party, there is no evidence on the record – and no such evidence exists – that following a tender award and in the process of execution of a contract signed as a result of such a tender, volumes assigned to the Union producer would be re-allocated in favour of a Moroccan supplier. ACEA argued that in the course of the on-site verification at one cooperating user was provided evidence showing that the volume of supplies agreed in the contract signed following the conclusion of a tender was generally a good indicator of the actual volume of supplies going forward.

(142) The Commission considered that ACEA confirmed the findings described in recital 157 that these producers have no guarantee regarding the volume that will be ultimately allocated to them. As indicated by ACEA in its comments and based on User A verification report 'suppliers quote for a volume: volumes are not secured, but suppliers have an idea of the volumes they are quoting for. If after the end of the project (several years) volumes are substantially lower than expected, suppliers might receive a compensation for the non-amortized equipment'. While the volume quoted was indicated, the typical contract did not mention the exact date of delivery and the planned volume of sales. As stated by ACEA in its comments: 'the exact number of wheels to be supplied is typically agreed within 4-8 weeks prior to the delivery to the assembly line'. Therefore, the claim was rejected.

(143) After final disclosure, ACEA claimed that, as acknowledged by EUWA, a more common practice is to award a tender for a particular ARW project to one supplier rather than two or more suppliers. Based on the tenders conducted by three ACEA members in the investigation period (the non-cooperating user and the two cooperating users), the tenders granted simultaneously to two suppliers were limited. Most of the tenders were granted only to one supplier, and thus the supplier will obtain the approximate quantity specified in the tender. When a tender is granted to one supplier, the re-allocation of supplies to any other supplier is not possible.

(144) The Commission examined the summary spreadsheet provided by ACEA in this respect. First, the listing of tenders provided concerned only tenders concluded during the investigation period, and thus these tenders did not concern actual deliveries during the investigation period as the estimated starting date for the supply under the tenders in question was planned for the time after the investigation period. Second, the Commission observed that most of the tenders listed were reported by the non-cooperating user (around 85 %). Due to the user's non-cooperation, the Commission was unable to verify the correctness of that listing and whether it included all the tenders and could cover the yearly needs of this car manufacturer. Notwithstanding this conclusion, the Commission, nevertheless, analysed the data provided.

(145) The list of tenders from the non-cooperating user showed that most of these tenders were granted to only one supplier. However, the weighted average volume quoted was rather low, around 50 000 items per tender for the complete lifetime of a project, which explained that only one supplier was awarded the tenders in question. Nevertheless, the Commission observed that one project was allocated to two suppliers 'due to high volume' as mentioned during a hearing held with ACEA. Third, the information on tenders provided by the cooperating users concerned three tenders. For User B the data showed that it split a tender for a quantity above 1 million to two suppliers. Moreover, for User A the data provided by ACEA was contradictory. Indeed, on the one hand, it showed that there was one tender which was allocated to one supplier, and, on the other hand, in a separate table regarding offers, the same quantities of that tender were split between two tenders. Consequently, the Commission considered that the information provided by ACEA did not contradict the findings made in recital 157, that the tenders may be allocated to several suppliers based on the quantity quoted which puts into question the actual amount of volumes to be supplied by each supplier throughout the life of the project. In addition, as explained in recital 115 above, ACEA acknowledged the fact that the total volume to be supplied may also depend on the success of the particular car model to be produced.

(146) The claim was therefore rejected.

(147) In the absence of other comments, the Commission confirmed its conclusions set out in recitals 111 and 113 of the provisional Regulation.

4.4.3.2. Labour costs

(148) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 114 and 115 of the provisional Regulation.

4.4.3.3. Inventories

(149) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 116 and 117 of the provisional Regulation.

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

(150) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 118 to 123 of the provisional Regulation.

4.4.4. *Conclusion on injury*

(151) In the absence of any comments, the Commission confirmed its conclusions set out in

5. **CAUSATION**

5.1. **Effects of the dumped imports**

5.1.1. *Quantity and market share of the dumped imports from the country concerned*

(152) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 131 to 136 of the provisional Regulation.

5.1.2. *Prices of the dumped imports from the country concerned and price effects*

(153) ACEA claimed, both after provisional and final disclosure, that imports from Morocco sold in 2020 and during the investigation period were based on tender procedures that took place in 2018-2019. Thus, they could not have had a price impact in 2020 or in the investigation period because they did not result in lost sales in 2020 and in the investigation period but rather before, at the point of the tender procedures.

(154) The Commission considered that the profit or losses materialized when the production or the sales took place and not at the time of the negotiation of the tenders. As further explained in recital 89, there are possible price and volume changes, during the life of a project, which go beyond the terms of a given tender. Moreover, as explained in recital 113 and recitals 146 to 148 of the provisional Regulation, the Commission considered that the impact of Moroccan producers is not only due to the quantity lost through tenders won by Moroccan exporting producers but also because of the overall price pressure on all tenders where they participated. Therefore, the claim was rejected.

(155) ACEA claimed, both after provisional and final disclosure, that the price analysis mentioned in the point 4.4.3.1 of the provisional Regulation should be conducted at the level of tenders, and in this scenario, there was no price difference between Union prices and Moroccan prices as reported in the provisional Regulation.

(156) ACEA also claimed, both after provisional and final disclosure, that the price competition between suppliers occurred during the tenders. Therefore, price undercutting, price suppression and the underselling margin should be calculated at the level of the tenders and not during the deliveries. Sales and deliveries did not reflect current conditions of competition. Moreover, the volume of deliveries did not depend on suppliers, but rather on the relative success of a specific car model and thus on the level of production.

(157) The Commission observed that the information provided by the interested parties showed that the prices did not remain unchanged for the entire duration of a certain tender. As explained in recital 79, when negotiating the tenders, ARW producers have to provide a discount scheme over the lifetime of a certain project. On top of this, during the life of a project, car manufacturers may request additional discounts. Moreover, there is no guarantee regarding the volume of sales for the ARW producers. Car manufacturers may select several producers for a certain project, but these producers have no guarantee regarding the volume that will be ultimately allocated to them. For each ARWs manufacturer, the volume of deliveries depended not only on the relative success of a specific car model, but also on the decision of the car manufacturers regarding the allocation of this volume between the selected producers. Consequently, as indicated in recital 115, the selection of data from individual tenders could not substitute the analysis made by the Commission based on the complete data, i.e. transaction sales listing and price comparisons on a per type basis. Such comparison reflects the largest possible amount of data of actual sales transactions that have taken place.

(158) In view of the above, the Commission considered that, in this case, tenders gave an incomplete picture, while the price effects could be fully grasped only by comparing all imports from the country concerned and all sales of the Union industry on a product type basis, which took place during the investigation period. Consequently, the Commission rejected the claim.

(159) ACEA and Hands claimed that, even in the absence of imports from Morocco, the Union industry would have been injured, thus demonstrating that imports from Morocco were not a cause of material injury. ACEA reiterated this claim after final disclosure. In particular, Union industry sales in 2020 and in the investigation period would have remained far below the 2019 levels in 2020 (-22 % in 2020 with Morocco and -20 % without Morocco) as well as in the investigation period (-18 % in the investigation period with Morocco and -14 % without Morocco). Injury in the investigation period could not be attributed to imports from Morocco, because in the investigation period as compared to 2020, the Union industry actually increased its sales (by 2 281 thousand items) more than the Moroccan exporting producers (by 1 478 thousand items). Thus, imports from Morocco had no volume impact. Furthermore, imports from Morocco could not have had a price impact in the investigation period since there was no significant price undercutting in tenders concluded during the investigation period, while sales prices of the imports from Morocco observed during the investigation period could not have had any negative impact on the contemporaneous sales of the Union industry.

(160) ACEA also claimed, both after provisional and final disclosure, that Union industry's profitability was affected by decreased production and sales resulting from a major decline in the Union car production in 2020 and 2021, which in turn resulted in an increased fixed costs.

(161) The Commission considered that the Union industry could not pass on these increased fixed costs to the car-makers, because, as set out above, under long-term contracts with the car-makers it was not possible to increase the price due to any increases in the fixed costs, except for the indexation of the cost of aluminium ingots.

(162) As indicated in the recitals 140 to 142 of the provisional Regulation, the Commission acknowledged that consumption decreased in 2020, which was due mainly to the COVID-19 pandemic. However, the imports from Morocco had a clearly negative impact on the Union industry in 2020 and especially during the investigation period when their volumes increased exponentially. Thus, when the conditions started to improve during the investigation period in terms of increase in consumption, the Union industry was forced, due to the dumped imports from Morocco which undercut the Union industry's prices by 26,9 %, to also keep its prices low, despite the increase in cost of production. Consequently, due to the price suppression the Union industry sold at prices which did not even cover their cost of production let alone a normal profit margin. This conclusion was valid, even assuming that prices were (mainly) fixed in long term contracts, as the negative effects of those lower prices of Moroccan imports materialised when the actual deliveries under the contracts, negotiated at an earlier stage, started in 2020 and the investigation period. Moreover, the participation of the Moroccan producers in tender procedures and their pricing policy, exerted further price pressure on the market which is currently characterized by an excess of supply. Even if the sales quantities of the Union industry increased during the investigation period, it continued to lose market share due to the imports from Morocco and, as a result, its financial situation further deteriorated significantly. Consequently, the claim was rejected.

(163) Hands claimed that any injury suffered by the Union industry could not be caused by Hands' exports to the Union from Morocco. According to the company, a majority of the injury indicators (e.g., Union consumption, production quantity, production capacity, capacity utilization, sales quantity, sales price) already started to deteriorate between 2018 and 2019, and could not be attributed to Hands, as the production started in January 2020. Hands argued that the plant was also built to meet growing demand in the Moroccan and non-EU markets, and not only to supply the EU. Moreover, Hands claimed that part of its export to the Union corresponded to a shift of production from South Korea to Morocco.

(164) Despite the fact that in 2018 and 2019 the Union consumption as well as the Union industry's sales and production decreased, the Union industry increased its profitability from 7,5 % to 8,2 %. Consequently, no injury was found for those years. Rather injury started to materialise in 2020, at the same time as the imports from Hands, together with other imports from Morocco, started coming into the Union. It had to be noted in this respect, that, in accordance with Article 3 of the basic Regulation, the Commission analysed the effect of all dumped imports from Morocco, and not only those of Hands. In any event, with regard to Hands, its imports undercut the Union industry's prices and its dumping and injury margins were significant during the investigation period. Consequently, it could not be argued that its imports did not contribute to the injury of the Union industry. Therefore, the claim was rejected.

(165) Hands also claimed that the findings in the provisional Regulation did not support a finding of material injury caused by ARW imports from Morocco. The analysis was built on confusing data and unsubstantiated allegations that have no support in the record of the investigation and in fact in the commercial realities of the ARW market.

(166) The Commission was unable to identify in this claim what part of its injury analysis was confusing or unsubstantiated or mere allegation. The findings of the Commission were based on positive evidence gathered during the investigation, which was made available to all interested parties in the case file and described in the provisional Regulation. Consequently, the claim was rejected.

5.1.3. *Volume of the dumped imports from the country concerned*

(167) ACEA claimed that there was no significant increase in the volume of Moroccan imports within the meaning of Article 3(3) of the basic Regulation and Moroccan imports occupied a niche that the Union producers voluntarily vacated causing no negative impact on the volumes sold by the Union industry.

(168) As explained in recital 83 of the provisional Regulation, the imports from Morocco reached 2,5 million items during the investigation period, while they were zero in 2018 and still hardly present in 2019. This resulted in a market share of 3,9 % during the investigation period. Regarding the market share of Moroccan imports, the Commission noted that ACEA contradicted its argument set out in recital 191, that the underselling margins should be calculated at the level of tenders where the competition takes place between the Moroccan producers and the Union producers, demonstrating that there was a direct competition between the Moroccan imports and the Union production. Therefore, the Commission considered that imports were significant, both in absolute terms and relative to the consumption in the Union, within the meaning of Article 3(3) of the basic Regulation. In light of the price levels established, the volumes had a negative impact on the Union industry's prices within the meaning of Article 3(3) of the basic Regulation. Consequently, the Commission rejected the claim and confirmed its findings summarised in recitals 131 to 136 of the provisional Regulation.

(169) After final disclosure, ACEA reiterated that the Moroccan imports had no negative volume impact on the Union industry. Moreover, ACEA claimed that the Commission failed to explain how imports of ARWs from Morocco with a 3,9 % market share led to the decrease in the Union production and sales in the period considered by 17 % (production) and by 21 % (sales).

(170) The Commission noted that ACEA referred to the period considered in its analysis, while as indicated above in recital 162, the decrease of the Union production between 2018 and 2020 was mainly due to the COVID-19 crisis. Moreover, regarding the subsequent period 2020 and the investigation period, when the Union consumption increased by + 8,0 %, the imports from Morocco increased significantly (that is by 244 %) while the Union industry sales increased by only 5,2 %. Furthermore, the increase of the market share of the imports from Morocco between

2020 and the investigation period was around 2,1 percentage points, whereas the Union industry market share decreased by 1,8 percentage points. In addition, when considering all origins of imports other than Morocco, the Commission noted that the increase of import volumes was at around 6,6 % between 2020 and the investigation period. That increase was due to the increase of imports volumes from Türkiye (by 19 %) whereas the imports volumes from all other countries decreased on balance during the same period. However, as described in recitals 171 to 174 below, the Commission established that the imports from Türkiye did not attenuate the causal link found between the imports from Morocco and the materials injury suffered by the Union industry. Consequently, the Commission reiterated its findings in recital 168 above that the volumes of imports from Morocco had a negative impact on the Union industry's prices within the meaning of Article 3(3) of the basic Regulation. The claim was therefore rejected.

5.2. **Effects of other factors**

5.2.1. *Imports from third countries*

(171) Hands and ACEA claimed that the impact of third countries' imports should be properly investigated: other third countries accounted for almost 90 % of the total imports and had a market share of around 25 %. In particular, Türkiye increased its market share in the period considered from 10,3 % to 13,0 %.

(172) The Commission analysed imports from third countries. Regarding Türkiye, the main importing country, the Commission pointed out that, as indicated in recital 138 of the provisional Regulation, average prices from Türkiye were significantly higher compared with import prices from Morocco (+ 14 %), and even slightly higher compared to the Union industry's prices (+ 1,0 %). Moreover, the average price of the imports from Türkiye was above the costs of production of the Union industry in 2018, 2019 and 2020. Only in the investigation period it went slightly below by less than 1 %. Moreover in 2020 and in the investigation period, when the profitability of the Union industry went down significantly, prices of Turkish imports were above Union industry's prices. Therefore, these imports did not attenuate the causal link found between the imports from Morocco and the materials injury suffered by the Union industry. The claim was therefore rejected.

(173) After final disclosure, regarding imports originating from Türkiye, Hands reiterated its claim that the Commission failed to consider and simply ignored the injurious effects of imports from Türkiye. The Commission allegedly failed to carry out more refined analysis based on the Hands' own data which shows that its own price offers in tenders were not always the cheapest and was awarded only a small fraction of all tenders. ACEA made a similar claim regarding the same producer.

(174) The Commission rejected Hands' claim for several reasons. First, the Commission observed, as explained in recital 90 of the provisional Regulation, that when comparing the actual sales by product type during the investigation period, it established significant undercutting margin of 26,9 %, which included the sales from Hands. Second, as explained in recitals 115 and 192, the Commission rejected ACEA's claim that the price effects should be analysed at the level of the tenders. Third, Hands did not argue that its price offers in tenders were necessarily more expensive than those of Turkish exporting producers. Rather, its claim concerned 'other ARW manufacturers' in general. In addition, even if Hands' price offers were not necessarily the cheapest, the Commission analysed the price effects on the basis of all imports from Morocco, whereby the share of the other exporting producer, Dika, was significant (representing around [60 % – 70 %] of the market). Finally, as observed in recital 172 above, the import prices from Türkiye were higher than the Union industry's average price during the investigation period. Consequently, the claim was rejected.

(175) After final disclosure, ACEA reiterated its claim indicated in recital 159 that the price undercutting from Morocco, based on tenders, was not significant (i.e. 3,7 %), in particular compared to the price undercutting, calculated by ACEA, for Türkiye or for Thailand, which was respectively around 10 % and 1 %.

(176) First, the Commission assessed the summary spreadsheet submitted by ACEA concerning price offers. This spreadsheet consisted of 15 tenders, originating from three ACEA members (i.e. the non-cooperating user and the two cooperating users). The following information was provided: the user name, the quantity and the item price offered by each suppliers. The Commission noted though that the internal numbering of each tender was not provided, which prevented the Commission from cross-checking the data with the verified information already provided in the course of the investigation by the two cooperating users. Moreover, some price elements were not

provided (such as the planned yearly discounts, also called 'productivity discounts') and thus it was impossible to assess if all of them had been included in the item price offered. More importantly, most of the price offers concerned the non-cooperating user. As indicated in recital 109, due to the overall lack of cooperation by that user, the limited information it provided could not be considered for the purpose of this investigation. Regarding, the additional information provided by ACEA with respect to User A and User B, it concerned price offers which the Commission could not verify due to its late submission. In particular, the Commission was unable to determine if the dataset provided was exhaustive or not. In any case, the dataset listed 14 Moroccan offers, out of 15 tenders, and 5 for Türkiye and Thailand each. The undercutting calculation made by ACEA was based on the quotation price ([22]). The Commission observed that ACEA's own calculations showed that the price offers by the Moroccan producers were lower than the ones of the Union industry. Furthermore, when comparing the volumes reported ([23]) in this spreadsheet with the total imports volumes established for Türkiye and Thailand on the basis of the Eurostat data (see table 11 of the provisional Regulation), it appeared that the volume reported in particular for Türkiye was not representative (below 5 %). Thus no meaningful conclusion could be drawn from that information provided by ACEA. Moreover, the Commission already concluded in recital 139 of the provisional Regulation that Thailand and Türkiye did not attenuate the causal link found between the dumped imports from Morocco and the injury suffered by the Union industry. Therefore the claims were rejected.

5.2.2. *The COVID-19 pandemic*

(177) Hands claimed that Union ARW demand decreased in 2020, that is a decrease by 14 million items, representing 20 times the size of imports of ARW from Morocco. The impact of the pandemic was therefore so significant that the Commission should consider that it broke any causal link that may have existed between imports of ARW from Morocco and any injury suffered by the Union industry.

(178) As indicated in recitals 140 to 142 of the provisional Regulation, the Commission acknowledged the impact of COVID-19 on the Union industry. However, as the investigation period also covered the period of post-COVID recovery, the Commission could establish, as explained in recital 94 above, that when the market rebounded post COVID, the Union industry did not benefit due to the increased imports from the country concerned at dumped prices. Rather the contrary, as the situation of the Union industry further deteriorated in the investigation period. Therefore, the negative impact of the COVID-19 pandemic could not be considered as the only cause of the injury suffered by the Union industry to the extent that it would have attenuated the causal link between such injury and the dumped imports from the country concerned. Therefore, the claim was rejected.

(179) Hands reiterated its request for a satisfactory and detailed explanation is especially needed, given that the Commission explicitly recognised that the COVID-19 pandemic had a negative impact on the Union industry.

(180) In the absence of a more precise and specific request, the Commission considered that the explanations already contained in this section were sufficient to allow the company to understand the Commission's reasoning and exercise its rights of defence. It thus rejected the claim.

5.2.3. *Export performance of the Union industry*

(181) In the absence of comments, recitals 143 to 145 of the provisional Regulation were confirmed.

5.2.4. *Effect of multi-year contracts and evolution of the costs of production*

(182) In the absence of comments, recitals 146 to 148 of the provisional Regulation were confirmed.

([22]) The quotation or offer price is the price offered by each participant in the tenders when submitting a bid.

([23]) In the absence of other information, the Commission assumed that the volumes reported in the spreadsheet concerned the overall volume quoted during the expected lifetime of each project. Based on an average duration of 5 years, the volumes thus reported was allocated accordingly.

5.2.5. *Consumption*

(183) In the absence of comments, recitals 146 to 148 of the provisional Regulation were confirmed

5.2.6. *Competition in tenders*

(184) ACEA claimed that the Commission should have investigated intra-Union competition. ACEA collected information from its members and found that out of a total of 45 tenders Union producers were successful in 31, suppliers from Morocco and from Thailand in 5 each and suppliers from Türkiye in 4, although in terms of items Türkiye won most of the tenders.

(185) At the outset, the Commission recalled that ACEA did not dispute the representativeness of the sample of Union producers, established in accordance with Article 17(1) of the basic Regulation. Thus, ACEA cannot validly maintain that the Commission was required to investigate whether the alleged impact of the dumped imports on prices did not result from price competition from Union producers not included in the sample ([24]). Moreover, as indicated in the Table 5 of the provisional Regulation, the Union producers demonstrated their ability to maintain a market share above 70 % but also a profitability of around 8 % in 2018-2019. This was achieved in a very competitive market, based on tenders organised by car manufacturers, in which all Union producers and producers located in other third countries could compete for the same tenders. This meant that the Union producers were competitive under normal and fair market conditions, without the industry as a whole being injured. Furthermore, the Commission noted that the claim made by ACEA was based on 45 tenders from three ACEA members (4 contracts reported by the two cooperating users and 41 from a non-cooperating user). The information was limited only to the tender winner, estimated quantities and the origin of the other non-Union tenderers (Morocco, Thailand or Türkiye). In addition, that information was not backed by any evidence proving its accurateness and reliability. The tender references were not even provided. The claim was therefore rejected.

(186) ACEA also claimed that, even assuming that it is correct that tender participants must align themselves to the lowest bidder, according to ACEA, there is overwhelming evidence that such alignment is undertaken first and foremost with regard to the cheapest Union producer and secondly by reference to third country imports, with any alignment with the quotations of Moroccan suppliers coming distant third with only 5 cases.

(187) The Commission noted that the analysis made by ACEA was based on a limited number of tenders (i.e. 15) and the information provided by ACEA consisted of a table listing 15 price offers covering all main sources of the product concerned (Union and all main third countries producers) submitted by three ACEA members. 4 contracts reported by the two cooperating users and 11 from a non-cooperating user. In addition, as for the previous claim, that information was not backed by any evidence proving its accurateness and reliability. The tender references were not even provided. For example, no information was provided regarding whether the price reported included all the ancillary costs and the discounts included in the offers. Furthermore, the underlying tender documents were not provided and, as a result, the Commission was unable to verify the information provided and the claim was therefore rejected. Even if the Commission was to take into account this information, it observed that the total volumes of the quoted offers represented around 5 % of the total Union consumption, and thus was not considered to be representative. In addition, in all but two instances the price offers made by the Moroccan producers were below the ones made by the Union producers. Consequently, the Commission considered that ACEA failed to provide evidence showing that the tender participants had to align themselves with the cheapest Union producers and that the Moroccan suppliers were not pushing prices down.

(188) After final disclosure, ACEA claimed that the Commission itself requested ACEA members to provide such data on tender quotations based on the start of production, which was provided by ACEA accordingly. ACEA also provided additional documents from User B. Finally, ACEA considered this dataset to be representative as it was based on 29 tenders, covered almost 100 % of Moroccan ARW purchases, and was backed by evidence.

([24]) See judgment of 14 September 2022, *Nevinnomysskiy Azot et NAK 'Azot'/Commission*, T-865/19, EU:T:2022:559, paras 283 – 286.

(189) The Commission stressed that the information on tenders was only requested from the two users that fully cooperated with the investigation, provided questionnaire replies and had their data verified. The data subsequently submitted by ACEA regarding the non-cooperating user was considered incomplete, unreliable and not verifiable due to the lack of cooperation by that user. The Commission noted that ACEA based its analysis mainly on the non-cooperating user. Also, while ACEA claimed that its dataset was backed by evidence, the Commission considered that the dataset consisted mainly of summary spreadsheets and that the tender references mentioned by ACEA were in fact the internal numbers of each tender. However, the full documentation regarding the tenders, such as copies of the terms of references, the actual offers received, etc., was not provided. Therefore, the claim was rejected.

5.3. **Conclusion on causation**

(190) In the absence of any other comments on causation, the Commission confirmed its conclusions set out in recitals 152 to 154 of the provisional Regulation.

6. **LEVEL OF MEASURES**

6.1. **Underselling margin calculations**

(191) ACEA claimed, after provisional and final disclosure, that the Commission should have conducted underselling margin calculations at the level of tenders as in the original investigation against imports of ARW from China ([25]).

(192) The Commission examined the argument and found that a similar claim during the expiry review investigation of the above mentioned measures ([26]) was made and rejected. In recital 115 above, the Commission explained that a selection of data from individual tenders cannot substitute the price and volume analysis made by the Commission based on the complete data, i.e. transaction sales listing and price comparisons on a per type basis. Such comparison reflects the largest possible amount of data of actual sales transactions that have taken place. Moreover, the underselling margin was expressed as a percentage of the export price during the investigation period. The analysis on the basis of the complete data from the sampled exporting producers and the Union producers showed an underselling of 44 % for Hands and of 51,6 % for other Moroccan producers. Therefore, this argument was rejected.

(193) Hands claimed that the Commission's adjustments linked to future environmental costs are arbitrary and speculative, and affect price comparability, and introduce a distortion to price comparability between Union and Moroccan sales. Hands made reference to Morocco's New Development Model, which was launched in April 2021 and includes investment in sustainable green energy in order to be competitive in low-carbon industries, and the country has vowed to source over 50 percent of its electricity from renewable sources by 2030. Therefore, it is clear that the Commission did not take into account future costs which would be incurred by Hands during the application of the measures, including those connected to the de-carbonization efforts in Morocco.

(194) The Commission stressed that the inclusion of the future environmental costs in the target price for the Union industry was in compliance with Article 7(2d) of the basic Regulation. The inclusion of these costs was not based on pure speculation but on positive evidence of actual investments planned. Whether Morocco may have investments in sustainable green energy is immaterial for the application of the relevant provisions of the basic Regulation regarding the establishment of the Union target price in which future environmental costs must be taken into account. Therefore, the claim was rejected.

(195) Hands claimed that the Commission did not provide any explanation on its calculation of future costs and thus deprived Hands and other interested parties from their right of defence.

([25]) Regulation (EU) No 404/2010, recitals 175 to 179.

([26]) Commission Implementing Regulation (EU) 2017/109 of 23 January 2017 imposing a definitive anti-dumping duty on imports of certain aluminium road wheels originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ L 18, 24.1.2017, p. 1), recitals 125 and 126.

(196) The Commission provided information regarding the future costs following a request from Dika. The reply was published in the open file which was available to all parties. Therefore, the rights of defence were not breached.

7. UNION INTEREST

7.1. Interest of the Union industry

(197) In the absence of comments, recitals 165 and 166 of the provisional Regulation were confirmed.

7.2. Interest of users

(198) ACEA reiterated its claim, after provisional and final disclosure, described in recital 170 of the provisional Regulation that the Union ARW industry could not satisfy the demand. Allegedly, for more than 15 years, Union market suffered from under-capacity and shortages due to the insufficient investments made by the Union producers. According to ACEA, the Union ARW producers consistently fail to meet their commitment to increase production capacity and ensure security of supply in the Union. ACEA recalled that in the context of the Commission's anti-dumping investigation on ARW from China, Union producers allegedly committed to increase their production capacity and the Commission allegedly extended the anti-dumping measure under a condition that capacities will be increased. According to ACEA, between 2006 and the investigation period, the Union capacity increased by 14 % while the consumption increased by 33 % during the same period.

(199) The Commission noted that this claim was already addressed in recital 171 of the provisional Regulation and no new elements or evidence were brought forward. The Commission observed that, if needed, the Union ARW industry could increase its capacity at relatively short notice, as the relevant investment referred to by the users did not concern the furnaces or the painting booths, but rather casting machines which can be installed easily. Therefore, if the Union ARW producers did not invest in additional production capacity, it was rather due to their difficult economic situation, and the lack of sufficient future contracts from the car manufacturers to justify such investment. Thus, the Union industry did not have sufficient incentive to invest in additional capacity in the absence of foreseeable increase in demand of its production.

(200) In addition, the Union consumption amounted to 64,31 million items in the investigation period. The total Union industry capacity was 61,29 million items, while the total Union production was 48,75 million items in the investigation period and exports of the Union industry were 2,71 million items, leaving the capacity of 9,83 million items unused. Consequently, the Union industry already had sufficient production capacity to cover almost the total Union demand of ARW. In addition, the Union market could be further supplied by exporting producers in third countries. The total worldwide capacity of ARWs even increased with the arrival of the Moroccan producers. Consequently, the claim was rejected.

(201) After final disclosure, ACEA claimed that the Commission's allegation that the relevant investments do not concern furnaces or the painting booths, but rather casting machines which can be installed easily, was not backed by evidence. ACEA claimed that the cooperating users demonstrated that the lack of sufficient painting booths is precisely one of the major bottlenecks limiting the Union's production capacity.

(202) The Commission observed that the evidence submitted by User A concerned the lack of production capacity from one Union producer for the years 2015-2016, thus before the period considered. Moreover, User A did not provide any document showing production capacity issues during the period considered. Regarding User B, the documents provided were also dated before the period considered (most of them dated in 2016). However, during the verification visit, User B declared that 'during a normal year like 2018/2019, there was no shortage of aluminium wheels'. ACEA or any other users did not provide any evidence of production shortage due to the lack of sufficient painting booths during the period considered.

(203) In the course of the investigation, the Commission collected evidence that the Union industry invested in painting booths when the consumption shifted to more diamond cut wheels, which request two turns in painting lines. Regarding investments in painting booths and casting equipment, the Commission collected copies of purchase invoices showing that the Union industry was able to increase its capacity in the past when demand for its products was certain. The Commission considered that more detailed information could not be included in the non-confidential file as the information in question concerned specific individual transactions which constitute data that is not capable of being summarised within the meaning of Article 19(2) of the basic Regulation. Therefore, the claim was rejected.

(204) ACEA claimed that at the time when Moroccan suppliers won tenders to supply wheels to the Union, the Union industry had no spare production capacity to offer and thus these imports covered strategic needs for the car manufacturers.

(205) The Commission noted that ACEA did not provide evidence of this claim, for example of tenders where there was no price offer from the Union producers, in particular for the tenders won by the Moroccan producers. The Commission also noted that no evidence was provided that the Union ARW industry failed to deliver ARW following requests from car manufacturers during the period considered ([27]). As already mentioned above, the production capacity of the Union industry, together with the one of the exporting producers in third countries is largely sufficient to meet the needs of the car industry. Therefore, the claim was rejected.

(206) After final disclosure, ACEA claimed that none of the Union producers decided to invest in additional production capacity, while the car production in the Union increased constantly since 2013.

(207) The Commission however found that the production capacity of the Union industry increased by around 10,8 million items during that period (51,644 million items ([28]) in 2013 to 62,475 million items ([29]) in 2019). Thus the claim was not supported by any evidence and was therefore rejected.

(208) After final disclosure, ACEA reiterated its claim that the Union industry cannot meet the demand in the Union, even in a disrupted market and a historical drop in demand.

(209) The Commission observed that the capacity utilisation of the Union industry was at 80 % during the investigation period. Therefore, there was additional spare capacity to meet the demand. Also, there was no requirement that the Union industry was obliged to have the capacity to meet the total demand. Users could also import ARW from any of the producing third countries. The claim was therefore rejected.

(210) After final disclosure, ACEA claimed that it provided evidence demonstrating that the Union industry had no spare production capacity to offer and thus the Moroccan imports covered strategic needs for the car manufacturers. Moreover, ACEA provided evidence concerning the lack of Union industry production in 2016.

(211) The Commission considered that the claim was not substantiated by sufficient evidence. For example, ACEA did not provide proof of any tender won by Moroccan suppliers where the Union producers did not participate in the bidding process. Regarding the lack of production, ACEA did not submit evidence showing a systemic issue as the evidence provided dated before the period considered. Therefore, the claim was rejected.

(212) ACEA claimed that the Commission did not address the fact that the costs of the car manufacturers increased due to the cumulative effects of anti-dumping measures applied on other raw materials, parts and components used for car production.

([27]) After provisional disclosure, User A reported that in 2014 for one project an Union producer was not in position to supply 100 % but 85 % of the quantity requested. However, the User is still considering this Union producer as its main supplier and did not raise claims or provide evidence that such reduction of supply by the Union producer occurred during the period considered.

([28]) Implementing Regulation (EU) 2017/109, recital 136.

([29]) Recital 97 of the provisional Regulation.

(213) The Commission noted that ACEA did not provide any supporting evidence regarding this claim. Even if the costs of their suppliers may have increased and passed on, fully or partially, to the car manufacturers, this appeared not to have led to a negative impact on their economic situation. As pointed out in recital 175 of the provisional Regulation, the car manufacturers published financial results for 2021 which exceeded the usual profits reported during the previous years. Finally, as already set out in recital 169 of the provisional Regulation, the percentage of the cost of ARWs in the production of a car is minor, approximately 0,5 %. Therefore, the impact of the measures on car manufacturers was very limited and the claim was rejected.

(214) After final disclosure, ACEA disagreed with the Commission's assessment in the above recital. ACEA submitted that the anti-dumping duties will represent an additional cost of EUR 241-413 million. This is a significant amount for the car manufacturers for an industry that continues to suffer from a low level of car production in the Union while having to absorb additional environmental costs.

(215) The Commission observed that ACEA did not contest the Commission's findings that the share of ARWs in the total cost of production of a car is minor, approximately 0,5 % and the relatively low anti-dumping duty would be only a fraction of this 0,5 %. No evidence was submitted demonstrating that the car manufacturers will not be able to absorb such costs. In addition, notwithstanding the correctness of the additional cost estimated by ACEA, the estimation of the additional costs was based on the Union target price and thus relates to the established injury margins. However, the duty was based on the dumping margins which was lower than the injury margins found and, as a result, the effects of the anti-dumping duty would be lower than the amounts estimated by ACEA. Consequently, the claim was rejected.

(216) ACEA claimed that some of its members estimated that Moroccan suppliers are increasingly committed to monitor the CO_2 impact of the supply chains. Therefore, redirecting supply to other third countries would significantly impact the capacity of car manufacturers to meet their CO_2 reduction goals.

(217) The Commission noted that ACEA did not provide any supporting evidence regarding this claim while information obtained during the verification visit of one cooperating user revealed that Moroccan imports face similar issue of their impact on car manufacturers' CO_2 reduction goals due to the distance between the Moroccan plants and the plant of the car manufacturers in the Union. Therefore, the claim was rejected.

(218) After final disclosure, ACEA referred to its 10-point plan to help implement the European Green Deal ([30]) as well as to the fact that User B provided evidence after the verification visit that Moroccan imports are important regarding the CO_2 impact due to the geographic proximity of the Moroccan plants and the car manufacturer plants.

(219) The Commission observed that the 10 point plan did not mention the impact of imports of wheels in general, and of Morocco in particular. Consequently, the plan did not constitute appropriate evidence with regard to the claim described in recital 216 above. In addition, User B indeed reported that it introduced the CO_2 emission criterion for selecting suppliers and that the target is to decrease the distance between the plants and the suppliers and thus the carbon print. However, User B also stated that the competitiveness remains a very important factor for the selection of a supplier. In addition, the Commission did not find any evidence that this criterion was actually assessed by User B during the tendering process or that a producer was disregarded due to the CO_2 emission criteria. Finally, even if this criterion would play a vital role in the future, the anti-dumping measures do not have as an objective to cease imports from Morocco, but rather to ensure that they enter the Union at fair prices. Therefore, the claim was rejected.

(220) ACEA claimed that German Federal Cartel Office initiated in March 2022 an investigation against a Union producer, based on allegations of a conduct restricting competition. However, the Commission noted that no claim of possible effects on the findings of the investigation of such alleged behaviour was made. In any case, that investigation is still on-going and no findings have been reached yet. Therefore, the claim was rejected.

([30]) https://www.acea.auto/files/ACEA_10-point_plan_European_Green_Deal.pdf

(221) After final disclosure, ACEA claimed that the anti-dumping measures should not be applied pending the outcome of the investigation conducted by the German Federal Cartel Office in such exceptional circumstances and in line with the principles of sound administration and good administrative practice as developed in the seamless pipes case ([31]).

(222) As already explained in recital 220 above, there has been no decision yet taken by the national administration. By contrast, in the seamless pipes case the duties were applied only after a definitive decision sanctioning the anti-competitive practice had been issued and when it had become apparent that that practice concerned the period considered in the investigation and that it covered the product concerned. None of these elements were present in the case at hand. Consequently, the claim was rejected.

7.3. **Conclusion on Union interest**

(223) On the basis of the above and in the absence of any other comments, the conclusions set out in recital 177 of the provisional Regulation were confirmed.

8. **DEFINITIVE ANTI-DUMPING MEASURES**

8.1. **Definitive measures**

(224) In view of the conclusions reached with regard to dumping, injury, causation, level of measures and Union interest, and in accordance with Article 9(4) of the basic Regulation, definitive anti-dumping measures should be imposed in order to prevent further injury being caused to the Union industry by the dumped imports of the product concerned.

(225) As indicated in recital 63, the dumping margins were slightly revised at the definitive stage.

(226) 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:

Country	Company	Dumping margin (%)	Injury margin (%)	Definitive anti-dumping duty (%)
Morocco	HANDS 8 S.A.	9,01	44,0	9,0
	DIKA MOROCCO AFRIKA S.A.R.L	17,54	51,6	17,5
	All other companies	17,54	51,6	17,5

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

([31]) Council Regulation (EC) No 1322/2004 of 16 July 2004 amending Regulation (EC) No 2320/97 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in, inter alia, Russia and Romania (OJ L 246, 20.7.2004, p. 10).

(228) A company may request the application of these individual anti-dumping duty rates if it changes subsequently the name of its entity. The request must be addressed to the Commission ([32]). The request must contain all the relevant information enabling to demonstrate that the change does not affect the right of the company to benefit from the duty rate which applies to it. If the change of name of the company does not affect its right to benefit from the duty rate which applies to it, a regulation about the change of name will be published in the *Official Journal of the European Union*.

(229) To minimise the risks of circumvention due to the difference in duty rates, special measures are needed to ensure the proper 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) of this Regulation. Imports not accompanied by that invoice should be subject to the anti-dumping duty applicable to 'all other companies'.

(230) While presentation of this invoice is necessary for the customs authorities of the Member States to apply the individual rates of anti-dumping duty to imports, it is not the only element to be taken into account by the customs authorities. Indeed, even if presented with an invoice meeting all the requirements set out in Article 1(3) of this Regulation, the customs authorities of Member States should carry out their usual checks and may, like in all other cases, require additional documents (shipping documents, etc.) for the purpose of verifying the accuracy of the particulars contained in the declaration and ensure that the subsequent application of the rate of duty is justified, in compliance with customs law.

(231) Should the exports by one of the companies benefiting from lower individual duty rates increase significantly in volume, in particular after the imposition of the measures concerned, such an increase in volume could be considered as constituting in itself a change in the pattern of trade due to the imposition of measures within the meaning of Article 13(1) of the basic Regulation. In such circumstances, an anti-circumvention investigation may be initiated, provided that the conditions for doing so are met. This investigation may, inter alia, examine the need for the removal of individual duty rate(s) and the consequent imposition of a country-wide duty.

(232) 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 also to the producers which did not have exports to the Union during the investigation period.

(233) Statistics of aluminium road wheels of the motor vehicles of headings 8701 to 8705 whether or not with their accessories and whether or not fitted with tyres are frequently expressed in number of pieces. However, there is no such supplementary unit for aluminium road wheels of the motor vehicles of headings 8701 to 8705 whether or not with their accessories and whether or not fitted with tyres specified in the Combined Nomenclature laid down in Annex I to Council Regulation (EEC) No 2658/87 ([33]). It is therefore necessary to provide that not only the weight in kg or tonnes but also the number of items for the imports of the product concerned must be entered in the declaration for release for free circulation. Items should be indicated for CN codes ex 8708 70 10 and ex 8708 70 50 (TARIC codes: 8708 70 10 15, 8708 70 10 50, 8708 70 50 15 and 8708 70 50 50).

8.2. **Definitive collection of the provisional duties**

(234) In view of the dumping margins found and given the level of the injury caused to the Union industry, the amounts secured by way of provisional anti-dumping duties imposed by the provisional Regulation, should be definitively collected up to the levels established under the present Regulation.

([32]) European Commission, Directorate-General for Trade, Directorate G, Wetstraat 170 Rue de la Loi, 1040 Brussels, Belgium.

([33]) Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 256, 7.9.1987, p. 1) as amended by Commission Implementing Regulation (EU) 2021/1832 of 12 October 2021 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 385, 29.10.2021, p. 1).

8.3. **Retroactive imposition of anti-dumping measures**

(235) As indicated in section 1.2, the Commission made imports of the product under investigation subject to registration.

(236) During the definitive stage of the investigation, the data collected in the context of the registration was assessed. The Commission analysed whether the criteria under Article 10(4) of the basic Regulation were met for the retroactive collection of definitive duties.

(237) The Commission observed that the volume of items imported during the pre-disclosure period (18 June 2022 – 16 July 2022) was around 291 000 items, that is a decrease by 11 % compared to the monthly average import volumes during the post-investigation period analysed in the registration Regulation, that is from 1 December 2021 to 30 April 2022. Therefore, the Commission did not find evidence of possible stock-piling during the pre-disclosure period. In addition, import prices increased by 11 % in line with the increase of LME 3 months prices. Consequently, there was no evidence that the imports undermined the remedial effects of the duties.

(238) On this basis, the legal conditions under Article 10(4) of the basic Regulation were not met and, therefore, the duties should not be levied retroactively on the registered imports.

9. **FINAL PROVISION**

(239) In view of Article 109 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council ([34]), when an amount is to be reimbursed following a judgment of the Court of Justice of the European Union, the interest to be paid should be the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the *Official Journal of the European Union* on the first calendar day of each month.

(240) The Committee established by Article 15(1) of Regulation (EU) 2016/1036 did not deliver an opinion,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is imposed on imports of aluminium road wheels of the motor vehicles of headings 8701 to 8705 whether or not with their accessories and whether or not fitted with tyres, currently falling under CN codes ex 8708 70 10 and ex 8708 70 50 (TARIC codes: 8708 70 10 15, 8708 70 10 50, 8708 70 50 15 and 8708 70 50 50) and originating in Morocco.

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

Country	Company	Definitive anti-dumping duty	TARIC additional code
Morocco	HANDS 8 S.A.	9,0 %	C873
	DIKA MOROCCO AFRIKA S.A.R.L	17,5 %	C897
	All other companies	17,5 %	C999

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

3. The application of the individual duty rates specified for the companies mentioned in paragraph 2 shall be conditional upon presentation to the Member States' customs authorities of a valid commercial invoice, on which shall appear a declaration dated and signed by an official of the entity issuing such invoice, identified by name and function, drafted as follows: 'I, the undersigned, certify that the (volume) of (product concerned) sold for export to the European Union covered by this invoice was manufactured by (company name and address) (TARIC additional code) in Morocco. I declare that the information provided in this invoice is complete and correct.' If no such invoice is presented, the duty applicable to all other companies shall apply.

4. Where a declaration for release for free circulation is presented in respect of the product referred to in paragraph 1, the number of items of the products imported shall be entered in the relevant field of that declaration, without prejudice to the supplementary unit defined in the Combined Nomenclature.

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

Article 2

The amounts secured by way of the provisional anti-dumping duty under Implementing Regulation (EU) 2022/1221 shall be definitively collected.

Article 3

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

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

Done at Brussels, 11 January 2023.

For the Commission
The President
Ursula VON DER LEYEN

COMMISSION IMPLEMENTING REGULATION (EU) 2023/100

of 11 January 2023

imposing a provisional anti-dumping duty on imports of stainless steel refillable kegs originating in the People's Republic of China

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ([1]) ('the basic Regulation'), and in particular Article 7 thereof,

After consulting the Member States,

Whereas:

1. PROCEDURE

1.1. Initiation

(1) On 13 May 2022, the European Commission ('the Commission') initiated an anti-dumping investigation with regard to imports of stainless steel refillable kegs originating in the People's Republic of China ('China' or 'the country concerned') on the basis of Article 5 of the basic Regulation. It published a Notice of Initiation in the *Official Journal of the European Union* ([2]) ('the Notice of Initiation').

(2) The Commission initiated the investigation following a complaint lodged on 31 March 2022 by the European Kegs Committee ('the complainant'). The complaint was made on behalf of the Union industry of stainless steel refillable kegs in the sense of Article 5(4) of the basic Regulation. The complaint contained evidence of dumping and of resulting material injury that was sufficient to justify the initiation of the investigation.

1.2. Registration

(3) Pursuant to Article 14(5a) of the basic Regulation, the Commission should register imports subject to an anti-dumping investigation during the period of pre-disclosure unless it has sufficient evidence within the meaning of Article 5 that the requirements either under point (c) or (d) of Article 10(4) are not met. Given that the evidence on the file did show that the requirement under point (d) was not met, the Commission did not make imports of the product concerned subject to registration under Article 14(5a) of the basic Regulation.

1.3. Interested parties

(4) In the Notice of Initiation, the Commission invited interested parties to contact it in order to participate in the investigation. In addition, the Commission specifically informed the Union producers represented by the complainant; other known Union producers; known importers, traders, and users; known exporting producers; and the authorities of the country concerned about the initiation of the investigation and invited them to participate.

(5) Interested parties had an opportunity to comment on the initiation of the investigation and to request a hearing with the Commission and/or the Hearing Officer in trade proceedings. No hearing was requested.

1.4. Sampling

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

([1]) OJ L 176, 30.6.2016, p. 21.
([2]) OJ C 195, 13.5.2022, p. 24.

Sampling of Union producers

(7) In its Notice of Initiation, the Commission stated that it had provisionally selected a sample of Union producers. The Commission selected the sample on the basis of production and sales volumes, taking into account their geographical location. This sample consisted of three Union producers. The sampled Union producers accounted for 73 % of the estimated total Union production and 74 % of sales in the Union. The Commission invited interested parties to comment on the provisional sample. No comments were received in that regard. The sample is representative of the Union industry.

1.4.1. *Sampling of importers*

(8) To decide whether sampling is necessary and, if so, to select a sample, the Commission asked unrelated importers to provide the information specified in the Notice of Initiation.

(9) Only one unrelated importer provided the requested information and agreed to be included in the sample. The Commission thus decided that sampling of unrelated importers was not necessary.

1.4.2. *Sampling of exporting producers in China*

(10) To decide whether sampling is necessary and, if so, to select a sample, the Commission asked all exporting producers in China to provide the information specified in the Notice of Initiation. In addition, the Commission asked the Mission of the People's Republic of China to the European Union to identify and/or contact other exporting producers, if any, that could be interested in participating in the investigation.

(11) Six producers in the country concerned that exported kegs to the Union during the IP, provided the requested information and agreed to be included in the sample. In accordance with Article 17(1) of the basic Regulation, the Commission selected a sample of two exporting producers on the basis of the largest representative volume of exports to the Union which could reasonably be investigated within the time available. In accordance with Article 17(2) of the basic Regulation, all known exporting producers concerned and the authorities of the country concerned were consulted on the selection of the sample. No comments were received.

1.5. **Questionnaire replies and verification visits**

(12) The Commission sent a questionnaire concerning the existence of significant distortions in China within the meaning of Article 2(6a)(b) of the basic Regulation to the Government of the People's Republic of China ('GOC'). No reply was received.

(13) The Commission published online ([3]) the questionnaires for the sampled exporting producers, the unrelated importers and the Union producers and sent the macro data questionnaire to the Complainant on 20 May 2022.

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

Union producers

— Blefa GmbH, Hüttenstraße 43, 57223 Kreuztal, Germany

— Schäfer - Sudex s.r.o., Podolí 5, 584 01 Ledeč nad Sázavou, Czechia

— Thielmann Portinox Spain S.A**.,** Carr. de Pulianas, 18197 Granada, Spain

(15) In view of the outbreak of COVID-19 and the confinement measures put in place the Commission carried out remote crosschecks ('RCC') in line with its Notice on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations of the following Chinese exporting producers:

([3]) https://tron.trade.ec.europa.eu/investigations/case-view?caseId=2602

— Penglai Jinfu Stainless Steel Products Co., Ltd, Shandong, China

— Ningbo Major Draft Beer Equipment Co., Ltd, Ningbo, Zhejiang, China

1.6. **Investigation period and period considered**

(16) The investigation of dumping and injury covered the period from 1 January 2021 to 31 December 2021 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2018 to the end of the investigation period ('the period considered').

2. **PRODUCT UNDER INVESTIGATION, PRODUCT CONCERNED AND LIKE PRODUCT**

2.1. **Product under investigation**

(17) The product under investigation is kegs, vessels, drums, tanks, casks and similar containers, refillable, of stainless steel, commonly known as 'stainless steel refillable kegs', with bodies approximately cylindrical in shape, with a wall thickness of 0,5 mm or more, of a kind used for material other than liquefied gas, crude oil, and petroleum products, of a capacity of 4,5 litres or more, regardless of the type of finish, gauge, or stainless steel grade, whether or not with additional components (extractors, necks, chimes or any other component), whether or not painted or coated with other materials ('kegs' or 'the product under investigation').

(18) The following products do not fall under the scope of this investigation when imported separately from the product under investigation: necks, spears, couplers or taps, collars, valves and other components of the product under investigation (extractors, necks, chimes or any other component).

2.2. **Product concerned**

(19) The product concerned is the product under investigation originating in China, currently falling under CN codes ex 7310 10 00 and ex 7310 29 90 (TARIC codes 7310 10 00 10 and 7310 29 90 10) ('the product concerned').

2.3. **Like product**

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

— the product concerned when exported to the Union;

— the product under investigation produced and sold on the domestic market of China; and

— the product under investigation produced and sold in the Union by the Union industry.

(21) The Commission decided at this stage that those products are therefore like products within the meaning of Article 1(4) of the basic Regulation.

3. **DUMPING**

3.1. **China**

3.1.1. *Procedure for the determination of the normal value under Article 2(6a) of the basic Regulation*

(22) In view of the sufficient evidence available at the initiation of the investigation pointing to the existence of significant distortions within the meaning of point (b) of Article 2(6a) of the basic Regulation with regard to China the Commission considered it appropriate to initiate the investigation with regard to the exporting producers from this country having regard to Article 2(6a) of the basic Regulation.

(23) Consequently, in order to collect the necessary data for the eventual application of Article 2(6a) of the basic Regulation, in the Notice of Initiation the Commission invited all exporting producers in China to provide information regarding the inputs used for producing kegs. Six exporting producers submitted the relevant information.

(24) In order to obtain information it deemed necessary for its investigation with regard to the alleged significant distortions, the Commission sent a questionnaire to the GOC. In addition, in point 5.3.2 of the Notice of Initiation, the Commission invited all interested parties to make their views known, submit information and provide supporting evidence regarding the application of Article 2(6a) of the basic Regulation within 37 days of the date of publication of the Notice of Initiation in the *Official Journal of the European Union*. No questionnaire reply was received from the GOC and no submission on the application of Article 2(6a) of the basic Regulation was received within the deadline. Subsequently, the Commission informed the GOC that it would use facts available within the meaning of Article 18 of the basic Regulation for the determination of the existence of the significant distortions in China. The Commission invited the GOC to submit its comment on the application of Article 18. No comments were received.

(25) In point 5.3.2 of the Notice of Initiation, the Commission also specified that, in view of the evidence available, possible appropriate representative third countries were Mexico and Türkiye pursuant to Article 2(6a)(a) of the basic Regulation for the purpose of determining the normal value based on undistorted prices or benchmarks. The Commission further stated that it would examine other possibly appropriate representative countries in accordance with the criteria set out in 2(6a)(a) first indent of the basic Regulation.

(26) On 20 July 2022, the Commission informed by a note ('the First Note') interested parties on the relevant sources it intended to use for the determination of the normal value. In that note, the Commission provided a list of all factors of production such as raw materials, labour and energy used in the production of kegs. In addition, based on the criteria guiding the choice of undistorted prices or benchmarks, the Commission identified possible representative countries, namely Mexico, Brazil and Russia as appropriate representative countries. The Commission received no comments on the First Note.

(27) On 19 September 2022, the Commission informed by a second note ('the Second Note') interested parties on the relevant sources it intended to use for the determination of the normal value, with Brazil as the representative country. It also informed interested parties that it would establish selling, general and administrative costs ('SG&A') and profits based on producer KHS Industria de Maquinas LTDA in Brazil. The Commission invited interested parties to comment. Comments were received from the two sampled exporting producers.

(28) After having analysed the comments and information received on the Second Note, the Commission concluded that Brazil was an appropriate choice as representative country from which undistorted prices and costs would be sourced for the determination of the normal value at the provisional stage. The underlying reasons for that choice are further described in detail in Section 3.2.1.1 and following.

3.2. **Normal value**

(29) According to Article 2(1) of the basic Regulation, 'the normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country'.

(30) However, according to Article 2(6a)(a) of the basic Regulation, 'in case it is determined […] that it is not appropriate to use domestic prices and costs in the exporting country due to the existence in that country of significant distortions within the meaning of point (b), the normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks', and 'shall include an undistorted and reasonable amount of administrative, selling and general costs and for profits' ('administrative, selling and general costs' is referred hereinafter as 'SG&A').

(31) As further explained in the following subsections, the Commission concluded in the present investigation that, based on the evidence available, and in view of the lack of cooperation of the GOC, the application of Article 2(6a) of the basic Regulation was appropriate.

3.2.1. *Existence of significant distortions*

(32) In recent investigations concerning the steel sector in China ([4]), which is the main raw material to produce kegs, the Commission found that significant distortions in the sense of Article 2(6a)(b) of the basic Regulation were present.

(33) In those investigations, the Commission found that there is substantial government intervention in China resulting in a distortion of the effective allocation of resources in line with market principles ([5]). In particular, the Commission concluded that in the steel sector not only does a substantial degree of ownership by the GOC persist in the sense of Article 2(6a)(b), first indent of the basic Regulation ([6]), but the GOC is also in a position to interfere with prices and costs through State presence in firms in the sense of Article 2(6a)(b), second indent of the basic Regulation ([7]). The Commission further found that the State's presence and intervention in the financial markets, as well as in the provision of raw materials and inputs have an additional distorting effect on the market. Indeed, overall, the system of planning in China results in resources being concentrated in sectors designated as strategic or otherwise politically important by the GOC, rather than being allocated in line with market forces ([8]). Moreover, the Commission concluded that the Chinese bankruptcy and property laws do not work properly in the sense of Article 2(6a)(b), fourth indent of the basic Regulation, thus generating distortions in particular when maintaining insolvent firms afloat and when allocating land use rights in China ([9]). In the same vein, the Commission found distortions of

([4]) Commission Implementing Regulation (EU) 2022/191 of 16 February 2022 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (OJ L 36, 17.2.2022, p. 1); Commission Implementing Regulation (EU) 2022/95 of 24 January 2022 imposing a definitive anti-dumping duty on imports of certain tube and pipe fittings, of iron or steel, originating in the People's Republic of China, as extended to imports of certain tube and pipe fittings, of iron or steel consigned from Taiwan, Indonesia, Sri Lanka and the Philippines, whether declared as originating in these countries or not, following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ L 16, 25.1.2022, p. 36); Commission Implementing Regulation (EU) 2021/2239 of 15 December 2021 imposing a definitive anti-dumping duty on imports of certain utility scale steel wind towers originating in the People's Republic of China (OJ L 450, 16.12.2021, p. 59); Commission Implementing Regulation (EU) 2021/635 of 16 April 2021 imposing a definitive anti-dumping duty on imports of certain welded pipes and tubes of iron or non-alloyed steel originating in Belarus, the People's Republic of China and Russia following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ L 132, 19.4.2021, p. 145).

([5]) See Implementing Regulation (EU) 2022/191 recital 208, Implementing Regulation (EU) 2022/95 recital 59, Implementing Regulation (EU) 2021/2239 recitals 67-74 and Implementing Regulation (EU) 2021/635 recitals 149-150.

([6]) See Implementing Regulation (EU) 2022/191 recital 192, Implementing Regulation (EU) 2022/95 recital 46, Implementing Regulation (EU) 2021/2239 recitals 67-74 and Implementing Regulation (EU) 2021/635 recitals 115-118.

([7]) See Implementing Regulation (EU) 2022/191 recitals 193-194, Implementing Regulation (EU) 2022/95 recital 47, Implementing Regulation (EU) 2021/2239 recitals 67-74, and Implementing Regulation (EU) 2021/635 recitals 119-122. While the right to appoint and to remove key management personnel in SOEs by the relevant State authorities, as provided for in the Chinese legislation, can be considered to reflect the corresponding ownership rights, CCP cells in enterprises, state owned and private alike, represent another important channel through which the State can interfere with business decisions. According to the China's company law, a CCP organisation is to be established in every company (with at least three CCP members as specified in the CCP Constitution) and the company shall provide the necessary conditions for the activities of the party organisation. In the past, this requirement appears not to have always been followed or strictly enforced. However, since at least 2016 the CCP has reinforced its claims to control business decisions in SOEs as a matter of political principle. The CCP is also reported to exercise pressure on private companies to put 'patriotism' first and to follow party discipline. In 2017, it was reported that party cells existed in 70 % of some 1,86 million privately owned companies, with growing pressure for the CCP organisations to have a final say over the business decisions within their respective companies. These rules are of general application throughout the Chinese economy, across all sectors, including to the producers of the product under investigation and the suppliers of their inputs.

([8]) See Implementing Regulation (EU) 2022/191 recitals 195-201, Implementing Regulation (EU) 2022/95 recitals 48-52, Implementing Regulation (EU) 2021/2239 recitals 67-74, and Implementing Regulation (EU) 2021/635 recitals 123-129.

([9]) See Implementing Regulation (EU) 2022/191 recital 202, Implementing Regulation (EU) 2022/95 recital 53, Implementing Regulation (EU) 2021/2239 recitals 67-74, and Implementing Regulation (EU) 2021/635 recitals 130-133.

wage costs in the steel sector in the sense of Article 2(6a)(b), fifth indent of the basic Regulation ([10]), as well as distortions in the financial markets in the sense of Article 2(6a)(b), sixth indent of the basic Regulation, in particular concerning access to capital for corporate actors in China ([11]).

(34) Like in previous investigations concerning the steel sector in China, the Commission examined in the present investigation whether it was appropriate or not to use domestic prices and costs in China, due to the existence of significant distortions within the meaning of point (b) of Article 2(6a) of the basic Regulation. The Commission did so on the basis of the evidence available on the file, including the evidence contained in the request, as well as in the including the Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations ([12]) ('Report'), which relies on publicly available sources. That analysis covered the examination of the substantial government interventions in China's economy in general, but also the specific market situation in the relevant sector including the product under investigation. The Commission further supplemented these evidentiary elements with its own research on the various criteria relevant to confirm the existence of significant distortions in China as also found by its previous investigations in this respect.

(35) The request alleged that the Chinese State engages in an interventionist economic policy in pursuance of goals, which coincide with the political agenda set by the Chinese Communist Party ('CCP') rather than reflecting the prevailing economic conditions in a free market. The request pointed out in this connection not only to the distortions in the stainless steel market (stainless steel accounting for between 40 % and 60 % of the cost of kegs production) but it claimed that all other factors of production – land, capital, labour - are equally distorted. As a consequence, the request concluded that not only the domestic sales prices of stainless steel are not appropriate for use within the meaning of Article 2(6a)(a) of the basic Regulation, but all the input costs, including raw materials, energy, land, financing or labour, are also affected because their price formation is affected by substantial government intervention.

(36) To support its position, the request referred to a number of publicly available information sources, such as the Report, the conclusions reached by the EUCCC ([13]), the Commission's recent investigations of the Chinese steel sector ([14]) as well as the conclusions of the G20 Global Forum on Steel Excess Capacity ([15]).

(37) As indicated in recital (24), the GOC did not comment or provide evidence supporting or rebutting the existing evidence on the case file, including the Report and the additional evidence provided by the complainant, on the existence of significant distortions and/or on the appropriateness of the application of Article 2(6a) of the basic Regulation in the case at hand.

([10]) See Implementing Regulation (EU) 2022/191 recital 203, Implementing Regulation (EU) 2022/95 recital 54, Implementing Regulation (EU) 2021/2239 recitals 67-74, and Implementing Regulation (EU) 2021/635 recitals 134-135.

([11]) See Implementing Regulation (EU) 2022/191 recital 204, Implementing Regulation (EU) 2022/95 recital 55, Implementing Regulation (EU) 2021/2239 recitals 67-74, and Implementing Regulation (EU) 2021/635 recitals 136-145.

([12]) Commission staff working document SWD(2017) 483 final/2, 20.12.2017, available at: https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf

([13]) European Union Chamber of Commerce in China, Overcapacity in China : an impediment to the Party's reform agenda, available at: https://www.europeanchamber.com.cn/en/publications-overcapacity-in-china (accessed on 16 November 2022).

([14]) Implementing Regulation (EU) 2021/635 and Commission Implementing Regulation (EU) 2020/508 of 7 April 2020 imposing a provisional anti-dumping duty on imports of certain hot rolled stainless steel sheets and coils originating in Indonesia, the People's Republic of China and Taiwan (OJ L 110, 8.4.2020, p. 3).

([15]) Global Forum on steel excess capacity, Ministerial Report, 20 September 2018.

(38) Specifically in the sector of the product under investigation, i.e. the steel sector, a substantial degree of ownership by the GOC persists. While the nominal split between the number of state-owned enterprises ('SOEs') and privately owned companies is estimated to be almost even, from the five Chinese steel producers ranked in the top 10 of the world's largest steel producers, four are SOEs ([16]). At the same time, while the top ten producers only took up some 36 % of total industry output in 2016, the GOC set the target in the same year to consolidate 60 % to 70 % of steel production to around ten large-scale enterprises by 2025 ([17]). This intention has been repeated by the GOC in April 2019, announcing a release of guidelines on steel industry consolidation ([18]). Such consolidation may entail forced mergers of profitable private companies with underperforming SOEs ([19]). Since there was no cooperation by the GOC, given the presence of a number of SMEs active in the sector, the exact ratio of the private and state-owned steel producers could not be determined. In any event, the investigation revealed that at least one producer of kegs is an SOE, namely Penglai Jinfu Stainless Steel Products Co., Ltd.

(39) However, while specific information may not be available for the product under investigation, the sector represents a sub-sector of the steel industry and the findings concerning the steel sector are therefore deemed indicative also for the product under investigation. The latest Chinese policy documents concerning the steel sector confirm the continued importance which GOC attributes to the sector, including the intention to intervene in the sector in order to shape it in line with the government policies. This is exemplified by the Ministry of Industry and Information Technology's draft Guiding Opinion on Fostering a High Quality Development of Steel Industry which calls for further consolidation of the industrial foundation and significant improvement in the modernization level of the industrial chain ([20]) or by the 14th Five Years Plan on Developing the Raw Material Industry according to which the sector will 'adhere to the combination of market leadership and government promotion' and will 'cultivate a group of leading companies with ecological leadership and core competitiveness ([21])'. Similar examples of the intention by the Chinese authorities to supervise and guide the developments of the sector can be seen at the provincial level, such as in Shandong which not only foresees 'building a steel industry ecology […], establish manufacturing parks, extend the industrial chain and create industrial clusters' but want the steel industry to 'provide a demonstration for the transformation and upgrading […] in our province and even the whole country ([22])'.

(40) As to the GOC being in a position to interfere with prices and costs through State presence in firms in the sense of Article 2(6a)(b), second indent of the basic Regulation, due to the lack of cooperation by the GOC, and since most kegs producers are SMEs, it was impossible to systematically establish existence of personal connections between producers of the product under investigation and the CCP. However, the investigation has shown that the management of Shandong Gold Group, an SOE and controlling shareholder of Penglai Jinfu Stainless Steel Products, is closely linked to the CCP: the Chairman of the Board of Directors of Shandong Gold Group is also Secretary of the Party Committee and was a representative at the 20th National Congress of the CCP and the Director and Executive Manager of Shandong Gold Group is also Deputy Secretary of the Party Committee.

(41) Given that the product under investigation represents a subsector of the steel sector, information available with respect to steel producers is relevant also to the product under investigation. In the broader category of the steel sector, there is ample evidence of personal connections between the steel producers and the CCP. To provide an example, Baowu's Chairman of the Board of Directors serves at the same time as the Party Committee Secretary

([16]) Report – Chapter 14, p. 358: 51% private and 49% SOEs in terms of production and 44% SOEs and 56% private companies in terms of capacity.

([17]) Available at: www.gov.cn/zhengce/content/2016-02/04/content_5039353.htm; https://policycn.com/policy_ticker/higher-expectations-for-large-scale-steel-enterprise/?iframe=1&secret=c8uthafuthefra4e, and www.xinhuanet.com/english/2019-04/23/c_138001574.htm (accessed on 28 October 2022).

([18]) Available at http://www.jjckb.cn/2019-04/23/c_137999653.htm (accessed on 28 October 2022).

([19]) As was the case of the acquired majority stake of China Baowu Steel Group in Magang Steel in June 2019, see https://www.ft.com/content/a7c93fae-85bc-11e9-a028-86cea8523dc2 (accessed on 28 October 2022).

([20]) See: https://www.miit.gov.cn/gzcy/yjzj/art/2020/art_af1bef04b9624997956b2bff6cdb7383.html (accessed on 16 November 2022).

([21]) See Section IV, Subsection 3 of the Plan, available at: https://www.miit.gov.cn/zwgk/zcwj/wjfb/tz/art/2021/art_2960538d19e34c66a5eb8d01b74cbb20.html (accessed on 16 November 2022).

([22]) See the 14th Five-Years Plan on the Steel Industry development, Foreword.

with the General Manager being the Deputy Secretary of the Party Committee ([23]). Similarly, the Chairman of Baosteel's Board of Directors occupies the position of the Party Committee's secretary while the Executive Manager is the Deputy Secretary of the Party Committee ([24]). More generally, in view of the general applicability of the legislation on CCP presence in companies, it cannot be assumed that the ability of the GOC to interfere with prices and costs through State presence in firms would be different with relation to the product under investigation compared to the steel sector in general.

(42) Both public and privately owned enterprises in the steel sector are subject to policy supervision and guidance. Since there was no cooperation by the GOC in this investigation and the kegs producers are mostly SMEs, it was difficult to establish the exact scale of party building in the enterprises from the kegs industry. However, the investigation has shown that Shandong Gold Group (controlling shareholder of Penglai Jinfu Stainless Steel Products) actively supports Party building activities. The role of the company's party committee was described as follows: 'We must firmly seize the great opportunity of the central government, the Shandong Provincial Party Committee and the Provincial Government supporting state-owned enterprises to speed up the construction of world-class enterprises, keep an eye on strategic goals, maintain strategic focus, strengthen strategic implementation, and adhere to the overall arrangement of overall targets, intermediate targets, and annual targets, adhere to the combination of strategic planning and tactical promotion' and further 'unswervingly and comprehensively run the party, fully implement the general requirements of party building in the new era, and provide a strong guarantee for high-quality development. It is necessary to comprehensively strengthen the party's political construction, strictly comply with the political discipline and political rules, to effectively improve the political judgment, political comprehension and political implementation of party organizations at all levels and party members and cadres, and to always maintain a high degree of consistency with the Party Central Committee with Comrade Xi Jinping at its core , establish "four consciousness", enhance "four self-confidence", and achieve "two maintenance"' ([25]).

(43) Further, policies discriminating in favour of domestic producers or otherwise influencing the market in the sense of Article 2(6a)(b), third indent of the basic Regulation are in place in the sector of the product under investigation. Even though no policy documents guiding specifically the development of the kegs industry as such could be identified during the investigation, the industry benefits from governmental guidance and intervention into the steel sector, given that the product under investigation represents one of its subsectors.

(44) The steel industry keeps being regarded as a key industry by the GOC ([26]). This is confirmed in the numerous plans, directives and other documents focused on steel, which are issued at national, regional and municipal level. Under the 14th Five Years Plan adopted in March 2021, the GOC earmarked the steel industry for transformation and upgrade, as well as optimization and structural adjustment ([27]).

(45) Furthermore, the 14th Five Years Plan on Developing the Raw Materials Industry, applicable also to the steel industry, lists the sector as the 'bedrock of the real economy' and 'a key field that shapes China's international competitive edge' and sets a number of objectives and working methods which would drive the development of the steel sector in the time period 2021-2025, such as technological upgrade, improving the structure of the sector (not least by means of further corporate concentrations) or digital transformation ([28]).

([23]) See the group's website, available at: http://www.baowugroup.com/about/board_of_directors (accessed on 7 September 2022).

([24]) See the company's website, available at: https://www.baosteel.com/about/manager (accessed on 7 September 2022).

([25]) Shandong Gold Group conveys, learns and implements the spirit of the 20th National Congress of the Communist Party of China (original text in Chinese), press article available on China Gold News' website: https://www.gold.org.cn/ky1227/kydj/202210/t20221028_193328.html (accessed on 17 November 2022).

([26]) Report, Part III, Chapter 14, p. 346 ff.

([27]) See People's Republic of China 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035, Part III, Article VIII, available at: https://cset.georgetown.edu/publication/china-14th-five-year-plan/ (accessed on 28 October 2022).

([28]) See in particular Sections I and II of the Plan.

(46) The 14th FYP on Developing the Raw Materials Industry also includes some specific targets for the development of the steel sector. Section IV Point 3 of the document includes the following provisions: 'Optimizing the organizational structure: make leading enterprises bigger and stronger. Adhere to the combination of market leadership and government promotion, remove obstacles to cross-regional mergers and reorganizations, remove restrictions such as market segmentation and regional blockades, coordinate and solve major problems encountered in enterprises' cross-regional mergers and reorganizations, support enterprises to speed up cross-regional and cross-ownership mergers and reorganizations, and increase the industry's concentration level, develop international business. In …, steel, … and other industries, cultivate a group of leading enterprises in the industrial chain with ecological leadership and core competitiveness'.

(47) The above mentioned FYPs on the central level are there echoed in the provincial and/or municipal FYPs or FYP implementation plans. As an example, the Henan Implementation plan for the transformation and upgrade of the steel industry during the 14th FYP includes the provisions regarding: point 2(1): strict control of the total production capacity; point 2(2): acceleration and promotion of mergers and acquisitions; point 2(3): construction of characteristic steel production bases ([29]).

(48) Apart from the 14th FYP, the steel industry is also strictly regulated in other policy documents. As an example, Hebei, the largest steel producing province in China, issued a Three-Year Action Plan on Cluster Development in the Steel Industry Chain 2020 - 2022 (applicable during the IP). This document regulates the steel industry in the following way: 'Adhere to structural adjustment and highlight product diversification. Unswervingly promote the structural adjustment and layout optimization of the iron and steel industry, promote the joint reorganization, transformation and upgrade of enterprises, and comprehensively promote the development of the iron and steel industry towards large-scale enterprises, modernization of technical equipment, diversification of production processes, and diversification of downstream products.' Furthermore, the plan sets specific targets for the structure of steel enterprises in the province: 'Steadily foster the development of groups. Accelerate the reform of mixed ownership of state-owned enterprises, focus on promoting the cross-regional merger and reorganization of private iron and steel enterprises, and strive to establish 1-2 world-class large groups, 3-5 large groups with some domestic influence as pillars, and 8-10 new, outstanding and specific enterprise groups'.

(49) Finally, the plan envisages state support to improve the global competitiveness of the steel enterprises located in Hebei: 'Appropriately ensure a relevant and diversified development. Support iron and steel enterprises to develop strategic emerging industries such as new generation of information technology, high-end equipment and new materials, and accelerate the development of modern service industries such as modern logistics, financial services, e-commerce etc. Encourage eligible iron and steel enterprises to develop towards deep processing such as automobiles and mechanical parts, steel wire ropes, steel strands welding electrodes etc. Strengthen international production capacity cooperation, encourage iron and steel enterprises to participate in mergers and reorganization of foreign iron and steel enterprises through multiple channels, and guide competitive iron and steel enterprises in the province to invest and build factories abroad' ([30]).

([29]) The provisions of this section are very detailed and set out strict targets for the future: 'For iron and steel enterprises that plan to relocate or renovate in different places, the governments of the places where they move in and move out should strengthen communication and coordination, and transfer relevant energy consumption and coal consumption indicators through the energy use rights trading market to achieve win-win cooperation and ensure the smooth and orderly progress of the project. Build 6 characteristic steel production bases in Anyang, Jiyuan, Pingdingshan, Xinyang, Shangqiu, Zhoukou, etc., and improve the scale, intensification, specialisation and distinction of the industry. Among them, by 2025, the production capacity of pig iron in Anyang City will be controlled to stay below 14 million tonnes, and the production capacity of crude steel will be controlled within 15 million tonnes and an 8,5 million-tonnes production centre of high-quality special steel will be formed in Anyang Base of Anyang Iron and Steel Group Co., Ltd.; support Henan Jiyuan Iron and Steel (Group) Co., Ltd. to build a production base for excellent and special steel bars and wires and a regional processing centre; to support Angang Group Xinyang Iron and Steel Co., Ltd., Minyuan Iron and Steel Group Co., Ltd., and Henan Angang Zhoukou Iron and Steel Co., Ltd. to build regional iron and steel complexes.'

([30]) See points 2, 8 and 16, respectively, of the Hebei Province's Three year action plan on cluster development in the steel industry chain 2020 2022.

(50) Moreover, the Guiding Catalogue for Industry Restructuring (2019 Version) ([31]) lists steel as an encouraged industry.

(51) In sum, the GOC has measures in place to induce operators to comply with the public policy objectives of supporting encouraged industries, including the production of the main raw materials used in the manufacturing of the product under investigation. Such measures impede market forces from operating freely.

(52) The present investigation has not revealed any evidence that the discriminatory application or inadequate enforcement of bankruptcy and property laws according to Article 2(6a)(b), fourth indent of the basic Regulation in the kegs sector referred to above in recital (33) would not affect the manufacturers of the product under investigation.

(53) The kegs sector is also affected by the distortions of wage costs in the sense of Article 2(6a)(b), fifth indent of the basic Regulation, as also referred to above in recital (33). Those distortions affect the sector both directly (when producing the product under investigation or the main inputs), as well as indirectly (when having access to inputs from companies subject to the same labour system in China) ([32]).

(54) Moreover, no evidence was submitted in the present investigation demonstrating that the sector of the product under investigation is not affected by the government intervention in the financial system in the sense of Article 2(6a)(b), sixth indent of the basic Regulation, as also referred to above in recital (33). Therefore, the substantial government intervention in the financial system leads to the market conditions being severely affected at all levels.

(55) Finally, the Commission recalled that in order to produce the product under investigation, a number of inputs is needed. When the producers of kegs purchase/contract these inputs, the prices they pay (and which are recorded as their costs) are clearly exposed to the same systemic distortions mentioned before. For instance, suppliers of inputs employ labour that is subject to the distortions. They may borrow money that is subject to the distortions on the financial sector/capital allocation. In addition, they are subject to the planning system that applies across all levels of government and sectors.

(56) As a consequence, not only the domestic sales prices of kegs are not appropriate for use within the meaning of Article 2(6a)(a) of the basic Regulation, but all the input costs (including raw materials, energy, land, financing, labour, etc.) are also affected because their price formation is affected by substantial government intervention, as described in Parts I and II of the Report. Indeed, the government interventions described in relation to the allocation of capital, land, labour, energy and raw materials are present throughout China. This means, for instance, that an input that in itself was produced in China by combining a range of factors of production is exposed to significant distortions. The same applies for the input to the input and so forth.

(57) No evidence or argument to the contrary has been adduced by the GOC or the exporting producers in the present investigation.

(58) In sum, the evidence available showed that prices or costs of the product under investigation, including the costs of raw materials, energy and labour, are not the result of free market forces because they are affected by substantial government intervention within the meaning of Article 2(6a)(b) of the basic Regulation, as shown by the actual or potential impact of one or more of the relevant elements listed therein. On that basis, and in the absence of any cooperation from the GOC, the Commission concluded that it is not appropriate to use domestic prices and costs to establish normal value in this case. Consequently, the Commission proceeded to construct the normal value exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks, that is, in this case, on the basis of corresponding costs of production and sale in an appropriate representative country, in accordance with Article 2(6a)(a) of the basic Regulation, as described in the following section.

([31]) Guiding Catalogue for Industry Restructuring (2019 Version), approved by Decree of the National Development and Reform Commission of the People's Republic of China No. 29 of 27 August 2019; available at: http://www.gov.cn/xinwen/2019-11/06/5449193/files/26c9d25f713f4ed5b8dc51ae40ef37af.pdf (accessed on 28 October 2022).

([32]) See Implementing Regulation (EU) 2021/635, recitals 134-135 and Implementing Regulation (EU) 2020/508, recitals 143-144.

3.2.1.1. Representative country

General remarks

(59) The choice of the representative country was based on the following criteria pursuant to Article 2(6a) of the basic Regulation:

— A level of economic development similar to China. For this purpose, the Commission used countries with a gross national income per capita similar to China on the basis of the database of the World Bank ([33]);

— Production of the product under investigation in that country;

— Availability of relevant public data in the representative country.

— Where there is more than one possible representative country, preference was given, where appropriate, to the country with an adequate level of social and environmental protection.

(60) As explained in recitals (26) - (27), the Commission issued two notes for the file on the sources for the determination of the normal value: the First Note on production factors of 20 July 2022 and the Second Note on the production factors of 19 September 2022. These notes described the facts and evidence underlying the relevant criteria. In the Second Note on production factors, the Commission informed interested parties of its intention to consider Brazil as an appropriate representative country in the present case if the existence of significant distortions pursuant to Article 2(6a) of the basic Regulation were confirmed.

A level of economic development similar to China and production of the product under investigation

(61) In the First Note on production factors, the Commission identified Brazil, Mexico and Russia as countries with a similar level of economic development as China according to the World Bank, i.e. they were all classified by the World Bank as 'upper-middle income' countries on a gross national income basis, and where production of the product under investigation was known to take place. No comments were received concerning the countries identified in that note.

(62) In the Second Note the Commission indicated that for one of the countries identified as countries where product under investigation is being produced, i.e. Mexico, the producer of kegs stopped production before the investigation period and no financial data were available after 2017 in Orbis database ([34]). Mexico was therefore no longer considered a possible representative country for this investigation.

Availability of relevant public data in the representative country

(63) In the Second Note the Commission indicated that the sole producer of kegs in Russia identified in the First Note did not have a reasonable amount of profit, neither in 2021, nor in 2020.

(64) In the Second Note, the Commission indicated that it had at its disposal data showing a reasonable amount of profits within the meaning of Article 2(6a)(a) of the basic Regulation only for one producer in Brazil, KHS Industria de Maquinas LTDA and only for the year 2020. No updated financial data were available yet for 2021.

(65) In light of the above considerations, the Commission informed the interested parties with the Second Note that it intended to use Brazil as an appropriate representative country and the company KHS Industria de Maquinas LTDA, in accordance with Article 2(6a)(a), first indent of the basic Regulation in order to source undistorted prices or benchmarks for the calculation of normal value. Interested parties were invited to comment on the appropriateness of Brazil as a representative country and of KHS Industria de Maquinas LTDA as producer in the representative country.

([33]) World Bank Open Data – Upper Middle Income, https://data.worldbank.org/income-level/upper-middle-income.
([34]) bvdinfo.com

(66) Following the Second Note, comments were received from the two sampled exporting producers, that argued the following:

(a) The producer KHS Industria de Maquinas LTDA in Brazil suggested in the Second Note on the sources for the determination of the normal value was not appropriate, because it was specialised in engineering and production of refilling or accessory equipment, rather than manufacturing of kegs.

(b) The existence of market distortions in Brazil (anti-dumping duties on stainless steel flat rolled products originating in China, export quotas on stainless steel flat rolled products towards the United States and import tariffs in imports of stainless steel flat rolled products originating in Indonesia, Belgium, Finland, South Africa, China and Germany) made the Brazilian market of stainless steel flat rolled products (HS721933) distorted and thus, the value of this most important factor of production in Brazil was unreliable.

(c) Brazil applied higher import tariff than many other countries on the three main raw materials (steel, spears and neck). The Brazilian local market was thus more protective than other markets.

(d) A part of imports of the major factors of production of kegs to Brazil were imported from China (37 % of steel flat rolled products, 50 % of spears and 54 % of neck), thus the market prices of these factors of production in Brazil were also tainted by the distortive prices.

(67) As a result, the parties claimed that the reliability of the market data in Brazil for the purpose of establishing undistorted market value for these factors of production was questionable.

(68) The two sampled exporting producers proposed Malaysia as an appropriate representative country, because it had a level of economic development similar to China, even if there was no keg producer in Malaysia.

(69) However, Malaysia could not be considered as a potential representative country, since, as acknowledged by the parties themselves, there was no production of kegs in Malaysia.

(70) The Commission further reviewed the evidence ([35]) on likely market distortions of stainless steel flat rolled products (HS721933) in Brazil. The existence of market anti-dumping duties on stainless steel flat rolled products originating in China is not relevant, since imports from China are excluded when establishing a benchmark price of the raw material. The export quotas on stainless steel flat rolled products towards the United States do not seem to limit the imports from the United States, since it is still the third largest exporter for this product to Brazil (after China and Indonesia). Furthermore, imports of stainless steel flat rolled products to Brazil from the United States are slightly higher priced than the imports from the ten largest importing countries excluding China (16,3 EUR/kg and 14,5 EUR/kg of stainless steel flat rolled products, respectively). In the light of these facts, the Commission rejected the argument that the Brazilian market of stainless steel flat rolled products (HS721933) was distorted due to the anti-dumping duties towards China and the export quotas towards the United States.

(71) Regarding the import tariff level on the three main raw materials, the Commission noted that the undistorted values used for the calculation of normal value do take into account import duties as they constitute a proxy for a price in the domestic market of the possible representative countries. Therefore, an abstract comparison of the respective levels of import duties for the raw materials is in principle not a relevant factor to compare the appropriateness of the representative countries. In any event, the Commission noted that the level of the import duties is only one of the elements to assess whether a certain market is open or protected, and the party submitted no other specific evidence to show that this was the case for Brazil for the raw materials concerned. Therefore the Commission rejected this argument.

(72) Regarding the imports from China of the main raw materials, the Commission also compared Brazil and Russia, the two potential representative countries, where production of kegs was confirmed. The analysis of import data showed that the imports from China into Russia of the major factor of production, stainless steel coil (HS721933), representing above 50 % of the cost of production of kegs, were higher than to Brazil (60 % of stainless steel coil to

([35]) https://www.globaltradealert.org/data_extraction

Russia was imported from China, while for Brazil the proportion was much lower (37 %)). Furthermore, the imports from China into Russia of spears, representing above 20 % of the cost of production of kegs, were also higher than to Brazil (68 % and 50 %, respectively). Considering the weight of these two main raw materials (stainless steel coil and spear) in the cost of production of kegs, these differences in import volume from China alone would undermine the quality of data for undistorted values in Russia more than in Brazil. In the light of this, Russia was not considered an appropriate representative country within the meaning of Article 2(6a)(a) of the basic Regulation.

(73) The Commission also reviewed the evidence on KHS Industria de Maquinas LTDA in Brazil and confirmed that the company was specialised in engineering and production of the filling technology and system for racking beer in kegs, refilling or accessory equipment, rather than manufacture of kegs. It could thus not be considered anymore as a producer of kegs.

(74) In fact, the Commission had identified two additional producers of kegs in the First Note. Nonetheless, the Commission could not find appropriate financial data for any of the remaining identified kegs producers in Brazil. In the absence of an appropriate benchmark to establish a reasonable SG&A and profit for the product under investigation in Brazil, the sole remaining representative country where production of kegs and hence the availability of the main raw materials was confirmed, the Commission provisionally considered that data of companies in a sector producing a similar product could be appropriate in these circumstances. Therefore, it searched for data on producers of a similar range of products to kegs, namely, products that were similar in terms of the raw material used, the form and the purpose of the final product. The research was based on the NACE codes ([36]). The data from five companies with NACE code 2592 (light metal packing), producing metal cans, packing products, containers for the food industry, was available in the Orbis database ([37]) and the products manufactured by those companies could be considered similar to kegs in terms of the raw material used, the form and the purpose of the final product. In addition, in the Orbis database, the two sampled exporting producers in China were also registered under the same NACE code 2592, as the producers of the metal cans, packing products, containers for the food industry. Finally, out of these five producers of metal cans, packing products, containers in Brazil, only one of them, Metalurgica Mococa SA ([38]), had financial data for the IP.

(75) Based on the analysis of the available data, the Commission decided to use Brazil as the appropriate representative country at the provisional stage of the investigation and use the financial data of one company, Metalurgica Mococa SA, for the constructed normal value in accordance with the Article 2(6a)(a) of the basic Regulation.

Level of social and environmental protection

(76) Having established that Brazil was the only available appropriate representative country, based on all of the above elements, there was no need to carry out an assessment of the level of social and environmental protection in accordance with the last sentence of Article 2(6a)(a) first indent of the basic Regulation.

Conclusion

(77) In view of the above analysis, Brazil met the criteria laid down in Article 2(6a)(a), first indent of the basic Regulation in order to be considered as an appropriate representative country.

([36]) NACE code is the standard European nomenclature of productive economic activities. Following codes were researched: 2591 (steel drums and similar containers), 2592 (light metal packing), 2599 (other fabricated metal products), 2829 (general purpose machinery), 2893 (machinery for food, beverage and tobacco processing).

([37]) Orbis database, provided by Bureau Van Dijk (https://orbis.bvdinfo.com).

([38]) https://www.mococa.com

Sources used to establish undistorted costs

(78) In the First Note, the Commission listed the factors of production such as materials, energy and labour used in the production of the product under investigation by the exporting producers and invited the interested parties to comment and propose publicly available information on undistorted values for each of the factors of production mentioned in that note.

(79) Subsequently, in the Second Note, the Commission stated that, in order to construct the normal value in accordance with Article 2(6a)(a) of the basic Regulation, it would use the Global Trade Atlas ('GTA') database to establish the undistorted cost of most of the factors of production, notably the raw materials. In addition, the Commission stated that it would use the ILO for establishing undistorted costs of labour ([39]) and the Global Electricity Prices research for electricity ([40]).

(80) In the Second Note, the Commission also informed the interested parties that due to the negligible weight of some of the raw materials in the total cost of production of the sampled exporting producers, these negligible items were grouped under 'consumables'. The Commission calculated the percentage of the consumables on the total cost of the raw materials and applied this percentage to the recalculated cost of raw materials when using the established undistorted benchmarks in the appropriate representative country.

Undistorted costs and benchmarks

3.2.1.2. Factors of production

(81) Considering all the information submitted by the interested parties and collected during the RCC, the following factors of production and their sources have been identified in order to determine the normal value in accordance with Article 2(6a)(a) of the basic Regulation:

Table 1

Factors of production of kegs

Factor of Production	Commodity Code	Undistorted value
Raw materials		
Stainless Steel Coil	721933	16,73 CNY/Kg
Spear	84819090	387,18 CNY/Kg
Neck	73269090	100,27 CNY/Kg
Scrap	720421	8,86 CNY/Kg
Labour		
Labour wages in manufacturing sector	N/A	29,20 CNY/hour
Energy		
Electricity	N/A	0,7475 CNY/kWh

Raw materials

(82) In order to establish the undistorted price of raw materials as delivered at the gate of a representative country producer, the Commission used as a basis the weighted average import price to the representative country as reported in GTA, to which import duties and transport costs were added. An import price in the representative country was determined as a weighted average of unit prices of imports from all third countries excluding China and countries which are not members of the WTO, listed in Annex 1 of Regulation (EU) 2015/755 of the European

([39]) https://ilostat.ilo.org/
([40]) https://www.globalpetrolprices.com/Brazil/

Parliament and the Council ([41]). The Commission decided to exclude imports from China into the representative country as it concluded in recital (58) that it is not appropriate to use domestic prices and costs in China due to the existence of significant distortions in accordance with Article 2(6a)(b) of the basic Regulation. Given that there is no evidence showing that the same distortions do not equally affect products intended for export, the Commission considered that the same distortions affected export prices. After excluding the imports into the representative country from China and non-market economy countries, the Commission found that imports of the main raw materials from other third countries remained representative.

(83) After the Second Note, the sampled exporting producers claimed that the right HS code for spears which should be used in order to establish the undistorted value of this raw material is HS848180 and not HS848190. The exporting producers argued that the code HS848180 stands for taps, cocks, valves and similar appliances for pipes, boiler shells, tanks, vats or the like, whereas the code HS848190 refers to parts of them. The sampled exporters claimed that a spear is a kind of valve in itself, rather than parts of the latter. As the unit measurement for this code is piece/item in the Brazilian nomenclature, it appropriately reflects the reality of the way this material is procured and pricing is made. Additionally, this is the code also used by the suppliers of spears when they export from the EU. Thus, the code HS848180 is the right classification for spears.

(84) The Commission clarified that the HS heading 8481, among others, also includes 'gas operated beer dispensing units for bar counters, consisting essentially of one or more hand operated cocks fed by the pressure of carbon dioxide piped into the casks of beer'. The spear of a keg is designed for the maintenance of the pressurized gas (carbon dioxide) within the keg and for the dispense of the carbonized liquid ensuring its conditioned flow. This function is mainly performed by the mechanism included in the body of the keg spear incorporating a valve (or two valves depending on the model). Therefore, a spear can be considered part of the gas operated beer dispensing units covered by the scope of the HS heading 8481 and should be classified under CN code 848190. Furthermore, one of the sampled exporting producers submitted its import documentation of spears, which indicated import of spears under the HS848190. Overall, half of the cooperating exporting producers stated that the code HS848190 is to be used for spears. The claim of the parties to use HS848180 code was therefore rejected.

(85) Data on imports of spears to Brazil was classified under the two relevant extended codes: 84819010 (parts of aerosol valves, appliances used for bathrooms, etc. and 84819090 (parts of taps, other appliances for canalizations, etc.). The 84819090 was selected, since spears were not parts of aerosol valves.

(86) For a number of factors of production, the actual costs incurred by the cooperating exporting producers represented individually a negligible share of total raw material costs in the investigation period. As the value used for these had no appreciable impact on the dumping margin calculations, regardless of the source used, the Commission decided to include those costs into consumables as explained in the recital (80).

(87) In order to establish the undistorted price of raw materials, as provided by Article 2(6a)(a), first indent of the basic Regulation, the Commission applied the relevant import duties of the representative country.

(88) The Commission expressed the transport cost incurred by the cooperating exporting producer for the supply of raw materials as a percentage of the actual cost of such raw materials and then applied the same percentage to the undistorted cost of the same raw materials in order to obtain the undistorted transport cost. The Commission considered that, in the context of this investigation, the ratio between the exporting producer's raw material and the reported transport costs could be reasonably used as an indication to estimate the undistorted transport costs of raw materials when delivered to the company's gate.

([41]) Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries (OJ L 123, 19.5.2015, p. 33).

Labour

(89) The Commission used the ILO ([42]) statistics to determine the wages in Brazil. The ILO statistics provided information on monthly wages of workers in the manufacturing sector and average weekly hours worked ([43]) in Brazil in 2021. Additional labour related costs borne by the employer, based on publicly available sources ([44]), were added to the monthly wage.

(90) During the RCC of one sampled exporting producer the Commission did not find a record for the actual labour hours, only the standard labour hours. The exporting producer reported that actual labour hours were on average 10 minutes higher before and after the shift/day worked to arrive and to leave the production facilities. The Commission therefore increased the standard labour hours of this sampled exporting producer by 20 minutes per shift/day.

Electricity

(91) In the Second Note, the Commission indicated that it will use the Global Electricity Prices research for electricity ([45]) benchmark. The sampled exporting producers claimed that the Commission should use the data from the EDP Brasil ([46]), the major electricity supplier in the local market of Brazil, taking into account the different tariffs for peak and off-peak periods and relevant prices charged to the category of industrial consumers, which was reliable for the electricity benchmark.

(92) The Ministry of Mining and Energy in Brazil (Ministério de Minas e Energia) publishes a yearly report on the energy sector in Brazil ([47]). The report of 2021 includes the average electricity tariff ([48]) from all major electricity suppliers applied for the industrial users in Brazil ([49]). The Commission considered this source as the most reliable to establish the electricity benchmark, since it included the average tariffs applied by all major electricity suppliers in Brazil contrary to the data source proposed by the exporting producers, which referred to only one supplier. It therefore used the average electricity tariff for the industrial users published in the report from The Ministry of Mining and Energy in Brazil in 2021.

Manufacturing overhead costs, SG&A and profits

(93) According to Article 2(6a)(a) of the basic Regulation, 'the constructed normal value shall include an undistorted and reasonable amount for administrative, selling and general costs and for profits'. In addition, a value for manufacturing overhead costs needs to be established to cover costs not included in the factors of production referred to above.

(94) The manufacturing overheads incurred by the cooperating exporting producers were expressed as a share of the costs of manufacturing actually incurred by the exporting producers. This percentage was applied to the undistorted costs of manufacturing.

(95) For establishing an undistorted and reasonable amount for SG&A and profit the Commission relied on the financial data of Metalurgica Mococa SA in 2021, as extracted from the Orbis database.

([42]) https://ilostat.ilo.org/data/data-catalogue/
([43]) Duly adjusted for statutory time not worked, such as vacation and national holidays.
([44]) https://establishbrazil.com/articles/whats-real-cost-employee ; https://ccbc.org.br/en/publicacoes/artigos-ccbc-en/how-much-do-your-employees-in-brazil-really-cost/ ; https://bpc-partners.com/inss-brazilian-salaries-benefits/
([45]) https://www.globalpetrolprices.com/Brazil/
([46]) https://www.edp.com.br/tarifas-vigentes/
([47]) https://www.gov.br/mme/pt-br/assuntos/secretarias/energia-eletrica/publicacoes/informativo-gestao-setor-eletrico
([48]) The peak and off-peak hours and the various additional cost applicable during the period.
([49]) https://www.gov.br/mme/pt-br/assuntos/secretarias/energia-eletrica/publicacoes/informativo-gestao-setor-eletrico/informativo-gestao-setor-eletrico-ano-2021.pdf/view

Calculation

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

(97) First, the Commission established the undistorted manufacturing costs. The Commission applied the undistorted unit costs to the actual consumption of each individual factor of production of the cooperating exporting producers. These consumption rates provided by the exporting producers were verified during the remote cross-check. The Commission multiplied the usage factors by the undistorted costs per unit observed in the representative country, as described in recitals (82) - (88).

(98) Once the undistorted manufacturing cost was established, the Commission applied the manufacturing overheads, as noted in recital (94).

(99) To the costs of production established as described in the previous recital, the Commission applied the SG&A and profit of Metalurgica Mococa SA in Brazil. SG&A expressed as a percentage of the Costs of Goods Sold ('COGS') and applied to the undistorted costs of production, amounted to 8,5 %. The profit expressed as a percentage of the COGS and applied to the undistorted costs of production, amounted to 24,4 %.

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

3.2.2. *Export price*

(101) One sampled exporting producer exported to the Union directly to independent customers. The other one exported directly to independent customers or through an unrelated trading company in Hong Kong. In this case, goods were shipped from the exporting producer directly to the independent customer in the Union, while the invoice was issued to the trading company in Hong Kong.

(102) For the export sales of the product concerned made directly to independent customers in the Union, the export price was the price actually paid or payable for the product concerned when sold for export to the Union, in accordance with Article 2(8) of the basic Regulation.

(103) For the export sales that were made through an unrelated trading company in Hong Kong, the export price was established on the basis of the price at which the exported product was first sold to that trading company. Although the Commission had evidence (shipping bills etc) that these goods were shipped from the exporting producer directly to the independent customer in the Union, the sales price to the end-customer could not be established. The Commission reached out to the trading company in Hong Kong, however there was no cooperation from that company. The European end-user buying the kegs in question also did not cooperate in the investigation. Therefore, the sales price to the end-customer in the Union was not available at the provisional stage of the investigation.

3.2.3. *Comparison*

(104) The Commission compared the normal value and the export price of the sampled exporting producers on an ex-works basis per product type.

(105) Where justified by the need to ensure a fair comparison, the Commission adjusted the normal value and/or the export price for differences affecting prices and price comparability, in accordance with Article 2(10) of the basic Regulation. Adjustments were made for transport, insurance, handling, loading costs, customs duty, credit costs and bank charges.

3.2.4. *Dumping margins*

(106) For the sampled cooperating exporting producers, the Commission compared the weighted average normal value of each type of the like product with the weighted average export price of the corresponding type of the product concerned, in accordance with Article 2(11) and (12) of the basic Regulation.

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

Company	Provisional dumping margin
Penglai Jinfu Stainless Steel Products Co., Ltd	77,1 %
Ningbo Major Draft Beer Equipment Co., Ltd	65,3 %

(108) For the cooperating exporting producers outside the sample, the Commission calculated the weighted average dumping margin, in accordance with Article 9(6) of the basic Regulation. Therefore, that margin was established on the basis of the margins of the sampled exporting producers, disregarding the margins of the exporting producers with zero and de minimis dumping margins, as well as margins established in the circumstances referred to in Article 18 of the basic Regulation.

(109) On this basis, the provisional dumping margin of the cooperating exporting producers outside the sample is 72,1 %.

(110) For all other exporting producers in China, the Commission established the dumping margin on the basis of the facts available, in accordance with Article 18 of the basic Regulation. To this end, the Commission determined the level of cooperation of the exporting producers.

(111) The Commission considered that the level of cooperation in this case was low since the cooperating exporting producers represented only about 32 % of the estimated total import quantities from China in the IP. Therefore, for all other exporting producers in China, the Commission considered it appropriate to establish the dumping margin on the basis of the representative product type with the highest margin of the sampled exporting producers. Therefore, the country-wide dumping margin applicable to all other non-cooperating exporting producers was set at the level of 91,0 %.

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

Company	Provisional dumping margin
Penglai Jinfu Stainless Steel Products Co., Ltd	77,1 %
Ningbo Major Draft Beer Equipment Co., Ltd	65,3 %
Other cooperating companies	72,1%
All other companies	91,0%

4. **INJURY**

4.1. **Definition of the Union industry and Union production**

(113) According to the information available to the Commission, like product was manufactured by eight producers in the Union during the investigation period. They constitute the 'Union industry' within the meaning of Article 4(1) of the basic Regulation.

(114) The total Union production during the investigation period was established at around 1 926 200 kegs. The Commission established this figure on the basis of all the available information concerning the Union industry, such as the reply to the macroeconomic questionnaire provided by the complainant. As indicated in recital (7), sampled Union producers represented around 73 % of the estimated total Union production of the like product.

4.2. **Union consumption**

(115) Union consumption developed as follows:

Table 2

Union consumption (pieces)

	2018	2019	2020	Investigation period
Total Union consumption	3 477 583	2 554 726	1 861 260	1 192 884
Index	*100*	*73*	*54*	*34*

Source: Questionnaire replies of Union producers and customs statistics (see Section 4.3.1).

(116) The Commission established the Union consumption of kegs on the basis of total Union industry's sales in the Union, plus total imports from China. The methodology for determining imports from China is explained in detail in Section 4.3.1 below. Imports from other third countries to the Union were not taken into account as they were considered negligible (see recital (119)).

(117) Sales of the Union industry on the Union market were obtained from the reply to the questionnaire supplied by the complainant, cross checked with the information provided by the sampled Union producers in their questionnaire replies.

(118) The product concerned is imported into the Union under two CN codes (ex 7310 10 00 and ex 7310 29 90), depending on the capacity of the keg. Kegs with the capacity of >= 50 litres but <= 300 litres fall under the CN code 7310 10 00, while those with the capacity of < 50 l fall under the CN code 7310 29 90. These two CN codes include also a broad range of other products besides the product under investigation (e.g., cans, tin boxes, feedthroughs for livestock, buckets, fire extinguishers, canisters, containers and tanks for various uses, water bottles, steel barrels, etc.), thus establishing imports based on CN codes alone was not possible.

(119) As regards imports from other third countries, the Complaint claimed that the Union market is supplied with kegs predominantly by the Union producers and exporters from China. The Commission's examination of data on suppliers, provided by three major users (see further below at recital (130)) indicated that there are no other suppliers on the market. Thus, the Commission concluded that imports into the Union from other third countries, if any, are negligible and would not have any appreciable impact on the Union consumption.

(120) Union consumption decreased by 66 % during the period considered. After the initial drop of 27 % in 2019, a more pronounced drop followed in 2020 and the IP (2021). This drop coincided with the years when the Union was hit the hardest by the Covid-19 pandemic and can be attributed to the corresponding so-called 'lockdowns', namely, measures introduced by the governments throughout the Union to combat the Covid-19 pandemic.

(121) Covid-19 measures affected particularly hotels, restaurants, and cafes ('HORECA sector'). HORECA sector buys beer and other beverages from users, which are most often beer breweries. The beer is delivered to them in kegs which are attached to draught installations through which the beverage is then poured into glasses and served to HORECA sector's customers.

(122) During 2020 and the IP, a vast majority of the HORECA sector in the Union was obliged to either shorten its working hours, and/or limit its capacity or remain completely closed for extended periods of time, pursuant to government measures introduced to supress the spread of the Covid-19 pandemic. Such decrease in HORECA sector activity and, consequently, decrease in demand for draught beer, had a logical consequence of decreasing the users' demand for kegs in which they supply the beer to their HORECA sector customers.

4.3. **Imports from the country concerned**

4.3.1. *Methodology used to quantify imports from the country concerned*

(123) In the complaint, the Complainant put forward a methodology to establish imports from the country concerned. This methodology relied on the Complainant's market knowledge and estimated a notable increase of imports into the Union, 188 % over the period considered, demonstrated in Table 3 below.

Table 3

Sales of Chinese kegs in the Union – Complaint's estimate (units)

	2018	2019	2020	IP
Via tenders	107 148	482 315	898 664	630 438
Via distributors	182 000	198 000	118 000	202 000
Total	289 148	680 315	1 016 664	832 438
Index	*100*	*235*	*352*	*288*

Source: Section 201 of the complaint.

(124) As explained in paragraphs 193 to 203 of the complaint, the above methodology consisted of three main elements. First, the Complainant added up the quantities of kegs sought in all the bidding processes (referred to in the complaint as 'tenders') organised by five major users, i.e., the big brewery groups present on the Union market, namely: AB InBev, Asahi CEE, Carlsberg, Heineken, and Molson Coors ('the major users'). Second, the Complainant deducted their own sales that they made pursuant to the bids they placed on those tenders, operating under the assumption that the remainder of the total lot requested in each tender was won and supplied by the producers from China. Finally, the Complainant added the quantities imported by importers/resellers, estimated based on their market knowledge.

(125) The investigation has shown that the quantities of kegs which the major users effectively purchased following a tender rarely correspond to the quantities initially sought via that tender. While the proportions vary from tender to tender and between the major users, on average, the major users purchased less than 60 % of the quantities originally sought through the tenders over the period considered. This is due to the particular way this market operates, in particular linked to the modalities and follow-up of the tenders by the users, as explained below in Section 5.1, whereby, notably, the users were not under any contractual obligation to purchase the quantities actually tendered.

(126) The Commission therefore sought to verify whether such estimate of imports of the product concerned into the Union by the Complaint was accurate and, in case it was not, to estimate the imports quantities in a more accurate manner. For that purpose, it requested data of all shipments under the two CN codes from customs authorities of six EU Member States ('MS') with the highest imports of the above two CN codes over the period considered, either from China, or from the whole world: Belgium, Czechia, France, Germany, the Netherlands and Poland. Belgium, France, Germany, and the Netherlands were among top five countries with biggest imports in both categories, while Poland was among top five MS with the biggest volume of imports from China, and Czechia with the biggest volume when looking at imports from the rest of the world. These six Member States together represented 73 % of EU imports from China and 66 % of worldwide imports over the period considered.

(127) The Commission analysed the received data and, based on the description of each shipment, it calculated a lower and an upper figure of what could reasonably be considered as imports of the product concerned into the six Member States. In particular, the shipments which were described as '(beer) kegs' were aggregated to form the lower figure, while the ones that had a description consistent with kegs characteristics, were aggregated to form the upper one. In that context, shipments which were described as something else, such as feedthroughs, buckets, gas tanks, boilers, cans, tin boxes, etc., or were incompatible with kegs characteristics, were discarded. In most cases, the customs

authorities would not register the units (number of kegs) in each shipment, but only the weight of such shipment. In those cases, the Commission would rely on the conversion rate of 1 keg = 10 kg ([50]) to calculate the number of kegs. The resulting upper and lower figures for each year were then adjusted by the factor of 0,73, i.e. the percentage which the six Member States represent in the total Union imports of the two CN codes from China, to calculate a full figure of the import quantities of kegs from China into the Union. The results of that analysis are shown in Table 4 below.

Table 4

Imports into the Union based on detailed customs data

Pieces of kegs	2018	2019	2020	IP
Kegs imports – lower figure	217 744	254 996	139 684	136 638
Index	*100*	*117*	*64*	*63*
Kegs imports – upper figure	602 010 ([51])	430 208	381 958	370 107
Index	*100*	*77*	*68*	*66*

Source: detailed transaction data from customs authorities of Belgium, Czechia, France, Germany, the Netherlands, and Poland, adjusted by the factor of 0,73.

(128) The above figures confirmed that the methodology used in the complaint was not the most appropriate to quantify imports of the product concerned into the Union.

(129) In addition, the Commission reached out to the remaining four non-sampled cooperating exporting producers to request their sales data for the entire period considered. All of them provided the requested unverified data that were aggregated with the verified sales quantities declared by the two sampled exporting producers in their questionnaire replies, resulting in the import quantities summarised in Table 5 below.

Table 5

Total export quantity declared by sampled and non-sampled cooperating exporting producers

Pieces of kegs	2018	2019	2020	2021
Total export quantity declared by sampled and non-sampled exporting producers	[600 000 – 675 000]	[350 000 – 425 000]	[200 000 – 275 000]	[100 000 – 175 000]
Index	*100*	*58*	*36*	*20*

Source: Questionnaire replies of sampled exporting producers and unverified data provided by non-sampled cooperating exporting producers in China.

([50]) Since the only available unit of quantity in Comext and Commission Surveillance databases is weight, the conversion of quantities from tonnes/kilograms into units (number of kegs) has been done throughout the investigation under the formula 1 keg=10 kg when relying on those databases. This was the conversion rate used in the complaint and the Commission further analysis confirmed that 10 kg is approximately the average weight of a keg on the market.

([51]) The upper figure for the year 2 018 differs from the value found in the Note to the File from 2 September 2022. This is due to the clerical error identified in aggregation of data from customs authorities that was subsequently corrected.

(130) In view of the discrepancies of the available data, on 2 September 2022, the Commission published a Note to the File indicating the import quantities collected as per Tables 4 and 5 as well as their underlying different methodologies, and invited interested parties to comment. The Commission also reached out to the major users despite their initial non-cooperation, requesting the data on their suppliers and purchase volumes to try and validate the figures received by the exporting producers in Table 5. Only three out of five major users provided the requested data (see further below at recital (136)). The only comments on the note were submitted by the Complainant on 12 September 2022.

(131) The first claim put forward by the Complainant was that the estimation of imports in Table 4 based on the customs data analysis still missed a share of Chinese imports. It referred for instance to the fact that import statistics into other Member States important for consumption of beer and kegs, such as Romania and Spain, were missing, thereby underestimating the totals.

(132) Second, the Complainant claimed that the figures reported by the cooperating exporting producers in Table 5 did not fully reflect the volumes imported in the Union during the period considered because of the limited cooperation of the exporting producers. In its submission, the Complainant claimed that the cooperation rate of exporting producers was only 28 %.

(133) Third, the Complainant claimed that the information on consumption obtained by the three major users only showed a partial picture of the Union consumption of kegs due to the small- and medium-sized breweries not being taken into account and the limited cooperation from users.

(134) The Commission carefully considered all these comments by the Complainant. With regard to the first claim, while the adjustment of the import statistics of the six Member States by the factor of 0,73 as explained in recital (127) was used to determine the remaining imports from the other Member States, it cannot be ruled out at this stage that the actual import quantities into other Member States such as Romania and Spain are underestimated.

(135) As for the second claim, as explained in recital (111), the investigation has provisionally shown that the level of cooperation is low and the cooperating exporting producers represent 32 % of imports of kegs from China in the IP. Therefore, at this stage of the investigation, it cannot be excluded that there are other exporting producers or exporters in China selling to the Union throughout the period considered, in addition to the cooperating exporters.

(136) With regard to the third claim and the very low cooperation by users, the Commission noted that, out of the five major users, which represent around 50 % of the user market, only three users (AB InBev, Asahi, and Molson Coors) provided the requested data. Furthermore, only one of these three users (AB InBev) purchased kegs from Chinese suppliers. In addition, as also specified below in Section 5.1, the remaining 50 % of the user market, composed mainly of smaller breweries, did not cooperate with the investigation.

(137) In light of these comments and considerations, the Commission further noted that the purchased quantities reported by the only cooperating user that sources kegs from China were well below the Union sales reported by the corresponding exporting producers. Furthermore, the Commission considered that there were other exporting producers that did not cooperate with the investigation, and that the figures submitted by the non-sampled cooperating exporting producers were not verified as those producers were not sampled.

(138) On balance, in light of all these elements and in particular contradictory data obtained from users and the very low cooperation by the exporting producers and by the users, whose data on purchases would be instrumental to double-check the quantities reported be the cooperating exporting producers, the Commission provisionally considered that the most appropriate methodology to quantify imports had to be based on the official import statistics in Table 4. Furthermore, given the comments submitted by the industry that even the upper figure of the data based on statistics would probably be underestimated, , the Commission provisionally considered that the upper figures obtained from statistics were the most appropriate to calculate the level of imports at this provisional stage.

(139) To gain additional assurance of the appropriateness of this methodology, the Commission subsequently examined the statistics on imports of kegs at TARIC code level, available from the initiation of this investigation in Surveillance database, to see how big of a share imports of kegs make in the total imports of products under both relevant CN codes. The average share of imports of products at TARIC code level (i.e., imports of kegs) in the imports of all the products at the relevant CN codes' level for the period 13 May 2022 – 6 December 2022 was consistent with the average share of imports of kegs in the CN codes which the Commission established for the period considered.

(140) In order to further check the appropriateness of this methodology, the Commission intends to contact again the major importers identified in the complaint to further refine its assessment of import quantities over the period considered. The Commission will also seek to collect more information concerning the small breweries after provisional stage.

(141) Moreover, the Commission intends to collect post-initiation data from the cooperating sampled and non-sampled exporting producers to reconcile them with the more precise official import statistics available for the post-initiation period. The Commission also intends to verify the import data of the non-sampled cooperating producers and request from the customs authorities of Romania and Spain the detailed customs data on the relevant CN codes to refine the actual import data further.

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

(142) As explained in Section 4.3.1 above, the Commission established the volume of imports on the basis of official customs statistics from Member States. The market share of imports was established as a proportion of total reported imports from China in total Union consumption (as established in Section 4.2 above).

(143) Imports into the Union from the country concerned developed as follows:

Table 6

Import volume (pieces) and market share

	2018	2019	2020	IP
Volume of imports from the country concerned (pieces)	602 010	430 208	381 958	370 107
Index	*100*	*71*	*63*	*61*
Market share (%)	17	17	21	31
Index	*100*	*97*	*119*	*179*

Source: Customs statistics from Member States adjusted as explained in Section 4.3.1.

(144) As the table above demonstrates, the volume of imports from China decreased by 39 % during the period considered. Such decreasing volume of imports followed the overall decreasing trend of the consumption of kegs during the period considered (see above Table 2), although to a lesser extent, and in any event significantly less pronounced than the decreasing trend of sales of the Union industry (see below Table 9).

(145) These decreases must be contextualised within the prevalent market situation in 2020 and the IP, namely, a significant decrease in demand for kegs during the Covid-19 pandemic. Within such a shrinking market, imports of kegs decreased by a significantly smaller margin than Union industry's sales. Thus the market share of imports from China, due to their lower prices, has constantly increased over the period considered (by 79 % over the period considered). During the IP, the Chinese market share was quite substantial at 31 %.

4.3.3. *Prices of the imports from the country concerned: price undercutting and price suppression*

(146) In view of the difficulties to establish prices per unit on the basis of official statistics, the Commission established the prices of imports on the basis of the data provided by the cooperating exporting producers. Price undercutting of the imports was established based on the questionnaire replies by the sampled Union producers and Chinese exporting sampled producers.

(147) The average price of imports into the Union from the country concerned developed as follows:

Table 7

Import prices (EUR/ piece)

	2018	2019	2020	Investigation period
China	43,13	37,34	38,40	43,62
Index	*100*	*87*	*89*	*101*

Source: Cooperating Chinese exporting producers.

(148) Import prices from China decreased, respectively, by 13 % and 11 % in 2019 and 2020 and started increasing again in 2020 and the IP reaching back the level of 2018.

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

— the weighted average sales prices per product type of the sampled Union producers charged to unrelated customers on the Union market, adjusted to an ex-works level, and

— the corresponding weighted average prices per product type of the imports from the sampled cooperating Chinese exporting producers to the first independent customer on the Union market, established on a cost, insurance, freight (CIF) basis, with appropriate adjustments for customs duties and post-importation costs.

(150) The price comparison was made on a type-by-type basis, duly adjusted where necessary, and after deduction of rebates and discounts. Almost the entirety of sales by both exporting producers and the Union industry were made directly to final users (that is, breweries), and therefore the sales channels and the level of trade were the same on both sides. The result of the comparison was expressed as a percentage of the sampled Union producers' theoretical turnover during the investigation period. It showed a weighted average undercutting margin of between 11,9 % and 14 % by the imports from the country concerned on the Union market.

(151) In addition to price undercutting, there was also significant price suppression within the meaning of Article 3(3) of the basic Regulation. Due to the significant price pressure caused by the low-priced dumped imports from Chinese exporting producers, the Union industry was unable to raise the prices throughout the IP in line with the development of costs of production and in order to achieve a reasonable level of profit.

(152) As shown in Table 11 below, the average EU sales price decreased by almost 10 % over the period considered. At the same time, the cost of production increased by 16 % over the same period, thus the sales price was significantly below the cost of production. Especially in 2020 and over the IP, the cost of production increased substantially, while the price had to be kept stable because of the price pressure by Chinese exports. On the contrary, price levels and resulting profits in export markets not affected by dumped imports or where measures have been imposed to restore fair trade were on average 22 % higher than Union industry's sales prices on the Union market (+ 29 % in the IP) (see recital (196)).

(153) This situation had a clear impact on the Union industry profitability, as shown in Table 14 below. After starting at 12 % in 2018, profitability decreased sharply for the rest of the period, especially in 2020 and during the IP.

(154) The development of these three indicators clearly show that the industry was subject to strong pricing pressure from the Chinese dumped imports, which forced it to sell at very low prices below cost of production. The details of particularities of the market situation, in particular with regard to the price pressure suffered by the Union industry in the selling process, is explained below at Section 5.1. This caused a clear price suppression for the Union industry.

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

4.4.1. *General remarks*

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

(156) As mentioned in recital (7), sampling was used for the determination of possible injury suffered by the Union industry.

(157) For the injury determination, the Commission distinguished between macroeconomic and microeconomic injury indicators. The Commission evaluated the macroeconomic indicators on the basis of data contained in the reply to the macro-questionnaire provided by the Complainant. The data related to all Union producers. The Commission evaluated the microeconomic indicators based on data contained in the questionnaire replies from the sampled Union producers. The data related to the sampled Union producers. Both sets of data were found to be representative of the economic situation of the Union industry.

(158) 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.

(159) The microeconomic 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

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

Table 8

Production, production capacity and capacity utilisation

	2018	2019	2020	Investigation period
Production volume (Pieces)	5 132 261	3 698 684	1 939 361	1 926 200
Index	*100*	*72*	*38*	*38*
Production capacity (measuring unit)	6 542 683	6 628 049	6 786 585	6 786 585
Index	*100*	*101*	*104*	*104*

Capacity utilisation (%)	78	56	29	28
Index	*100*	*71*	*36*	*36*

Source: Macro questionnaire provided by the complainant.

(161) During the period considered, the production volume decreased by 62 %. The production followed closely the variation in consumption: a first drop in demand in 2019 (by 23 %) and further and more pronounced drop in demand in 2020 and 2021 (Covid-19 outbreak).

(162) Production capacity slightly increased by 4 % over the period considered. This is due to efficiency gains in procedures and staff allocation operated by the Union industry in its production lines over the period considered.

(163) The two above-mentioned trends (decrease in production, increase in capacity) led to a significant decrease in the capacity utilisation (– 64 %). During the investigation period, the capacity utilisation rate reached a very low level (28 %).

4.4.2.2. Sales volume and market share

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

Table 9

Sales volume and market share

	2018	2019	2020	Investigation period
Sales volume on the Union market (Pieces)	2 875 573	2 124 518	1 479 302	822 777
Index	*100*	*74*	*51*	*29*
Market share (%)	83	83	79	69
Index	*100*	*101*	*96*	*83*

Source: Macro questionnaire provided by the complainant.

(165) Sales volume of the Union industry on the Union market decreased steadily (by 71 %) over the period considered, at a trend steeper than the development of consumption.

(166) Market share of the Union industry dropped from 83 % in 2018 to 69 % in the IP, a decrease of 14 percentage points, due to the significant price pressure of the Chinese imports, as explained in section 4.4.3.1 below, that constantly gained market share over the period considered.

4.4.2.3. Growth

(167) The demand and production of kegs followed a decreasing trend over the period considered. In the context of decreasing consumption, the Union industry lost significant sales volumes and market share and it maintained a reduced amount of sales only at the expense of its sales prices, as explained below in section 4.4.3.1.

4.4.2.4. Employment and productivity

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

Table 10

Employment and productivity

	2018	2019	2020	Investigation period
Number of employees	960	822	538	481
Index	100	86	56	50
Productivity (Pieces/ employee)	5 349	4 497	3 606	4 008
Index	100	84	67	75

Source: Macro questionnaire provided by the complainant.

(169) Employment in the sector followed the same trend as the production and the consumption on the Union market and dropped dramatically by 50 % over the period considered. Given the above, in a situation where production decreased by 62 % over the period considered, the productivity fell. Despite the reduction in employment it dropped by 33 % over the period considered and it recovered only partially during the IP thanks to some efficiency gain.

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

(170) All dumping margins were significantly above the de minimis level. The impact of the magnitude of the actual margins of dumping on the Union industry was substantial, given the prices of imports from the country concerned.

(171) This is the first anti-dumping investigation regarding the product concerned. Therefore, no data were available to assess the effects of possible past dumping.

4.4.3. *Microeconomic indicators*

4.4.3.1. Prices and factors affecting prices

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

Table 11

Sales prices in the Union

	2018	2019	2020	Investigation period
Average unit sales price in the Union on the total market (EUR/ piece)	56	55	51	51
Index	*100*	*98*	*90*	*91*
Unit cost of production (EUR/ piece)	55	59	63	64
Index	*100*	*107*	*114*	*116*

Source: Questionnaire replies from the sampled Union producers.

(173) The sales prices decreased by 2 % between 2018 and 2019 before decreasing steeply in 2020 by 8 % and remaining at about the same level in the IP. Overall the average Union industry's sales prices decreased by 9 % during the period considered.

(174) During the same period considered, unit costs of production increased by 16 %. This was linked mostly to the increase of the fixed costs, which followed the drop in the production volume. To counter this, during the years affected by the Covid-19 lockdowns the Union industry managed to decrease its fixed costs by over 20 %. Despite this, the impact of the proportionally higher incidence of fixed costs in a period of low capacity utilisation was significant, as the weight of such costs out of the overall costs of production went from 13 % in 2018 to 23 % in the IP. Over the period considered the Union industry decreased its employment as per Table 10 and labour costs yielded by the dismissals during the Covid-19 period as show at Section 4.4.3.2.

(175) Sales prices and cost of production followed a divergent trend. As explained above at Section 4.3.3 and below at Section 5.1, the Union industry was not able to raise its prices to sustainable levels to cover the increased cost of production and the low capacity utilization as the price negotiation in the market was significantly affected by low-priced and dumped imports from China.

4.4.3.2. Labour costs

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

Table 12

Average labour costs per employee

	2018	2019	2020	Investigation period
Average labour costs per employee (EUR)	48 510	45 157	50 218	52 988
Index	*100*	*93*	*104*	*109*

Source: Questionnaire replies from the sampled Union producers.

(177) The average labour cost per employee decreased in 2019, followed by an increase in 2020 and in the IP. However, as shown in Table 10, at the same time employment decreased by 54 %.

4.4.3.3. Inventories

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

Table 13

Inventories

	2018	2019	2020	Investigation period
Closing stocks (Pieces)	308 350	210 370	157 417	128 525
Index	*100*	*68*	*51*	*42*
Closing stocks as a percentage of production	6	6	8	7
Index	*100*	*95*	*135*	*111*

Source: Questionnaire replies from the sampled Union producers.

(179) Stocks decreased by 58 % over the period considered. This was linked to the decrease of the production and sales. During the period considered, stocks as a percentage of production overall increased by 11 %, as the industry had to maintain some volume of activity and was therefore not able to reduce production in line with the decrease of sales. In any case, given that the majority of the production was based on orders and customers specifications, inventories do not constitute an important indicator of injury.

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

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

Table 14

Profitability, cash flow, investments and return on investments

	2018	2019	2020	Investigation period
Profitability of sales in the Union to unrelated customers (% of sales turnover)	12	5	- 18	- 9
Index	*100*	*42*	*- 144*	*- 73*
Cash flow (EUR)	26 413 388	17 979 438	- 4 762 380	- 2 257 500
Index	*100*	*68*	*- 18*	*- 9*
Investments (EUR)	11 655 450	5 408 642	2 536 354	1 220 214
Index	*100*	*46*	*22*	*10*
Return on investments (%)	65	14	- 35	- 19
Index	*100*	*21*	*- 54*	*- 29*

Source: Questionnaire replies from the sampled Union producers.

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

(182) Over the period considered, profits decreased by 58 % in 2019, before dropping steeply and turning into double-digit losses in 2020. It partially recovered in 2021 but still remained negative. Overall, profit decreased by – 173 % over the period considered. In the context of the sudden drop in demand linked to the Covid-19 pandemic, the increased competition of low-priced Chinese exports, as explained below in section 5.1, forced the Union industry to decrease its prices in a period of increasing cost of production, as explained in section 4.4.3.1, and led to significant losses.

(183) The net cash flow is the ability of the Union producers to self-finance their activities. The trend in net cash flow developed in a similar manner to profitability: a drastic fall in 2019-2020 followed by a partial recovery in the IP, yet remaining negative.

(184) The return on investments is the profit in percentage of the net book value of investments. It developed in a similar manner to profitability: a drastic fall by 129 % over the period considered to the negative values.

(185) Given the drop in profitability, cash flow and return on investment, the sampled Union producers' ability to raise capital was severely affected.

4.4.4. *Conclusion on injury*

(186) The main macro-indicators showed a negative trend during the period considered: Union sales volume dropped by 71 %, production by 62 %, employment by 50 %.

(187) A similar picture can be drawn as regards the micro-indicators. Profitability of sales in the Union (from + 12 % to - 9 %), sales prices (- 9 %), as well as cash flow (- 109 %) all deteriorated significantly.

(188) Against a background of decreased consumption due to Covid-19, while cost of production of the Union industry increased by 16 %, import prices from China were consistently and significantly below Union industry prices and costs since 2018.

(189) Chinese exporters' import volumes decreased by 39 % over the period considered. However, at the same time the decrease in consumption was far more pronounced (by 66 %). As a result Chinese exports increased their market share by 79 %, from 17 % in 2018 to 31 % in the IP, and their prices significantly undercut the Union industry's prices throughout the whole period considered. The undercutting margin was on average 13,1 % during the IP, as set out above in section 4.3.3.

(190) The low-priced Chinese dumped imports also caused significant price suppression for the Union industry in view of the underselling margins which ranged from 52,9 % to 58,8 %. The Union industry was unable to increase its prices in line with the increase of cost of production and was thus forced in a dire profitable situation to preserve, at least partially, its sales quantity.

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

5. **CAUSATION**

(192) In accordance with Article 3(6) of the basic Regulation, the Commission examined whether the dumped imports from the country 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. These factors were the Covid-19 pandemic affecting the Union consumption and the export performance of the Union industry. The Commission ensured that any possible injury caused by factors other than the dumped imports from the country concerned was not attributed to the dumped imports.

5.1. **Effects of the dumped imports**

(193) The volume of imports from China decreased by 39 % over the period considered, from 602 010 pieces in 2018 to 370 107 pieces in 2021; however, during the same period, their market share gained 14 percentage points reaching 31 % in the investigation period, causing injury to the Union industry that, in the same period, had its sales volume dropping by 71 %.

(194) Furthermore, these imports were made at prices significantly lower than those of the Union industry over the whole period considered. The Union industry had no choice but to follow the low prices set by the Chinese producers to preserve a minimum sales volume in a period of dropping consumption and increasing production costs, as explained above in section 4.4.3.1. This in turn resulted in a profound profitability drop for all sampled Union producers from profits (of + 12 % in 2018) to heavy losses (– 9 % in 2021), and the consequent deterioration of other financial indicators such as return on investment and cash flow. This price suppression, as explained in Section 4.3.3, was clearly due to the behaviour of the Chinese exporting producers offering dumped kegs on the Union market.

(195) In a significantly smaller market the Union industry sales went from 2,8 million kegs in 2018 to 800 000 in the IP. Without lowering its prices, the Union industry would have been at risk of losing even this limited amount of sales that would have resulted, for some of the Union producers, in a complete stop of their production.

(196) Union exports, detailed in section 5.2.2, show what a normal situation would be in terms of price levels and resulting profits in export markets not affected by dumped imports or where measures have been imposed to restore fair trade, e.g. the USA, the main export market for the Union producers, where kegs originating in China are subject to anti-dumping measures since 2019. Over the period considered, the landed prices (including transport related costs and import duties) of the Union industry, were on average 22 % higher than its sales prices on the Union market (+ 29 % in the IP) and constantly above its cost of production, except for 2020, the year most significantly affected by the Covid-19 pandemic. These prices are representative of a market on which fair trade has been restored by anti-dumping measures against Chinese imports and are therefore a reasonable proxy for what prices could have been on the Union market without the price suppression described below in recitals (197) to(209).

(197) The Union market is mainly split between two main categories of users for both the Union producers and the Chinese exporting producers, i.e., the small and mid-size independent breweries (which account for around 40 % of the sales) and the major beer conglomerates (which account for more than 50 %).

(198) Small and mid-size independent breweries mostly buy kegs according to their needs in medium and short period. The breweries contact several kegs producers asking for a quote for the requested quantity and a delivery time. This is a very important segment for the Union industry, where the geographical proximity and the delivery time could constitute an advantage. This segment of users did not cooperate with the investigation. Nevertheless, the Union industry provided evidence that several orders were lost to the low-priced Chinese offers for this segment. This forced the Union producers to significantly reduce their prices to remain competitive.

(199) The other half of the market is characterized by the presence of the five major users, accounting for over 50 % of the Union industry's sales in the Union (out of this five the major two, AB InBev and Heineken, are believed to have a combined global share in the beer market of above 50 %/60 %) and at least 55 % of the sales of the two sampled Chinese exporting producers. The Union industry demonstrated that those users organised their kegs purchases for the following year through a bidding process via private tenders. As for the sales to the independent breweries, also the tendering process forced competitors to minimise their prices and the presence of the Chinese exporting producers bidding at very low prices pushed the Union industry to match those low prices and prevented them to pass their cost increases on their customers.

(200) Regarding the tendering process, the investigation showed that this was conducted by the major users in a peculiar way. The tender conditions were specific in terms of prices and maximum quantities sought. There was no contractual obligation for the buyer to purchase the quantity of kegs tendered, whereas there was a contractual obligation for the supplier to supply the tendered quantity at a tendered price. In fact, the actual purchased quantities rarely corresponded to the quantities initially sought on the given tender. At the same time, the tender winners (i.e. the suppliers of kegs) were obliged to respect the tendered delivery quantities at a given price, not being able to take into account for instance the changes of costs of production.

(201) Over the period considered the cooperating users organized an average of seven tenders per year. The quantities ultimately purchased based on these tenders vary from tender to tender and corresponded, on average, to less than 60 % of the quantities tendered. In addition, the price agreed during the tender procedure was used by the users as a starting point for any subsequent price negotiation for spot sales.

(202) The tender process, which worked with red, yellow and green lights to advise any participant (including Union producers and Chinese exporters) how high or low was its offer compared to the other participants, was used as a tool to minimise the prices. The presence of the Chinese exporters, with very low-price bids, forced the Union industry to lower their prices to unsustainable levels. Union industry's prices for sales via tenders were on average 10 % lower than the other sales in 2020 and the IP, while the contract signed at the end of the tendering procedure concerned only potential purchase volumes without any certainty to receive an order. This is confirmed by the significant undercutting and underselling levels established in the investigation.

(203) In addition, AB InBev in its submission 20 June 2022, referred to 'recent pricing from the [Union] keg suppliers that [has been] competitive against Chinese supplier pricing' in the IP and 2022. This further confirms that Union producers have decreased their prices compared to the earlier years of the period considered to remain competitive with Chinese prices.

(204) Another related feature of the tendering process was that there was a substantial amount of sales concluded eventually outside the actual tenders by these subsequent price negotiation relying on this 'lights system'. This is shown by the quantities sold by the Union industry via tenders, which was very low throughout the period considered. This level shrank from above 30 % of their total sales in the period 2019-2020, to less than 16 % in the IP. In practice, the users exploited this peculiar tendering process and the low-priced, dumped Chinese offers to push the EU industry prices down to the Chinese level, eventually agreeing on these prices outside the framework of the tender.

(205) The data provided by the cooperating users shows that the Chinese exporting producers won on average 30 % of the quantities tendered over the period considered. However, this is a conservative estimate since evidence on file shows that one of the biggest non-cooperating users (Heineken) accounted for at least 30 % of the quantities exported by the two sampled Chinese producers during the IP.

(206) In any event, as explained above, whether the sales were formally concluded under a tender or not did not make any difference as concerns the effects and causation of dumped Chinese prices on the EU industry prices and injurious situation.

(207) As explained above in section 4.3.3, the Chinese prices decreased in 2019 and 2020, as compared to 2018, and increased again during the IP, but only reaching again the 2018 levels. Over the same period Union industry's prices dropped by 9 % while its cost of production increased by 16 %.

(208) The price pressure exerted by imports of kegs from China in both segments of the market entailed that, to maintain, at least partially, its market share, the Union industry had to decrease its sales prices despite the spike in cost of production. As a result, profitability shrank from 12 % to -9 % during the period considered and all the financial indicators deteriorated.

(209) It is therefore concluded that – in view of the concomitance in time – the deterioration of the economic situation of the Union industry coincided with a significant presence of Chinese imports at very low prices. In a context of shrinking market and increasing cost of production, the Chinese prices consistently undercut the Union industry prices and suppressed EU market price levels, establishing a genuine and substantial causal nexus between the two.

5.2. **Effects of other factors**

5.2.1. *The Covid-19 pandemic and the decrease in consumption*

(210) Imports of kegs from China at very low prices were recorded from 2018 onwards. Over the period considered, the average price of Chinese imports was on average 24 % lower than the average sales price of the Union industry. This coincided with a constant decrease of the Union industry's prices despite the increasing production costs. The fact that the decrease in consumption was further aggravated by the Covid-19 pandemic did not attenuate the causal link between the dumped imports and the injury of the Union industry. Over the period consumption decreased by 66 % and sales volume of the Union industry by 71 % while the Chinese exports decreased only by 39 %, increasing their market share from 17 % to 31 %. As discussed in recital (196) on the basis of market prices achievable on the US market, without the Chinese imports and the price pressure exerted, the Union industry would have been able to increase its prices to a more sustainable level and to cover for the increased cost of production.

(211) The substantial decrease of the consumption and the capacity utilisation significantly impacted the Union industry performance. However, as explained above in section 4.4.3.1, even when the Union industry managed to substantially decrease their fixed costs, its share on the total costs increased to 23 %. At the same time, the industry also managed to reduce other structural costs such as employment during the Covid-19 period. This management of fixed and other structural costs during this period allowed a minimisation of the impact of such costs on its performance, as also explained above, but could be compensated only partially due to the significant price suppression caused by the Chinese imports.

5.2.2. *Export performance of the Union industry*

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

Table 15

Export performance of the sampled Union producers

	2018	2019	2020	Investigation period
Export volume (pieces)	2 364 368	1 827 572	547 427	1 124 371
Index	*100*	*77*	*23*	*48*
Average EXW price (EUR/piece)	66,04	62,18	58,86	63,05
Index	*100*	*94*	*89*	*95*
Average landed ([52]) price (EUR/piece)	68,34	64,87	60,83	66,28
Index	*100*	*95*	*89*	*97*

Source: Questionnaire replies from the sampled Union producers.

(213) During the period considered, Union industry's exports decreased by 52 %.

(214) Between 2018 and 2020 the export performance of the Union industry showed somewhat similar trends as the development of volumes of sales of the Union industry on the Union market. Both Union and export sales volume of the Union industry decreased during this first part of the period considered which was the most affected by Covid 19 pandemic. However, the volume of export sales, in relative terms, decreased less than the sales to the Union market. Furthermore, export performance of Union industry clearly started recovering as soon as Covid-19 restrictions were lifted with volumes of export sales more than doubling from 2020 to 2021. Moreover, throughout the period considered Union industry export sales prices were significantly higher than the sales price on the Union market and constantly above its cost of production, except for 2020, the year most significantly affected by the Covid-19 pandemic, which covers also half of the IP. On that basis, the Commission concluded that the temporary decrease in export performance did not contribute to the injury as the export prices level was sufficient to allow the Union industry to be profitable on the majority of its export sales.

5.3. **Conclusion on causation**

(215) The Chinese export prices were significantly lower than Union industry's prices and costs since the beginning of the period considered in 2018. The investigation showed a weighted average undercutting margin of 13,1 %. This increasing market presence at very low prices was to the detriment of the Union industry that was obliged to

([52]) EXW price including transport related costs and import duties applicable on the US market

decrease sales prices during the period considered to maintain at least a limited amount of sales in the market during and after the Covid-19 pandemic. This led to the negative development in the economic situation of the Union industry.

(216) The Commission distinguished and examined the effects of all known factors on the situation of the Union industry from the injurious effects of the dumped imports. The effect of the Covid-19 pandemic and the related drop in the Union and global consumption of kegs weighed negatively on the Union industry's developments but was considered as a temporary factor with limited impact. The situation of the Union industry deteriorated already before the Covid-19 pandemic and continued to do so until the end of the period considered.

(217) On the basis of the above, the Commission concluded that the dumped imports from the country concerned caused material injury to the Union industry and that the other factors, considered individually or collectively, did not attenuate the causal link between the dumped imports and the material injury.

6. **LEVEL OF MEASURES**

(218) To determine the level of the measures, the Commission examined whether a duty lower than the margin of dumping would be sufficient to remove the injury caused by dumped imports to the Union industry.

6.1. **Injury margin**

(219) The injury would be removed if the Union Industry were able to obtain a target profit by selling at a target price in the sense of Articles 7(2c) and 7(2d) of the basic regulation.

(220) In accordance with Article 7(2c) of the basic Regulation, for establishing the target profit, the Commission considered the following factors: the level of profitability before the increase of imports from the country concerned, the level of profitability needed to cover full costs and investments, research and development (R&D) and innovation, and the level of profitability to be expected under normal conditions of competition. Such profit margin should not be lower than 6 %.

(221) The sampled Union producers proposed in their questionnaire replies that the target profit should be set between 12 % and 20 % as, in their view, this is the level needed to finance the necessary investments in processes and products and to ensure the long term viability of the Union industry. The industry also showed that in the years in which there were normal conditions of competition their average profitability was 15 %.

(222) In light of this evidence, the Commission provisionally decided to use the profit margin of 12 %, which is at the low end of the range of the figures as detailed in the previous recital, thus adopting a very conservative approach.

(223) In view of the above considerations, the profit margin was provisionally established at 12 % in accordance with the provision of Article 7(2c).

(224) As regards the level of investments, research and development (R&D) and innovation during the period considered, the Commission verified the information provided and concluded that the difference between investments, R&D and innovation ('IRI') expenses under normal conditions of competition as provided by the EU Industry and verified by the Commission was already included in the target profit of 12 %.

(225) On this basis, the Commission calculated a non-injurious price per piece for the like product of the Union industry by applying the above-mentioned target profit margin (see recital (223)) to the cost of production of the sampled Union producers during the investigation period on a type-by-type basis.

(226) The Commission then determined the injury margin level on the basis of a comparison of the weighted average import price of the sampled cooperating exporting producers in the country concerned, 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.

(227) The injury elimination level for 'other cooperating companies' and for 'all other companies' is defined in the same manner as the dumping margin for these companies.

Country	Company	Dumping margin	Injury margin
People's Republic of China	Penglai Jinfu Stainless Steel Products Co., Ltd	77,1 %	58,8 %
	Ningbo Major Draft Beer Equipment Co., Ltd	65,3 %	52,9 %
	Other cooperating companies	72,1 %	56,3 %
	All other companies	91,0 %	112,0 %

6.2. **Conclusion on the level of measures**

(228) Following the above assessment, provisional anti-dumping duties should be set as below in accordance with Article 7(2) of the basic Regulation:

Country	Company	Provisional anti-dumping duty
People's Republic of China	Penglai Jinfu Stainless Steel Products Co., Ltd	58,8 %
	Ningbo Major Draft Beer Equipment Co., Ltd	52,9 %
	Other cooperating companies	56,3 %
	All other companies	91,0 %

7. **UNION INTEREST**

(229) Having decided to apply Article 7(2) of the basic Regulation, the Commission examined whether it could clearly conclude that it was not in the Union interest to adopt measures in this case, despite the determination of injurious dumping, in accordance with Article 21 of the basic Regulation. 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**

(230) There are eight companies producing kegs in the Union. They employ over 400 workers directly (they were more than 800 in 2018), located in Austria, Czechia, Germany, Italy and Spain.

(231) The imposition of measures would allow the Union industry to maintain its market share, increase capacity utilisation, increase prices to sustainable levels and improve profitability to levels to be expected under normal conditions of competition.

(232) The non-imposition of measures would likely lead to further deterioration of profitability, which was already negative. The non-imposition of measures could lead to the closure of production facilities and dismissals thus endangering the viability of the Union industry.

(233) The Commission therefore provisionally concluded that the imposition of provisional measures is in the interest of the Union industry.

7.2. **Interest of unrelated importers and traders**

(234) One unrelated importer, representing 1,6 % in volume of Chinese imports, submitted a sampling form and replied to the questionnaire. The average profit of the cooperating importer during the investigation period was 16 %.

(235) This importer was against the imposition of measures. It claimed that, in the light of increasing price of stainless steel and shipping, the imposition of measures would have a further negative impact on its profitability, resulting in liquidation of the company. The company also stressed that it made significant R&D investments from its own resources over the past years to develop new intellectual property, as well as investments to develop new solutions in keg production which could benefit the Union users and that the imposition of measures may end this project.

(236) The Commission concluded that it is likely the importer can pass part of the anti-dumping duty to the final users. The good profit level of the importer also mitigates the impact of the duty on the importer's viability. On balance, the very limited cooperation of only one importer in this investigation suggests the measures will not have a highly negative impact on importers overall and would thus not outweigh the positive effect of measures on Union producers.

(237) The traders/service providers that are in the business of personalisation and customisation of kegs will be able to continue this business, competing on the merits and not with the dumped imports.

7.3. **Interest of users**

(238) At initiation two users, Appie and Carlsberg, came forward but provided only limited information in their questionnaire replies. Another user, AB InBev, registered as interested party and provided comments but did not provide a questionnaire reply. These users represent breweries or brewing conglomerates.

(239) At a later stage, as explained above in section 4.3.1, the Commission contacted again the major users requesting data on their suppliers and purchase volumes. Three users (AB InBev, Asahi, and Molson Coors) provided some data, but did not provide the key questionnaire narrative.

(240) In its initial submission AB InBev opposed the imposition of measures claiming that:

— the duties would result in an increase of cost of kegs that will negatively affect the HORECA sector, which has been already significantly affected by the Covid-19 pandemic;

— the Union industry does not have sufficient capacity to supply the full Union demand of kegs.

(241) As regards the first claim, the information collected during the investigation showed that the HORECA sector do not buy kegs from the beer producers, they just buy its content (i.e. the beer). Pubs and bars pay a deposit for the kegs which is refunded when empty and returned to the beer producers. Therefore the impact of the cost of kegs on the profitability of the HORECA sector is expected to be limited.

(242) As regards the second claim, the Union industry appears to have sufficient spare capacity. At its peak, in 2018, the Union consumption was around 3,2 million kegs while the Union industry has a total production capacity of almost 6,8 million kegs. Even considering the export sales, the Union industry has still almost 2 million kegs of spare capacity.

(243) Given the long lifetime (typically 30 years) and its refillable nature, the cost impact of kegs on the beverage industry is minimal.

(244) The Commission therefore provisionally concluded that negative impacts of measures on users are expected to be limited and not to outweigh the positive effect of measures on Union producers.

7.4. **Conclusion on Union interest**

(245) On the basis of the above, the Commission concluded that there were no compelling reasons to suggest that it was not in the Union interest to impose measures on imports of stainless steel refillable kegs originating in the People's Republic of China at this stage of the investigation.

8. **PROVISIONAL ANTI-DUMPING MEASURES**

(246) Based on the conclusions reached by the Commission on dumping, injury, causation, level of measures and Union interest, provisional measures should be imposed to prevent further injury being caused to the Union industry by the dumped imports.

(247) Provisional anti-dumping measures should be imposed on imports of stainless steel refillable kegs originating in the People's Republic of China in accordance with the lesser duty rule in Article 7(2) of the basic Regulation. The Commission compared the injury margins and the dumping margins. The amount of the duties was set at the level of the lower of the dumping and the injury margins.

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

Country	Company	Provisional anti-dumping duty
People's Republic of China	Penglai Jinfu Stainless Steel Products Co., Ltd	58,8 %
	Ningbo Major Draft Beer Equipment Co., Ltd	52,9 %
	Other cooperating companies	56,3 %
	All other companies	91,0 %

(249) The individual company anti-dumping duty rates specified in this Regulation were established on the basis of the findings of this investigation. Therefore, they reflect 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 country concerned and produced by the named legal entities. Imports of the product concerned produced by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, should be subject to the duty rate applicable to 'all other companies'. They should not be subject to any of the individual anti-dumping duty rates.

(250) 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.

(251) To minimise the risks of circumvention due to the 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) of this Regulation. Imports not accompanied by that invoice should be subject to the anti-dumping duty applicable to 'all other companies'.

(252) While presentation of this invoice is necessary for the customs authorities of the Member States to apply the individual rates of anti-dumping duty to imports, it is not the only element to be taken into account by the customs authorities. Indeed, even if presented with an invoice meeting all the requirements set out in Article 1(3) of this Regulation, the customs authorities of Member States must carry out their usual checks and may, like in all other cases, require additional documents (shipping documents, etc.) for the purpose of verifying the accuracy of the particulars contained in the declaration and ensure that the subsequent application of the lower rate of duty is justified, in compliance with customs law.

(253) Should the exports by one of the companies benefiting from lower individual duty rates increase significantly in volume after the imposition of the measures concerned, such an increase in volume could be considered as constituting in itself a change in the pattern of trade due to the imposition of measures within the meaning of Article 13(1) of the basic Regulation. In such circumstances and provided the conditions are met an anti-circumvention investigation may be initiated. This investigation may, inter alia, examine the need for the removal of individual duty rate(s) and the consequent imposition of a country-wide duty.

(254) Statistics of stainless steel refillable kegs are frequently expressed in number of pieces. However, there is no such supplementary unit for stainless steel refillable kegs specified in the Combined Nomenclature laid down in Annex I to Council Regulation (EEC) No 2658/87 ([53]). It is therefore necessary to provide that not only the weight in kg or tonnes but also the number of pieces for the imports of the product concerned must be entered in the declaration for release for free circulation. Pieces should be indicated for TARIC codes 7310 10 00 10 and 7310 29 90 10, provided this indication is compatible with Annex I to Regulation (EEC) No 2658/87.

9. **REGISTRATION**

(255) As mentioned in recital (3), the Commission did not make imports of the product concerned subject to registration.

10. **INFORMATION AT PROVISIONAL STAGE**

(256) In accordance with Article 19a of the basic Regulation, the Commission informed interested parties about the planned imposition of provisional duties. This information was also made available to the general public via DG TRADE's website. Interested parties were given three working days to provide comments on the accuracy of the calculations specifically disclosed to them.

(257) Ningbo Major and Penglai Jinfu jointly submitted comments on the pre-disclosure, where they requested the Commission to refrain from applying the provisional measures. They highlighted that the target prices of some product types did not reflect the expected target prices according to their knowledge. They also claimed some product types were not part of the injury margin calculation and that a heading of a disclosure table was not properly annotated.

(258) The Commission examined the comments in detail and considered that none of them concerned the accuracy of the calculations, therefore it will consider them, together with all other submissions after the publication of the provisional measures.

(259) Regarding the units used in the disclosure table, as the exporting producers rightly noted, these are indeed pieces rather than tonnes. Moreover, some product types were not included in the injury margin calculation, because the Union industry did not produce the corresponding product types and therefore were not relevant to calculate the underselling margin.

([53]) Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 256, 7.9.1987, p. 1) as amended by Commission implementing regulation (EU) 2022/1998 of 20 September 2022 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 282, 31.10.2022, p. 1).

11. **FINAL PROVISION**

(260) In the interests of sound administration, the Commission will invite 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.

(261) The findings concerning the imposition of provisional duties are provisional and may be amended at the definitive stage of the investigation,

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is imposed on imports into the Union of kegs, vessels, drums, tanks, casks and similar containers, refillable, of stainless steel, commonly known as 'stainless steel refillable kegs', with bodies approximately cylindrical in shape, with a wall thickness of 0,5 mm or more, of a kind used for material other than liquefied gas, crude oil, and petroleum products, of a capacity of 4,5 litres or more, regardless of the type of finish, gauge, or stainless steel grade, whether or not with additional components (extractors, necks, chimes or any other component), whether or not painted or coated with other materials, currently falling under CN codes ex 7310 10 00 and ex 7310 29 90 (TARIC codes 7310 10 00 10 and 7310 29 90 10) and originating in the People's Republic of China, excluding necks, spears, couplers or taps, collars, valves and other components imported separately.

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

Country	Company	Provisional anti-dumping duty	TARIC additional code
People's Republic of China	Penglai Jinfu Stainless Steel Products Co., Ltd	58,8 %	A024
	Ningbo Major Draft Beer Equipment Co., Ltd	52,9 %	A030
	Other cooperating companies listed in Annex	56,3 %	
	All other companies	91,0 %	C999

3. The application of the individual duty rates specified for the companies mentioned in paragraph 2 shall be conditional upon presentation to the Member States' customs authorities of a valid commercial invoice, on which shall appear a declaration dated and signed by an official of the entity issuing such invoice, identified by his/her name and function, drafted as follows: 'I, the undersigned, certify that the (volume) of (product concerned) sold for export to the European Union covered by this invoice was manufactured by (company name and address) (TARIC additional code) in [country concerned]. I declare that the information provided in this invoice is complete and correct.' If no such invoice is presented, the duty applicable to all other companies shall apply.

4. The release for free circulation in the Union of the product referred to in paragraph 1 shall be subject to the provision of a security deposit equivalent to the amount of the provisional duty.

5. Where a declaration for release for free circulation is presented in respect of the product referred to in paragraph 1, the number of pieces of the products imported shall be entered in the relevant field of that declaration, provided this indication is compatible with Annex I to Regulation (EEC) No 2658/87.

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

Article 2

1. Interested parties shall submit their written comments on this Regulation to the Commission within 15 calendar days of the date of entry into force of this Regulation.

2. Interested parties wishing to request a hearing with the Commission shall do so within 5 calendar days of the date of entry into force of this Regulation.

3. Interested parties wishing to request a hearing with the Hearing Officer in trade proceedings shall do so within 5 calendar days of the date of entry into force of this Regulation. The Hearing Officer shall examine requests submitted outside this time limit and may decide whether to accept to such requests if appropriate.

Article 3

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

Article 1 shall apply for a period of six months.

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

Done at Brussels, 11 January 2023.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX

Cooperating exporting producers not sampled

Country	Name	TARIC additional code
People's Republic of China	Kingyip – Guangzhou JingYe Machinery Co., Ltd.	A031
	Ningbo Hefeng Container Manufacturer Co., Ltd.	A032
	Qingdao HenKeg Craft Beer Technology Co., Ltd.	A033
	Yantai Toptech Ltd.	A034

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION No 161/22/COL

of 6 July 2022

on aid in relation to the streetlight infrastructure in Bergen (Norway) [2023/101]

THE EFTA SURVEILLANCE AUTHORITY ('ESA'),

Having regard to:

the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 and 62,

Protocol 26 to the EEA Agreement,

the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular to Article 24,

Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'), in particular to Article 7(5) and Article 14 of Part II, and

having called on interested parties to submit their comments ([1]), and having regard to their comments,

Whereas:

I. **FACTS**

1. *PROCEDURE*

1.1. THE COMPLAINT

(1) By letter of 11 May 2017, Nelfo ('the complainant') complained about alleged State aid granted by the Municipality of Bergen ('the Municipality') in respect of streetlighting along municipal roads. Nelfo is a sectoral federation within the confederation of Norwegian Enterprise ('NHO'). It comprises electrics, IT, e-communication, system integrators and lift companies in Norway ([2]).

(2) The alleged aid beneficiary is BKK AS, acting through different subsidiaries ([3]). In the following, BKK AS, and its subsidiaries, will jointly be referred to as the 'BKK-group'.

([1]) Decision No 27/19/COL of 16 April 2019 to open a formal investigation into potential State aid granted in relation to the streetlights in Bergen (OJ C 197, 13.6.2019, p. 25), and EEA Supplement No 46, 13.6.2019, p. 1.

([2]) At the time of the adoption of this decision, information on Nelfo was available through the following link: https://www.nho.no/en/english/nho-sectoral-federations/.

([3]) Document No 855990, with enclosures filed as Document Nos 855997, 855996, 855995, 858823, 858813, 858821, and 855991. According to publicly available information from the website www.proff.no, the name of BKK AS was recently changed to Eviny AS. In view of the concerned time period, and the need to ensure consistency with the opening decision, the name BKK AS is nevertheless used in this decision. The remaining company names referred to are those used in the complaint, and in the submissions made by the Norwegian authorities and interested parties.

1.2. ADDITIONAL INFORMATION

(3) By letter dated 1 June 2017 ([4]), ESA forwarded the complaint to the Norwegian authorities. By letters dated 27 June 2017 and 5 July 2017 ([5]), the Norwegian authorities provided comments.

(4) By email of 7 September 2017, ESA invited the Norwegian authorities to provide further information ([6]). The Norwegian authorities responded by emails of 8 September 2017 ([7]) and 12 September 2017 ([8]).

(5) On 11 July 2018, ESA sent an additional information request ([9]). A video conference was held on 17 August 2018. By email of 28 February 2019, the Norwegian authorities submitted further information ([10]).

1.3. THE FORMAL INVESTIGATION PROCEDURE

(6) By Decision No 027/19/COL ('the opening decision'), ESA initiated the formal investigation procedure ([11]). At this stage, ESA had formed the preliminary view that three measures, identified in the opening decision as measures (a), (b) and (c), appeared to constitute State aid. ESA furthermore expressed doubts as to the compatibility of this potential State aid with the functioning of the EEA Agreement. The three measures are described in Section 2 below.

(7) The Norwegian authorities were invited to comment on the opening decision by 20 May 2019. Upon request, ESA extended the deadline to 5 June 2019 ([12]).

(8) By letter dated 5 June 2019, ESA received joint comments from BKK AS and Veilys AS ('BKK Veilys') ([13]). By letter of 6 August 2019, the Norwegian authorities were invited to present their observations on these comments by 6 September 2019 ([14]).

(9) The Norwegian authorities submitted their comments to the opening decision on 5 April 2020 ([15]). The comments are set out in two letters from the Municipality, dated respectively 10 May 2019 ([16]) and 3 April 2020 ([17]).

(10) ESA sent an additional request for information to the Norwegian authorities on 5 February 2021 ([18]). The Norwegian authorities submitted their reply to this request on 12 April 2021 ([19]).

([4]) Document No 858239.
([5]) Document Nos 863097, 863099, 864432, and 864434.
([6]) Document No 872926.
([7]) *Ibid.*
([8]) Document No 873252.
([9]) Document No 923689.
([10]) Document No 1058456.
([11]) The COVID-19 outbreak, and related extraordinary workload in terms of notification cases, has impacted the case handling of this complaint.
([12]) Document No 1070238.
([13]) Document No 1073541, including enclosures filed as Document Nos 1073542 and 1073543.
([14]) Document No 1082647.
([15]) Document No 1126799.
([16]) Document No 1126803.
([17]) Document No 1126801.
([18]) Document No 1178400.
([19]) The Norwegian authorities replied by email of 12 April 2021, filed as Document No 1202143. The cover letter with attachments are filed as Document Nos 1194243, 1194249, 1194179, 1194189, 1194181, 1194183, 1194199, 1194185, 1194187, 1194217, 1194191, 1194193, 1194197, 1194195, 1194255, 1194253, 1194205, 1194201, 1194203, 1194209, 1194207, 1194211, 1194213, 1194223, 1194215, 1194229, 1194219, 1194221, 1194225, 1194233, 1194227, 1194235, 1194231, 1194239, 1194251, 1194237, 1194245, 1194241, and 1194247.

2. *DESCRIPTION OF THE MEASURES*

2.1. THE INVOLVED INFRASTRUCTURE AND LEGAL ENTITIES

(11) The streetlight infrastructure along municipal roads was historically owned by a municipal unit called Bergen Lysverker. In 1996, however, Bergen Lysverker, including its assets, was acquired by BKK DA. This company was at the time owned by several municipalities, with the Municipality as the majority shareholder.

(12) BKK DA was later reorganised into BKK AS ([20]). According to publicly available information, the Municipality owns 37,75 % of the shares. Other shareholders include Statkraft Industrial Holding AS and different municipalities ([21]).

(13) Various subsidiaries of BKK AS have since been owning and operating the streetlight infrastructure along the municipal roads in Bergen. The infrastructure controlled by the BKK-group is currently owned by Veilys AS. This company also owns streetlight infrastructure along state roads, county roads and private roads.

(14) According to the Norwegian authorities, Veilys AS has neither operated nor maintained its streetlight infrastructure itself. These activities have instead been performed by a subsidiary with the name of BKK EnoTek AS ([22]).

(15) As will be described in further detail below, Veilys AS does not own the entire streetlight infrastructure along the municipal roads in Bergen. Parts of this infrastructure are owned by the Municipality.

2.2. THE MEASURES IDENTIFIED IN THE COMPLAINT

(16) Two alleged State aid measures were identified in the complaint. First, the complainant submitted that the Municipality has overcompensated companies within the BKK-group for maintenance and operation of streetlights along municipal roads (measure (a)). Second, the complaint concerned the financing by the Municipality of 12 000 new LED fixtures installed onto infrastructure owned by Veilys AS (measure (b)) ([23]).

(17) According to the complainant, measures (a) and (b) entail an ongoing breach of the State aid rules dating back to 1 January 2016. As stipulated in paragraph 18 of the opening decision, ESA has consequently limited its assessment of measures (a) and (b) to this period.

(18) The complainant considers that several suppliers would be willing to operate and maintain the streetlights for compensation. On that basis, it regards the activities comprising maintenance and operation as economic in nature ([24]).

([20]) Document No 863099, p. 1. Further information is included under points 3 and 4 below on the comments from the Norwegian authorities and interested parties.
([21]) The figures are from the website www.proff.no.
([22]) Document Nos 1126803, p. 1, and 1126801, p. 1.
([23]) See paragraphs 19 and 34 of the opening decision.
([24]) Document No 855990, p. 6.

(19) To the extent that the compensation concerns a service of general economic interest ('SGEI'), the complainant argues ([25]): First, that the presence of State aid cannot be excluded on the basis of the *Altmark*-criteria ([26]). Second, that the compensation involved exceeds the SGEI *de minimis* ceiling of EUR 500 000 ([27]). Third, that the measures fail to meet the requirements in the SGEI Decision ([28]).

(20) The complainant estimates the overcompensation for maintenance and operation to EUR 1,12 million per year. Comparable service contracts have allegedly stipulated prices of about NOK […] per light point per year ([29]).

2.3. THE ADDITIONAL MEASURE IDENTIFIED IN THE OPENING DECISION

(21) The payments from the Municipality include compensation for capital cost related to the streetlight infrastructure owned by Veilys AS. This element in the compensation mechanism was included in the formal investigation as measure (c). As stipulated in paragraph 18 of the opening decision, the assessment of measure (c) is not limited to the period from 1 January 2016.

3. *COMMENTS FROM THE NORWEGIAN AUTHORITIES*

3.1. BACKGROUND INFORMATION

3.1.1. ***The relationship between the streetlight infrastructure and the power network***

(22) The Norwegian authorities underline the close functional relationship between power networks and infrastructures used to provide streetlighting. Streetlight fixtures and connecting cables are frequently affixed to utility posts also carrying power cables. As such, the infrastructure in Bergen serves a twofold objective ([30]).

(23) There was no distinction between operating and maintaining infrastructures for power and streetlighting purposes until 1991. Along municipal roads, the operation and maintenance of such infrastructures was either carried out by municipalities or local entities owned by municipalities ([31]).

(24) With effect from 1991, however, energy markets in Norway were partly liberalised. In conjunction with this, the operation of power networks was made subject to monopoly regulation ([32]).

([25]) Document No 855990, p. 7-10.

([26]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraphs 87-93.

([27]) Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8), referred to at point 1ha of Annex XV of the EEA Agreement, see Joint Committee Decision No 225/2012, published in OJ L 81, 21.3.2013, p. 27 and EEA Supplement No 18, 21.3.2013, p. 32, as amended by Commission Regulation (EU) 2018/1923 of 7 December 2018 amending Regulation (EU) No 360/2012 as regards its period of application (OJ L 313, 10.12.2018, p. 2), see Joint Committee Decision No 266/2019 (not yet published), and Commission Regulation (EU) 2020/1474 of 13 October 2020 amending Regulation (EU) No 360/2012 as regards the prolongation of its period of application and a time-bound derogation for undertakings in difficulty to take into account the impact of the COVID-19 pandemic (OJ L 337, 14.10.2020, p. 1), see Joint Committee Decision No 68/2021 (not yet published).

([28]) Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3), referred to at point 1h of Annex XV to the EEA Agreement, see Joint Committee Decision No 66/2012 published in OJ L 207, 2.8.2012, p. 46 and EEA Supplement No 43, 2.8.2012, p. 56.

([29]) Document No 855990, p. 8.

([30]) Document No 1126801, p. 3.

([31]) Document No 1126801, p. 3.

([32]) Document No 1126801, p. 3.

(25) Under this sector-specific regime, infrastructure owners are obliged to operate their infrastructures. Other entities are prohibited from duplicating them. The operation and maintenance costs are covered by tariffs (*nettleie*) that have to comply with the regulated return set by the Norwegian Energy Regulatory Authority (NVE) ([33]).

(26) By contrast, no monopoly regulation has been established at the national level for streetlight infrastructures. For such infrastructures, the structure of ownership and conditions for operations therefore depend on local conditions. Several entities offer services related to operation and maintenance on a commercial basis ([34]).

3.1.2. ***The sale of Bergen Lysverker and regulation of future supplies***

(27) The objective of the process in 1996 was for the Municipality to sell Bergen Lysverker, including all of its assets and operations ([35]). Those assets and operations concerned, in particular, electricity production and distribution. The streetlight infrastructure was considered a minor element that could not practically be separated ([36]).

(28) In a written summary from the counsellor (*Rådmannen*) to the Bergen City Council in preparation for the decision on the sale, it was reiterated that a number of publicly owned companies had been invited to bid. The Municipality had also procured a valuation from Enskilda Securities ([37]).

(29) This valuation was accounted for in a proposal from a representative in the Bergen City Council. Taking net liabilities into account, it indicated a value between NOK 2,8 and 3,0 billion ([38]).

(30) The case before the Bergen City Council further included a memo concerning synergy effects. In this memo, it was stated that a sale would have a twofold purpose. First, the Municipality should contribute to a functional structure for the supply of electricity in the Bergen area. Second, a sale should free up capital for the Municipality based on market pricing ([39]). A number of additional considerations were also identified ([40]).

(31) In Section 6 of the sales agreement between the Municipality and BKK DA, the price to be paid for Bergen Lysverker was set to NOK 2,619 billion. This price was based on a gross price of NOK 3,124 billion before the deduction of debts and pension liabilities ([41]).

(32) A mechanism regulating the compensation for the future provision of streetlighting and related services, was included in Section 7(c) of the 1996 sales agreement ([42]). According to this mechanism, BKK DA would be free to operate the streetlights on market terms, which should entail cost coverage plus a capital cost for the committed capital equal to the rate-of-return fixed by the NVE for the regulated power grid infrastructure ([43]).

(33) The value of the streetlight network was not identified separately in the sales agreement. In accordance with its Section 6, however, BKK DA initiated a due diligence process. In the report from the accounting firm used for this purpose, the accounted value of the streetlights was set to NOK 55 million ([44]).

([33]) Document No 1126801, p. 3.
([34]) Document No 1126801, p. 3.
([35]) Document No 1194249, p. 2.
([36]) Document No 1194249, p. 4.
([37]) Document No 1194189, p. 2 (paginated 1372).
([38]) Document No 1194189, p. 2-3 (paginated 1372 and 1373).
([39]) Document No 1194189, p. 5 (paginated 1375).
([40]) Document No 1194189, p. 5 and 7 (paginated 1375 and 1376).
([41]) Document No 1194179.
([42]) Document No 1194249.
([43]) Document No 1194179. The section reads as follows in the original Norwegian wording: '[…] kjøperen står fritt til å avtale på markedsmessige betingelser drift av veilys som skal innebære kostnadsdekning + NVE rente for den kapital som er bundet.'
([44]) Document Nos 1194249, p. 3-4, and 1194183.

3.1.3. ***The subsequent contracts between the Municipality and companies in the BKK-group***

(34) The Norwegian authorities have provided contracts regulating the supply of streetlighting and related services along municipal roads in Bergen since 2012. The duration of the contracts has normally been for 2 years, with a 1-year option for prolongation ([45]).

(35) The contract for 2012 to 2014 was entered into with the company BKK Nett AS. It originally comprised 18 228 lamp points. Of these, 16 082 were controlled by the BKK-group, while 2 146 were owned by the Municipality. However, the number of lamp points was foreseen to change during the course of the contract ([46]).

(36) The regulation of the compensation is set forth in Section 7 and appendix A of the contract. The price for maintenance and operation was set to NOK […], excluding VAT, per lamp point per year. The total annual compensation for the maintenance and operation of the 18 228 existing lamp points would therefore amount to NOK […] ([47]).

(37) The compensation for capital cost was stipulated to NOK […], excluding VAT, per lamp point per year. As this element only covered the lamp points controlled by the BKK-group, it resulted in an annual compensation of NOK […] in respect of these 16 082 existing lamp points ([48]).

(38) The contract for the period 2015 to 2017 was also made with BKK Nett AS. At its inception, it comprised 18 407 lamp points. Of these, 16 058 were controlled by the BKK-group while 2 349 were owned by the Municipality ([49]).

(39) Following the same structure as the previous contract, the compensation was set out in Section 7 and appendix A of the contract. The price for maintenance and operation was set to NOK […], excluding VAT, per lamp point per year. Therefore, based on the number of existing lamp points being 18 407, the annual compensation for maintenance and operation amounted to NOK […] ([50]).

(40) The compensation for capital cost was set to the same unit level, NOK […] excluding VAT, as in the previous contract (see paragraph (37)). Based on the BKK-group owning 16 058 existing lamp points, the annual compensation for capital cost was consequently calculated to NOK […] ([51]).

(41) For the period from 2018 onwards, the existing contract was prolonged. In accordance with the letter from the Municipality of 19 June 2017, the contract was initially prolonged until 1 July 2018. The Municipality noted in this connection that due to a change in the company structure, the prolonged contract would have to be entered into with BKK EnoTek AS ([52]).

(42) The contract was then prolonged until 1 January 2019. In this regard, the Municipality made reference to an ongoing process, whereby it was working towards acquiring the streetlights owned by the BKK-group ([53]).

(43) In a letter concerning the prolongation, the BKK-group explained that the streetlight infrastructure had been transferred to its subsidiary Veilys AS. On that basis, the Municipality would receive two confirmations on the prolongation. The first confirmation would be from Veilys AS and relate to the streetlights owned by this company. The second confirmation would be sent from BKK EnoTek AS for its services rendered with respect to those streetlights owned by the Municipality ([54]).

([45]) Document No 1194249, p. 6.
([46]) Document No 1194253, p. 1-5.
([47]) Document No 1194253.
([48]) Document No 1194253.
([49]) Document No 1194205, p. 1-5.
([50]) A copy of the contract was submitted to ESA on 28 February 2019. It is filed as Document No 1058456.
([51]) Document No 1058456.
([52]) Document No 1194203.
([53]) Document No 1194209.
([54]) Document No 1194211.

(44) On 20 December 2018, the contract was prolonged on the same terms until 1 January 2020. This was done in conjunction with the prolongation of an intention agreement relating to the possible acquisition by the Municipality of the streetlight infrastructure owned by Veilys AS ([55]).

(45) The Norwegian authorities have lastly submitted an unsigned second prolongation of the intention agreement. According to this document, the contract was prolonged once more on the same terms. Based on the submitted information, it is ESA's understanding that this contract is still effective ([56]).

(46) In addition to the contracts pertaining to streetlighting along municipal roads, there exist contracts concerning: (i) streetlighting along private roads ([57]); and (ii) lighting in parks and along pedestrian roads ([58]). In accordance with paragraphs 19 and 34 of the opening decision, these contracts fall outside the scope of this decision.

3.1.4. *The tendering out of certain operation and maintenance activities*

(47) The operation and maintenance of the streetlights and LED fixtures owned by the Municipality has been tendered out. The delivery of services under this contract commenced on 1 April 2020 ([59]).

(48) According to the invitation to tender, the contract covers approximately 3 100 streetlights owned by the Municipality. In addition, it comprises 12 000 LED fixtures installed onto infrastructure owned by Veilys AS. This included infrastructure was specified further as 3 133 light fixtures, 2 254 steel posts/arrangements for wires, 841 wooden posts, 12 000 LED fixtures, and an unknown quantity of cables ([60]).

(49) It further follows from the invitation to tender that the duration of the contract is 4 years, and its estimated value between NOK 4 and 6 million per year (excluding VAT). The contract was to be awarded on the basis of the open procedure to the tenderer with the lowest price ([61]).

(50) Six tenders were submitted in the competition ([62]). The contract was awarded to BKK EnoTek AS at a price of NOK 10 554 689. The price of the five other tenders ranged from NOK 11 930 826 to NOK 26 596 947,50 ([63]).

(51) The level of services under the tendered-out contract is generally similar to that under the contracts described in Section 3.1.3 above. However, under the latter contracts, the responsibilities of the supplier include replacing defective equipment. This obligation falls on the Municipality under the tendered-out contract ([64]).

3.1.5. *Developments in the number of streetlights*

(52) The contracts between the Municipality and companies in the BKK-group, described in Section 3.1.3 above, foresee that the number of streetlights will change over time. Based on the latest available documentation, the Norwegian authorities explained in the letter of 12 April 2021 that the number of streetlights owned by the Municipality had increased to 4 219. The total number of streetlights owned by Veilys AS amounted to 27 748 at this time ([65]). Further, the Municipality has as mentioned purchased 12 000 LED fixtures that have been installed onto infrastructure owned by Veilys AS ([66]).

([55]) Document No 1194213.
([56]) Document No 1194223.
([57]) Document No 1194201.
([58]) This contract is mentioned in the letter filed as Document No 1194203.
([59]) Document Nos 1126801, p. 4, and 1194249, p. 13.
([60]) Document No 1194249, p. 13.
([61]) Document No 1194251 under points 1.6, 2.2, and 8.
([62]) Document No 1194249, p. 13.
([63]) Document No 1194231.
([64]) Document No 1194249, p. 14.
([65]) At the time of the adoption of this decision, aggregated information on the services provided by the BKK-group was available at: https://www.eviny.no/vare-tjenester.
([66]) Document No 1194249, p. 1.

3.1.6. ***The activities within the BKK-group***

(53) The Norwegian authorities have provided an overview of the payments from the Municipality to companies within the BKK-group. In addition to the payments under the concerned measures, the Municipality has also paid for other activities outside their scope. These latter payments relate to energy supply and related services. Several of the services remunerated outside the scope of the concerned measures entail operating in competition with other suppliers ([67]).

(54) In addition to those activities remunerated by the Municipality, it is evident from the web-pages of the BKK-group that the companies of that group are active on a number of other markets. The group is presented as the largest renewables group in Western Norway. The services offered include, amongst others, charging facilities for cars, boats and ships, services pertaining to the establishment and upgrade of infrastructures, including in the areas of data centres, telecoms, and marine farming, as well as internet-related services concerning fibre internet, data storage and the so-called internet of Things ([68]).

(55) The Norwegian authorities are not in possession of direct evidence that the compensation paid by the Municipality in respect of streetlighting along municipal roads is used to cross-subsidise other economic activities. The transfer of the streetlight infrastructure to Veilys AS was partly made to prevent cross-subsidisation. However, due to a lack of documentation, cross-subsidisation cannot be excluded ([69]).

(56) The Norwegian authorities have also pointed out that the streetlight-related activities within the BKK-group are not limited to the Municipality. In particular, Veilys AS is compensated by other public entities in respect of the streetlights it owns along their public roads ([70]).

3.2. GENERAL COMMENTS ON THE OPENING DECISION

(57) The Norwegian authorities consider that ESA has failed to provide sufficient reasons to open the formal investigation procedure. As a result, the Municipality has been placed in a situation of legal uncertainty ([71]).

(58) On the basis that the Municipality is purchasing streetlighting, the Norwegian authorities dispute the distinction between measures (a) and (c). It is however correct that the compensation reflects different elements ([72]).

(59) The Norwegian authorities submit that the legal classification must take account of the context in which the activity is performed. The sole purpose of providing streetlighting is to serve the public at large ([73]), and the provision is organised in accordance with the Norwegian Road Act ([74]).

(60) Pursuant to Section 20 of this Act, municipalities are responsible for operating and maintaining municipal roads. While the Act does not require municipalities to provide streetlighting, or to provide streetlighting at a certain level, this activity is consistent with its objective of road safety ([75]). The Municipality further follows the standard (*veinormalen*) of the Norwegian Public Roads Administration (*Statens vegvesen*) when planning, building and upgrading roads. This standard contains specifications as to the existence of streetlights ([76]).

([67]) Document No 1194249, p. 15.
([68]) Document No 1194249, p. 15.
([69]) Document No 1194249, p. 16.
([70]) Document No 1126801, p. 4.
([71]) Document No 1126803, p. 2.
([72]) Document No 1126801, p. 4, 6 and 7.
([73]) Document No 1126801, p. 4.
([74]) *Lov om vegar* (Road Act), LOV-1963-06-21-23.
([75]) Document No 1126801, p. 4.
([76]) Document Nos 1126801, p. 4, and 1194249, p. 5.

(61) In view of these factors, the Norwegian authorities maintain that the compensation is granted in respect of non-economic activities. The Norwegian authorities consider that the judgment in *Selex* ([77]) supports their position ([78]).

(62) The Norwegian authorities further refer to the Guidelines on the notion of State aid ([79]). They submit that paragraph 17, on public powers and public authorities, supports that the provision of streetlighting is non-economic in nature ([80]). In any event, activities pursuing public safety objectives should be classified equally to non-economic activities carried out for social, cultural, educational and pedagogical purposes ([81]).

(63) Should ESA consider that there exists a market for streetlighting, this market is characterised by two failures. First, the streetlight infrastructure amounts to a natural monopoly which must be located alongside the concerned roads. Second, streetlighting is a public good associated with free-rider problems ([82]).

(64) The ownership of the infrastructure confers market power upon the BKK-group *vis-à-vis* the Municipality. It is practically not feasible for the Municipality to refrain from providing its roads with streetlighting. The Municipality is also unable to instruct the infrastructure owner as to how, and on what terms, services related to the infrastructure are procured ([83]).

(65) While there are normally available alternative methods to tendering to establish market prices, ESA has, according to the Norwegian authorities, failed to take account of the specific circumstances of the case. An entity purchasing from a monopolist does not have a legal right to obtain services at the conditions it deems reasonable. This harmful effect of monopoly power can only be remedied through the enforcement of competition law, or through price regulation ([84]).

3.3. SPECIFIC COMMENTS ON MEASURE (A) – OPERATION AND MAINTENANCE

(66) Index regulations may have taken place to establish the compensation levels over the concerned period. The Norwegian authorities are however unable to provide a definitive answer ([85]).

(67) As regards the prospects for comparing the compensation level with that in other areas, the Norwegian authorities underline that an external provider of maintenance and operation services will not bear the capital cost associated with an infrastructure that it does not own. Accordingly, the compensation for capital cost (measure (c)) must be excluded when comparing the compensation level with that paid by public entities in respect of infrastructure they own themselves. In 2020, the Municipality paid NOK […] per street light for operation and maintenance ([86]).

(68) As for the complainant's assertion that operation and maintenance services have been delivered for NOK […] per lamp point per year, the Norwegian authorities consider this undocumented. The complainant has also used another geographical region as a reference ([87]).

([77]) The Norwegian authorities refer generally to the judgment in '*Selex*'. Based on previous correspondence, and the opening decision, ESA take it that the Norwegian authorities are referring to the judgment of the Court of Justice of 26 March 2009, *Selex Sistemi Integrati* v *Commission*, C-113/07P, EU:C:2009:191, as well as to the judgment of the General Court of 12 December 2006, *Selex Sistemi Integrati* v *Commission*, T-155/04, EU:T:2006:387.

([78]) Document Nos 1126803, p. 1, and 1126801, p. 4-9.

([79]) EFTA Surveillance Authority Decision No 3/17/COL of 18 January 2017 amending, for the one-hundred and second time, the procedural and substantive rules in the field of State aid by introducing new Guidelines on the notion of State aid as referred to in Article 61(1) of the Agreement on the European Economic Area [2017/2413] (OJ L 342, 21.12.2017, p. 35) and EEA Supplement No 82, 21.12.2017, p. 1.

([80]) Document No 1126801, p. 5-6.

([81]) Document No 1126801, p. 6.

([82]) Document No 1126801, p. 6.

([83]) Document No 1126801, p. 6.

([84]) Document No 1126803, p. 2.

([85]) Document No 1194249, p. 7.

([86]) Document No 1126801, p. 7.

([87]) Document No 1126801, p. 7.

(69) The Norwegian authorities have, however, presented figures from the KOSTRA-database on the costs incurred for streetlighting by large Norwegian municipalities ([88]). These figures show the total yearly costs per light point, including electricity cost, over the period 2016 to 2019. As is evident from the below table, the costs incurred by the Municipality were the highest recorded ([89]).

Table 1 – Costs for streetlighting incurred by large Norwegian municipalities (NOK)

SFS Kostnader til gatebelysning per lyspunkt kommunale veier

Category	Bergen	Bærum	Drammen	Fredrikstad	Kristiansand	Oslo	Sandnes	Stavanger	Tromsø	Trondheim
2015										
2016	1200,20	779,70	592,90	883,90	801,30	818,20	758,20	519,00	466,20	1056,90
2017	1216,70	673,70	622,00	633,90	912,80	945,50	733,30	519,00	831,10	1115,00
2018	1324,00	643,50	714,90	687,50	741,10	1000,00	730,20	733,10	724,90	1187,40
2019	1219,70	773,50	861,00	667,90	747,10	1000,00	750,00	666,70	607,10	779,10

(70) The compensation may have included an element of overcompensation, and the Municipality has over time questioned what it considers as high prices. Further, the Norwegian authorities consider that account separation should have been established between the provision of streetlighting and other activities ([90]).

3.4. SPECIFIC COMMENTS ON MEASURE (B) – FINANCING OF 12 000 LED FIXTURES

(71) The Bergen City Council decided in 2017 to procure 12 000 LED fixtures for installation onto the streetlight infrastructure along municipal roads. Due to its scale and nature, this upgrade fell outside the contracts with the BKK-group ([91]).

(72) The objectives of the investment were (i) environmental; and (ii) to reduce electricity cost ([92]). Reduced electricity cost will benefit the Municipality directly as electricity is not included in the contracts with the BKK-group ([93]).

(73) The contract was awarded on the basis of an open tender procedure at the price of NOK 60 million. Installation took place until late 2019 ([94]). The Municipality will retain the ownership of the LED fixtures ([95]).

(74) The cost per fixture was NOK 1 899 in 2018 and NOK 2 039 in 2019. Planning and installation cost amounted to NOK […] per light point. On the basis that the savings in electricity cost are estimated to NOK […] per light point per year, the Municipality therefore expects to recoup its investment cost in 7 to 10 years ([96]).

(75) As explained in Section 3.1.4, the maintenance of the LED fixtures has been tendered out together with that of the remaining infrastructure owned by the Municipality. Under this contract, the Municipality is experiencing cost savings reflecting the increased lifetime of LED fixtures ([97]). The Municipality is also expecting to negotiate adjustments in the contract covering the infrastructure owned by Veilys AS ([98]).

([88]) According to the Norwegian authorities, the term KOSTRA is an abbreviation for KOmmune-STat-RApportering. The main purpose of the aggregation of data in KOSTRA is to benchmark the cost-level of various public services. The statistics are managed by Statistics Norway (SSB). See Document No 1194249, p. 10.
([89]) Document Nos 1126801, p. 7, and 1194249, p. 10. The table is set forth at page 10 of Document No 1194249.
([90]) Document Nos 1126801, p. 7, and 1194249, p. 16.
([91]) Document Nos 1126801, p. 7-8, and 1194249, p. 16.
([92]) *Ibid.*
([93]) Document No 1194249, p. 11.
([94]) Document Nos 1126801, p. 8, and 1194249, p. 12.
([95]) Document No 1126801, p. 8.
([96]) Document No 1194249, p. 12.
([97]) Document No 1194249, p. 11-12.
([98]) Document No 1194249, p. 11.

3.5. SPECIFIC COMMENTS ON MEASURE (C) – CAPITAL COST

(76) The Norwegian authorities consider it normal practise that an external owner of an infrastructure that is used to produce a public good, is entitled to compensation for capital cost. By comparison, where the public entity that is financing the provision of streetlighting owns the infrastructure itself, the capital cost associated with this infrastructure are borne by the public entity as infrastructure owner ([99]).

(77) The compensation for capital cost has been established on the basis of the terms in Section 7(c) of the 1996 sales agreement. This mechanism stipulates, as set forth in Section 3.1.2, that the BKK-group is entitled to capital cost for the committed capital equal to the rate-of-return fixed by the NVE for the regulated power grid infrastructure ([100]).

(78) This principle has been specified somewhat further ([101]). In Section 6 of the contract from 1998, it was stipulated that the compensation should cover depreciation and interests relating to the capital invested in the streetlight infrastructure at the time when this contract was entered into. Depreciation and interests relating to future investments ordered by the Municipality, should also be covered. This approach has been maintained in subsequent contracts ([102]).

(79) The Municipality and the BKK-group have, however, disagreed on how the capital cost should be calculated. The contested elements concerned, in particular, what cost base should be applied in the calculations, and how depreciation should be taken into account.

(80) In this respect, the Norwegian authorities refer to a report submitted by BKK Nett AS in 2002. According to the Norwegian authorities, this report reflected a depreciation profile in line with the 1996 sales agreement ([103]).

(81) In 2003, however, the Municipality questioned how BKK Nett AS had established the capital base, including in particular the depreciation charges. By letter of 18 February 2004, BKK Nett AS provided an explanation where it stated, inter alia, that the capital cost had been established on the basis of normal criteria ([104]).

(82) BKK Nett AS described the basis for its calculations further in a letter of 30 March 2004. According to BKK Nett AS, the value of the infrastructure assets should be set to NOK 81,6 million based on a technical valuation of the replacement value ([105]).

(83) The Municipality did not agree with this approach and considered that the asset value should be based on the book value. The Municipality demanded that the compensation be adjusted accordingly ([106]).

(84) By letter of 4 August 2004, BKK Nett AS rejected this claim. In doing so, BKK Nett AS emphasised that the mechanism established in the 1996 sales agreement entails that the NVE rate-of-return should be applied on the committed capital. BKK Nett AS further upheld their view that it is appropriate to establish the level of the committed capital on the basis of a technical valuation of the assets' replacement value ([107]). This method resulted in an almost doubling of the capital base compared with what would follow from the book value. To this day, the compensation level has remained much higher than if it had been calculated on the basis of the book value ([108]).

([99]) Document Nos 1126801, p. 8, and 1194249, p. 7.
([100]) Document No 1194179. As set forth in footnote 43, the item reads as follows in the original Norwegian wording: '[…] kjøperen står fritt til å avtale på markedsmessige betingelser drift av veilys som skal innebære kostnadsdekning + NVE rente for den kapital som er bundet.'
([101]) Document No 1194249, p. 7-8.
([102]) Document Nos 1194249, p. 8, and 1194229, p. 4.
([103]) Document Nos 1194249, p. 8, and 1194221.
([104]) Document Nos 1194249, p. 8-9, and 1194225.
([105]) Document No 1194249, p. 9.
([106]) Document Nos 1194249, p. 8, and 1194233.
([107]) Document No 1194227.
([108]) Document No 1194249, p. 9-10.

(85) Similarly to what is the case for the compensation for operation and maintenance (measure (a)), the Norwegian authorities have not provided a definitive answer as to how the compensation level has been established. The lack of separate accounts makes control difficult ([109]). In a due diligence report concerning Veilys AS ([110]), the auditors mentioned that they had obtained limited insight into the costs associated with the contract with the Municipality ([111]).

(86) The Norwegian authorities thus consider that the concerned companies in the BKK-group may have been overcompensated. The figures from KOSTRA, as presented in paragraph (69) above, are indicative of such overcompensation ([112]).

4. *COMMENTS FROM INTERESTED PARTIES*

4.1. COMMENTS FROM BKK VEILYS

4.1.1. ***Background information***

(87) The agreement from 1996 entailed that BKK DA purchased the assets and operations of Bergen Lysverker. In doing so, it undertook to ensure the continued supply of streetlighting and assumed responsibility for the operation and maintenance of the infrastructure ([113]).

(88) In the same way as the Norwegian authorities, BKK Veilys consider that Section 7(c) of the sales agreement regulates the future economic compensation for the provision of streetlighting. Section 7(c) reflects, first, that the BKK-group is entitled to compensation for the operation and maintenance of the infrastructure and, second, that it is entitled to compensation for the committed capital. This provision has served as basis for the subsequent contracts ([114]).

(89) All contracts and operations regarding the streetlight infrastructure controlled by the BKK-group is organized under the wholly-owned subsidiary Veilys AS. These activities encompass approximately 50 000 streetlights, including the concerned streetlights along municipal roads in the Municipality ([115]).

4.1.2. ***General comments on the opening decision***

(90) The compensation concerns a public infrastructure that is not used for offering goods or services on a market. The measures consequently fall outside the scope of Article 61(1) of the EEA Agreement ([116]).

(91) In that regard, the opening decision does not adequately reflect that the infrastructure is owned by Veilys AS. As Veilys AS is the only possible supplier and the Municipality the only possible buyer, the compensation does not accrue to an undertaking ([117]).

(92) In any event, no overcompensation has taken place. To the extent that the provision of streetlighting is a SGEI, the *Altmark* criteria are fulfilled ([118]).

4.1.3. ***Specific comments on measure (a) – operation and maintenance***

(93) According to BKK Veilys, the compensation reflects the underlying costs and the remuneration level in comparable contracts. There has been no overcompensation ([119]).

([109]) Document Nos 1126801, p. 8, and 1194249, p. 10.
([110]) Document No 1194235.
([111]) Document No 1194249, p. 10.
([112]) Document No 1194249, p. 10.
([113]) Document No 1073541, p. 2.
([114]) Document No 1073541, p. 2.
([115]) Document No 1073541, p. 2.
([116]) Document No 1073541, p. 1-2.
([117]) Document No 1073541, p. 2.
([118]) Document No 1073541, p. 1.
([119]) Document No 1073541, p. 3.

(94) With respect to benchmarking, BKK Veilys considers the price level indicated in the complaint unsupported. It is furthermore necessary to have regard to the particularities of the case. The concerned contracts have the format fixed price per light point and include a full range service scope. This entails that BKK Veilys has the risk for adverse events, such as extreme weather conditions, and the responsibility for all operation and maintenance. It is also more expensive to operate in city areas with heavy traffic and other disturbances ([120]).

4.1.4. *Specific comments on measure (b) – financing of 12 000 LED fixtures*

(95) BKK Veilys refutes that the financing of the 12 000 LED fixtures amounts to State aid.

(96) As far as BKK Veilys is aware, the Municipality purchased the fixtures at a cost of NOK 2 000 per light point. The costs of planning, installation and documentation were NOK […] per light point.

(97) Based on these figures, the costs of the upgrade amounted to NOK […] per light point. This equates to approximately […] times the yearly capital cost compensated by the Municipality. Accordingly, the upgrade consisting in the 12 000 LED fixtures was far more costly than what could be undertaken on the basis of this compensation ([121]).

(98) The LED fixtures will further ensure significant savings in energy cost for the Municipality. According to the information available to BKK Veilys, the cost savings have been estimated to NOK 450 per light point per year. This implies that the Municipality will recoup its investment in less than 7 years ([122]).

4.1.5. *Specific comments on measure (c) – compensation for capital cost*

(99) According to BKK Veilys, the compensation relates to non-economic activities. The element concerning capital cost should be perceived as an access fee to the infrastructure ([123]).

(100) In any event, the compensation for capital cost does not confer an economic advantage upon BKK Veilys. The cost of establishing a lamp point is approximately NOK 20 000, with the addition of another NOK 10 000-50 000 for groundwork. The minimum cost for establishing the 16 058 streetlights owned by BKK Veilys is therefore NOK 500 000 000 ([124]).

(101) It follows from this that the capital cost is not disproportionately compensated. The streetlight infrastructure is managed so as to maintain its technical standard ([125]).

II. **ASSESSMENT**

5. *PRESENCE OF STATE AID*

5.1. BACKGROUND

(102) Article 61(1) of the EEA Agreement reads as follows:

> ‘Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.’

([120]) Document No 1073541, p. 3.
([121]) Document No 1073541, p. 3.
([122]) Document No 1073541, p. 3.
([123]) Document No 1073541, p. 2-3.
([124]) Document No 1073541, p. 3.
([125]) Document No 1073541, p. 3.

(103) The qualification of a measure as State aid therefore requires the following cumulative conditions to be met: (i) the measure must be granted by the State or through State resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade. As touched upon above, ESA has issued Guidelines on the notion of State aid ([126]).

(104) Based on the comments received, ESA considers it appropriate to assess first whether the compensation under measures (a) and (c) has accrued to an undertaking. If that question is answered in the affirmative, and to the extent that the financing of the LED-fixtures (measure (b)) has conferred an advantage on the same entities, this advantage would then also have accrued to an undertaking.

5.2. THE NOTION OF UNDERTAKING

5.2.1. ***The legal test***

(105) The notion of undertaking encompasses every entity engaged in economic activity, regardless of its legal status and the way in which it is financed ([127]). Any activity consisting in offering goods or services on a market is economic ([128]).

(106) Contrary to what is asserted by the complainant, it is not decisive whether an activity might in principle be pursued by a private operator. Rather, it is necessary to ascertain the specific circumstances under which the activity is performed ([129]). In that regard, it must be verified whether, by its nature, aim and the rules to which it is subject, the concerned activity is connected with the exercise of public powers, or has an economic character justifying the application of the EEA competition rules ([130]).

(107) Whether there exists a market for a given activity may vary between EEA States depending on national conditions ([131]). The classification of a given activity can also change over time as a result of political decisions or economic developments.

(108) With respect to entities performing several activities, the legal classification must be carried out separately for each activity. The fact that an entity is vested with public powers, does therefore not prevent it from being classified as an undertaking as regards other activities ([132]). However, if an economic activity cannot be separated from the exercise of public powers, the activities as a whole are classified as non-economic ([133]).

([126]) Decision No 3/17/COL of 18 January 2017, cited in footnote 79.

([127]) Judgment of the EFTA Court of 17 November 2020 in Case E-9/19 *Abelia and WTW AS* v *EFTA Surveillance Authority*, paragraph 87; Judgment of the EFTA Court of 21 February 2008 in Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 62, paragraph 78; Judgment of the EFTA Court of 22 March 2002 in Case E-8/00 *Landsorganisasjonen i Norge* v *Kommunenes Sentralforbund and Others* [2002] EFTA Ct. Rep. 114, paragraph 62.

([128]) Judgment of the EFTA Court of 10 May 2011 in Joined Cases E-4/10, E-6/10 and E-7/10 *The Principality of Liechtenstein and others* v *EFTA Surveillance Authority* [2011] EFTA Ct. Rep p. 16, paragraph 54; Judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, 118/85, EU:C:1987:283, paragraph 7; Judgment of the Court of Justice of 18 June 1998, *Commission* v *Italy*, C-35/96, EU:C:1998:303, paragraph 36; Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, EU:C:2000:428, paragraph 75.

([129]) *Abelia and WTW AS* v *EFTA Surveillance Authority*, cited in footnote 127, paragraph 88; *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority*, cited in footnote 127, paragraph 80.

([130]) *Abelia and WTW AS* v *EFTA Surveillance Authority*, cited in footnote 127, paragraph 89; Judgment of the Court of Justice of 7 November 2019, *Aanbestedingskalender and Others* v *Commission*, C-687/17 P, EU:C:2019:932, paragraphs 15-16.

([131]) Judgment of the Court of Justice of 17 February 1993, *Poucet and Pistre* v *AGF and Cancava*, Joined Cases C-159/91 and C-160/91, EU:C:1993:63, paragraphs 16 to 20.

([132]) Judgment of the Court of Justice of 1 July 2008, *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v *Elliniko Dimosio*, C-49/07, EU:C:2008:376, paragraph 25.

([133]) *Abelia and WTW AS* v *EFTA Surveillance Authority*, cited in footnote 127, paragraph 90; *Aanbestedingskalender and Others* v *Commission*, cited in footnote 130, paragraphs 17-19; Judgment of the Court of Justice of 12 July 2012, *Compass-Datenbank GmbH* v *Republik Österreich*, C-138/11, EU:C:2012:449, paragraph 38.

(109) It follows from the case-law of the EFTA Court that the notion of 'services' within the meaning of the fundamental freedoms is relevant for determining whether activities are economic in a State aid context. As follows from the first paragraph of Article 37 of the EEA Agreement, only services normally provided for remuneration are considered 'services' within the meaning of the Agreement ([134]).

(110) The essential characteristic of 'remuneration' is that it constitutes consideration for the service in question ([135]). Moreover, the remuneration is normally agreed upon between the provider and the recipient of the service ([136]).

(111) The notion of 'services' should also be understood in light of the second paragraph of Article 37 of the EEA Agreement ([137]). According to this provision, 'services' include, in particular, activities of an industrial or commercial character and those of craftsmen and the professions.

(112) It follows from settled case-law that the nature of an activity must be ascertained in the light of the sector in which it takes place, and the way in which this sector is organized.

(113) Within the educational field, as an example, the financing of education provided under a national system is not regarded as consideration for a service where two conditions are fulfilled. First, the State is not seeking to engage in gainful activity when establishing and maintaining the education system, but rather to fulfil its duties towards the population. Second, the education system is generally funded from the public purse and not through user payments ([138]).

(114) On the basis of a similar line of reasoning, the element of remuneration has been considered absent in respect of municipal kindergartens in Norway. Accordingly, municipal kindergartens were not considered undertakings in the context of State aid ([139]).

(115) As regards the health sector, the EFTA Court has held that the nature of the provision of support services in the areas of procurement, information and communication technologies, and archiving, must be determined according to the subsequent use of the services. Where the support services are not provided on the market, but within a national health system established on the basis of solidarity, their provision is non-economic in nature ([140]).

5.2.2. ***Application of the legal test to the case at hand***

(116) As set out in paragraphs (53) and (54) above, companies within the BKK-group perform economic activities on a number of markets.

(117) According to the Court of Justice, it is possible that an establishment may carry out both economic and non-economic activities. This is however conditional upon it keeping separate accounts for the different funds that it receives so as to exclude any risk of cross-subsidisation of its economic activities by means of public funds received for its non-economic activities ([141]). Thus, any risk of cross-subsidisation must be excluded in order for public funding to be regarded as accruing to non-economic activities.

([134]) *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority*, cited in footnote 127, paragraphs 80-81.
([135]) Judgment of the EFTA Court of 10 December 2020 in Case E-13/19, *Hraðbraut ehf.* v *mennta- og menningarmálaráðuneytið, Verzlunarskóli Íslands ses., Tækniskólinn ehf., and Menntaskóli Borgarfjarðar ehf.*, paragraph 91; *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority*, cited in footnote 127, paragraph 81; Judgment of the Court of Justice of 27 September 1988, *Belgian State* v *Humbel and Edel*, 263/86, EU:C:1988:451, paragraph 17.
([136]) *Belgian State* v *Humbel and Edel*, cited in footnote 135, paragraph 17.
([137]) *Belgian State* v *Humbel and Edel*, cited in footnote 135, paragraph 16.
([138]) *Hraðbraut ehf.*, cited in footnote 135, paragraph 92.
([139]) *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority*, cited in footnote 127, paragraphs 82-84.
([140]) *Abelia and WTW AS* v *EFTA Surveillance Authority*, cited in footnote 127, paragraphs 95-97.
([141]) Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* v *Ayuntamiento de Getafe*, C-74/16, EU:C:2017:496, paragraph 51.

(118) In the case at hand, ESA has not been presented with arguments to the effect that sufficient safeguards, effectively and appropriately separating the income and costs under the concerned contracts from other economic activities, have been in place. To the contrary, the Norwegian authorities have stated that safeguards should have been put in place, and that cross-subsidisation cannot be excluded ([142]).

(119) On this basis, and irrespective of whether the activities compensated are economic in nature, ESA is therefore bound to conclude that the compensation under measures (a) and (c) has accrued to an undertaking.

(120) In light of the arguments presented, ESA will nevertheless also assess whether the activities compensated under the concerned measures are in themselves economic. ESA will assess first those activities concerning the streetlights that have been owned by companies in the BKK-group.

(121) As reiterated in paragraphs (59)-(60) above, the Norwegian authorities refer to the responsibilities of municipalities under Section 20 of the Norwegian Road Act to operate and maintain municipal roads. While Section 20 does not oblige municipalities to provide streetlighting, or to provide streetlighting at a certain level, this activity contributes to the objective of road safety. Moreover, the Municipality follows the standard (*veinormalen*) of the Norwegian Public Roads Administration (*Statens vegvesen*) when planning, building and upgrading roads. This standard contains specifications as to the existence of streetlights ([143]).

(122) Against this background, the Norwegian authorities assert, as identified in paragraph (61), that the judgment in *Selex* supports their position that the activities compensated are non-economic ([144]). Further, as set forth in paragraph (62), the Norwegian authorities invoke paragraph 17 on public powers and public authorities in the Guidelines on the notion of State aid ([145]). In any event, the Norwegian authorities purport that activities pursuing public safety objectives should be classified equally to non-economic activities carried out for social, cultural, educational and pedagogical purposes.

(123) As already established, it is necessary to ascertain the specific circumstances under which an activity is performed when determining whether the activity is economic in nature ([146]). In the case at hand, the natural starting point for this assessment is the regulatory framework in place as regards the provision of streetlighting along municipal roads in Norway, as well as the specific circumstances in Bergen.

(124) As regards the regulatory framework in place in Norway, the legislation and standards referred to by the Norwegian authorities simply entail that municipalities are responsible for operating municipal road infrastructures, and that requirements on the existence of streetlighting need be fulfilled, in order for roads to meet the standard (*veinormalen*) of the Norwegian Public Roads Administration (*Statens vegvesen*). As set out above, however, Section 20 of the Norwegian Road Act does not require municipalities to provide streetlighting, or to provide streetlighting at a certain level. Further, there is nothing to preclude municipalities from contracting with commercial entities (parts) of the operation and maintenance of municipal roads as an economic activity.

(125) With respect to the specific circumstances in Bergen, ESA notes that the effect of including the streetlight infrastructure, when selling Bergen Lysverker, was that BKK DA became the only available supplier along the concerned municipal roads. BKK DA obtained this position in competition with five other bidders.

(126) Moreover, as described in paragraph (32), Section 7(c) of the sales agreement included a mechanism governing the future economic compensation. This mechanism allows for a regulated level of return.

([142]) Document No 1126801, p. 7.
([143]) Document Nos 1126801, p. 4, and 1194249, p. 5.
([144]) The judgments of the Court of Justice and the General Court, cited in footnote 77.
([145]) Guidelines on the notion of State aid, cited in footnote 79.
([146]) *Abelia and WTW AS* v *EFTA Surveillance Authority*, cited in footnote 127, paragraph 88; *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority*, cited in footnote 127, paragraph 80.

(127) On this basis, ESA takes the view that by means of the sale of the streetlight infrastructure, in combination with the establishment of the compensation mechanism allowing for a regulated level of return, the Municipality created a market for the supply of the concerned services to the Municipality as an economic activity. The fact that the infrastructure was of a unique nature, resulting in its purchaser becoming the only available supplier, does not in itself entail that the concerned companies in the BKK-group have not delivered services in a market. Also, BKK DA did obtain its exclusive position in competition with five other bidders.

(128) This point of view is corroborated by the course of action undertaken by the BKK-group and the Municipality in relation to the subsequent contracts entered into at regular intervals. The BKK-group has sought to maximize its profits through its interpretation of the contract terms and underlined that it is operating commercially with a view to create values for its shareholders ([147]). On the flip side, the Municipality has acted on the basis that it is facing a commercial vendor. The Norwegian authorities have indeed referred to the market power enjoyed by the BKK-group in the capacity of infrastructure owner.

(129) As is evident from multiple complaints cases before the Norwegian complaints board for public procurement (*KOFA*), services pertaining to maintenance and operation of streetlights are furthermore offered by different vendors on a commercial basis ([148]). In line with this, the Municipality did, as described in Section 3.1.4, receive tenders from several suppliers when it launched a competitive procedure for such services.

(130) Accordingly, ESA observes that it was indeed normal practise in Norway and the Bergen area to provide maintenance and operation services for remuneration. This also indicates that these activities were of an economic nature.

(131) As regards the compensation paid in respect of the maintenance and operation of those streetlights owned by the Municipality, there is nothing in the contract terms to indicate that these activities should be classified differently. With the exception that there are no capital costs to be compensated, the terms were, until 1 April 2020, the same as for those streetlights controlled by the BKK-group. Since 1 April 2020, the services have been provided under a commercial contract awarded on the basis of a competitive procedure ([149]).

(132) In respect of the reference made by the Norwegian authorities to the judgment in *Selex* ([150]), it should be recalled that that case concerned activities undertaken by the European Organisation for the Safety of Air Navigation ('Eurocontrol'). Eurocontrol was established by various European States under the International Convention on Cooperation for the Safety of Air Navigation ([151]).

(133) On appeal, the Court of Justice repeated its finding from a previous case that, when taken as a whole, Eurocontrol's activities were by their nature, aim and the rules to which they were subject, connected with the exercise of public powers relating to the control and supervision of air space. This conclusion also applied with respect to the assistance provided by Eurocontrol to national administrations in connection with, in particular, tenders for the acquisition of equipment and systems in the field of air traffic management ([152]).

(134) In view of the assessment set out in paragraphs (123)-(131), ESA therefore maintains that the case at hand is materially different from the judgment in *Selex*. It should also be recalled that in *Selex*, the Court did indeed indicate that the fact that a body is profit-making is an indication that an activity is of an economic nature ([153]).

([147]) Document No 1194227, p. 2.

([148]) Decision of 23 March 2022, *Otera Traftec AS* v *Lillehammer Municipality*, Case 2021/1439; Decision of 24 March 2021, *Nett-Tjenester AS* v *Fredrikstad Municipality*, Case 2021/367; Decision of 14 September 2015, *Nettpartner AS* v *Stavanger Municipality and Others*, Joined Cases 2015/47, 2015/48, 2015/49 and 2015/50; Decision of 2 September 2015, *Traftec AS* v *Vest-Agder County Municipality*, Case 2015/71. The decisions are available on: https://www.klagenemndssekretariatet.no/klagenemda-for-offentlige-anskaffelser-kofa/.

([149]) See Sections 3.1.3 and 3.1.4.

([150]) The judgments of the Court of Justice and the General Court, cited in footnote 77.

([151]) The judgment of the General Court, cited in footnote 77, paragraph 1.

([152]) The judgment of the Court of Justice, cited in footnote 77, paragraphs 71-72.

([153]) The judgment of the Court of Justice, cited in footnote 77, paragraphs 116-117.

(135) ESA also cannot agree that the activities compensated under measures (a) and (c) concern public powers or public authority within the meaning of paragraph 17 of the Guidelines on the notion of State aid ([154]). Rather, the situation is that the Municipality has compensated a supplier operating on a commercial and economic basis. As such, the situation is analogous to that where a municipality procures construction works relating to building or maintaining municipal roads from a commercial contractor.

(136) In the same vein, ESA remains unconvinced by the assertion that activities pursuing public safety objectives should be classified equally to non-economic activities carried out for social, cultural, educational and pedagogical purposes. There is no basis in case-law for concluding that activities are non-economic *per se* because they pursue a given objective. To that end, it is, as mentioned, necessary to ascertain the specific circumstances under which the activity is performed. By way of example, maintenance activities relating to public property may clearly be undertaken on an economic basis, even if necessary for the safety of users.

5.2.3. ***Conclusion***

(137) On the basis of the above, ESA concludes that the compensation under measures (a) and (c) has accrued to an undertaking. To the extent that the financing of the LED-fixtures ((measure (b)) has conferred an advantage on the same entities, this would therefore also accrue to an undertaking.

5.3. PRESENCE OF STATE RESOURCES

(138) For a measure to constitute State aid, it must be granted by the State or through State resources. The concept of State resources includes the resources of regional intra-state entities ([155]).

(139) The measures are all financed by the budget of the Municipality. They therefore involve the consumption of State resources.

5.4. ADVANTAGE

5.4.1. ***Introduction***

(140) An advantage within the meaning of Article 61(1) of the EEA Agreement is any economic benefit that an undertaking could not have obtained under normal market conditions ([156]). Accordingly, not only positive benefits such as subsidies, loans or direct investments are capable of conferring an advantage, but also interventions which, without being subsidies in the strict sense, are of the same character and have the same effects ([157]). In line with this, a measure cannot be considered to fall outside the scope of the State aid prohibition merely because it takes the form of an agreement comprising reciprocal commitments ([158]).

([154]) Guidelines on the notion of State aid, cited in footnote 79.

([155]) Guidelines on the notion of State aid, cited in footnote 79, paragraph 48 and the case-law cited.

([156]) Guidelines on the notion of State aid, cited in footnote 79, paragraph 66; Judgment of the Court of Justice of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others* v *La Poste and others*, C-39/94, EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain* v *Commission*, C-342/96, EU:C:1999:210, paragraph 41.

([157]) Judgment of the Court of Justice of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 13; Judgment of the EFTA Court of 17 August 2012 in Case E-12/11 *Asker Brygge* v *EFTA Surveillance Authority* [2012] EFTA Ct. Rep p. 536, paragraph 55; Judgment of the Court of Justice of 20 November 2003, *Ministère de l'Économie, des Finances et de l'Industrie* v *GEMO SA*, C-126/01, EU:C:2003:622, paragraph 28.

([158]) Judgment of the General Court of 28 January 1999, *BAI* v *Commission*, T-14/96, EU:T:1999:12, paragraph 71.

5.4.2. ***An advantage cannot be excluded on the basis of the Altmark-conditions***

5.4.2.1. **The *Altmark*-conditions**

(141) There is specific case-law applicable with respect to public service compensation granted to undertakings entrusted with a service of general economic interest ('SGEI'). It follows from the judgment of the Court of Justice in *Altmark* that, in such cases, the presence of an advantage within the meaning of Article 61(1) of the EEA Agreement, can be excluded where the following four cumulative conditions are fulfilled ([159]):

i. 'First, the recipient undertaking must actually have public service obligations to discharge and such obligations must be clearly defined.

ii. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner […].

iii. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

iv. Fourth, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided […], would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'

(142) ESA has published a set of guidelines on the application of the State aid rules to compensation granted for SGEIs ([160]). The *Altmark*-conditions are addressed in Section 3 of those guidelines.

5.4.2.2. **Application of the *Altmark*-conditions to the case at hand**

(143) According to the first condition, the recipient undertaking must be required to discharge clearly defined public service obligations.

(144) According to the Court of Justice, the purpose of this condition is to ensure transparency and legal certainty. It requires the determination of whether, first, the recipient undertaking actually has public service obligations to discharge and, second, whether those obligations are clearly defined in national law. Accordingly, minimum criteria must be met as regards the existence of one or more acts of public authority defining, in a sufficiently precise manner, the nature, duration and scope of the public service obligations imposed on the entrusted undertaking(s) ([161]).

(145) In keeping with this, the Court of Justice upheld a judgment from the General Court finding that, in the absence of a clear definition of the service at issue as a SGEI in national law, the first *Altmark* condition was not fulfilled. This finding could not be called into question by the existence of a market failure on the concerned market, and that the service could have been defined as a SGEI. Those circumstances were not relevant for determining whether the concerned undertakings were actually entrusted with public service obligations by a public act, and whether those obligations were clearly defined in that act ([162]).

([159]) *Altmark*, cited in footnote 26, paragraphs 87-93.
([160]) OJ L 161, 13.6.2013, p. 12 (Annex I) and EEA Supplement No 34, 13.6.2013, p. 1 (Annex I).
([161]) Judgment of the Court of Justice of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P, EU:C:2017:654, paragraphs 72-73.
([162]) *Ibid*, paragraphs 74-75.

(146) It furthermore follows from settled case-law that for an undertaking to be regarded as entrusted with a SGEI, it must have been so by an act of public authority ([163]). Such entrustment acts may encompass contracts, provided that they emanate from public authority and are binding ([164]). The fact that a service forms the subject matter of a public contract, however, does not suffice for it to assume the status of a SGEI without any specific explanation ([165]).

(147) The relevant question is therefore not whether the Municipality could have entrusted companies in the BKK-group with a SGEI encompassing the concerned services, but whether it has actually done so.

(148) The natural starting point for assessing this, is that neither the Norwegian authorities nor BKK Veilys have submitted that the BKK-group has been entrusted with a SGEI.

(149) As is evident from Sections 3 and 4 above, the Norwegian authorities have in their comments not referred to the law pertaining to SGEIs at all. BKK Veilys have merely asserted that if the provision of streetlighting is a SGEI, then the *Altmark* conditions are fulfilled. This suggests, in line with the preliminary finding in the opening decision, that the companies in the BKK-group have not had, and do not have, a public service obligation to discharge with respect to the measures ([166]).

(150) This point of view is further supported by the contracts provided by the Norwegian authorities.

(151) As explained in Section 3 above, the 1996 sales agreement was characterised by the Municipality selling, and BKK DA acquiring, an enterprise. While the agreement included stipulations on the future supply of streetlighting and related services, the provided documentation contains no indication that the Municipality, within the meaning of case-law, entrusted public service obligations upon BKK DA.

(152) The same is true for the subsequent contracts with companies in the BKK-group. As regards those activities concerning the streetlights controlled by the BKK-group, they reflect the Municipality purchasing from a seller controlling a necessary input, as opposed to entrusting public service obligations. As for the maintenance and operation of those streetlights owned by the Municipality, it has been procured as an input in the Municipality's provision of streetlighting through this infrastructure. Both sets of activities have been included in the contracts without any stipulation, explanation or indication that the companies in the BKK-group have been entrusted with a SGEI.

5.4.2.3. **Conclusion**

(153) On the basis of the above considerations, ESA upholds its preliminary finding from the opening decision. As far as the three measures are concerned, the companies in the BKK-group have not had, and do not have, a public service obligation to discharge. Consequently, an advantage cannot be excluded on the basis of the *Altmark*-conditions.

5.4.3. ***The market economy operator principle***

5.4.3.1. **Background**

(154) Economic transactions carried out by public entities are considered not to confer an advantage on the counterpart, and therefore not to constitute State aid, when they are in line with normal market conditions. This question of market conformity is assessed pursuant to the market economy operator principle ('MEOP').

([163]) Judgment of the Court of Justice of 23 October 1997, *Commission* v *French Republic*, C-159/94, EU:C:1997:501, paragraph 65.

([164]) Judgment of the General Court of 7 November 2012, *Coordination bruxelloise d'institutions sociales et de santé (CBI)* v *Commission*, T-137/10, EU:T:2012:584, paragraph 109.

([165]) Judgment of the General Court of 26 November 2015, *Spain* v *Commission*, T-461/13, EU:T:2015:891, paragraph 71. The judgment was upheld on appeal in the judgment of the Court of Justice of 20 December 2017, *Spain* v *Commission*, C-81/16 P, EU:C:2017:1003. See in particular paragraph 49 of the judgment of the Court of Justice.

([166]) Paragraph 33 of the opening decision.

(155) When assessing a disposition against the MEOP, the decisive element is whether the public entity acted as a market operator would have done in a similar situation ([167]). Consequently, only the benefits and obligations linked to the role as an economic operator, as opposed to that of public authority, are to be taken into account ([168]).

(156) The question of whether a transaction involves State aid must be resolved with regard to the situation existing at the time when the transaction was decided on ([169]). What constitutes normal remuneration thus follows from the factors which an undertaking, acting under normal market conditions, would have taken into consideration when fixing the remuneration ([170]).

(157) ESA is required to undertake a complex economic assessment when applying the MEOP ([171]). This assessment must be carried out by relying on the objective and verifiable evidence which is available ([172]).

(158) In line with what is purported in the complaint, ESA will in the following assess whether the BKK-group has been compensated above market rates for maintenance and operation (measure (a)). Thereafter, ESA will assess whether the financing of the 12 000 LED fixtures (measure (b)) has conferred an advantage on it.

(159) Lastly, ESA will address the compensation for capital costs (measure (c)). In that assessment, ESA will consider, first, whether it was commensurate with normal market practice to compensate for capital costs. Second, ESA will assess whether the BKK-group has been compensated for such costs above market rates.

5.4.4. ***Measure (a) – operation and maintenance***

5.4.4.1. **The compensation paid in respect of the BKK-owned infrastructure**

(160) During the formal investigation procedure, ESA has received additional information on the Municipality's sale of Bergen Lysverker.

(161) As set forth in Section 3.1.2, the Municipality sold the municipal unit Bergen Lysverker, including its assets and operations, to BKK DA in 1996. Although BKK DA acquired Bergen Lysverker through a bidding process, the sale was also an internal transfer of a subsidiary. BKK DA was at the time wholly controlled by the Municipality.

(162) A mechanism governing the compensation for the future provision of streetlighting through the infrastructure that was purchased by BKK DA, was established in Section 7(c) of the 1996 sales agreement. As follows from the information presented in Sections 3.1.2 and 4.1.1, the Norwegian authorities and BKK Veilys agree that they have been, and still are, bound by this provision when fixing the compensation.

(163) The question of whether a transaction involves State aid must, as already mentioned, be resolved with regard to the situation existing at the time when the transaction was decided on ([173]). Consequently, if the compensation mechanism in the 1996 sales agreement was established in a manner which, at the time of its inception, limited the future compensation levels to market rates, compensation subsequently calculated in accordance with this mechanism does not amount to an advantage ([174]).

([167]) Guidelines on the notion of State aid, cited in footnote 79, paragraph 76; Judgment of the Court of Justice of 21 March 1991, *Italy* v *Commission*, C-305/89, EU:C:1991:142, paragraph 19; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, Joined Cases T-228/99 and T-233/99, EU:T:2003:57, paragraph 208.

([168]) Guidelines on the notion of State aid, cited in footnote 79, paragraph 77; Judgment of the Court of Justice of 5 June 2012, *Commission* v *Électricité de France (EDF)*, C-124/10 P, EU:C:2012:318, paragraphs 79, 80 and 81.

([169]) *Westdeutsche Landesbank Girozentrale*, cited in footnote 167, paragraphs 245-246.

([170]) *Syndicat français de l'Express international (SFEI)*, cited in footnote 156, paragraphs 60-61.

([171]) Judgment of the Court of Justice of 2 September 2010, *Commission* v *Scott SA*, C-290/07 P, EU:C:2010:480, paragraph 68. See also the judgment of the General Court of 27 April 2022, *Petra Flašker* v *Commission*, T-392/20, EU:T:2022:245, in paragraph 42.

([172]) *Électricité de France (EDF)*, cited in footnote 168, paragraph 102.

([173]) *Westdeutsche Landesbank Girozentrale*, cited in footnote 167, paragraph 245 and 246.

([174]) See as regards option agreements the judgment in *Asker Brygge*, cited in footnote 157, at paragraph 57 with further references to case-law.

(164) It therefore needs to be assessed, first, whether the compensation mechanism was devised in a manner limiting the future remuneration to market rates. If that question is answered in the affirmative, it needs to be assessed, second, whether the mechanism has actually been adhered to.

(165) In a case concerning the market conformity of the remuneration paid for assistance afforded by the French Post Office, *La Poste*, to its subsidiary *SFMI-Chronopost* ('Chronopost'), the Court of Justice underlined that the services provided to Chronopost were inseparably linked to the unique postal network managed by La Poste. As this network was not devised on the basis of commercial considerations, it would not have been established by a private undertaking in lack of state intervention ([175]).

(166) The Court of Justice found that, in this situation, the costs borne by La Poste in respect of the provision of the concerned services could constitute the objective and verifiable elements on the basis of which the market conformity of the remuneration would have to be assessed. The presence of an advantage could be excluded if, first, the price charged properly covered the additional variable costs incurred in providing the services, an appropriate contribution to the fixed costs and an adequate return on the capital investment, and, second, there was nothing to suggest that these elements had been wrongly estimated or fixed in an arbitrary fashion ([176]).

(167) The case at hand also concerns services inseparably linked to a unique network that was not constructed on the basis of a commercial approach, and which would not have been created by a private undertaking in lack of state intervention. Moreover, BKK DA was indeed wholly owned by the Municipality at the time of the conclusion of the sales agreement.

(168) On this basis, ESA finds the situation prevailing at the time when the compensation mechanism in the 1996 sales agreement was established, comparable to that assessed by the Court of Justice in *Chronopost*. Accordingly, insofar as this compensation mechanism fulfils the stipulations in *Chronopost*, ESA considers it in line with market terms.

(169) Section 7(c) of the 1996 sales agreement entails, as set forth in Section 3.1.2, that the compensation should cover BKK's operational cost plus a regulated return on the committed capital. Therefore, as far as the element concerning maintenance and operation is concerned, this mechanism only allows for cost coverage. ESA has furthermore not received any information indicating that costs that are wrongly or arbitrarily fixed, for example as a result of an artificially low efficiency level or an inappropriate allocation of indirect cost, would be eligible for compensation. On this basis, ESA finds that the element in the compensation mechanism pertaining to maintenance and operation is in keeping with the stipulations in *Chronopost*.

(170) Regarding the second question of whether the compensation mechanism in the 1996 sales agreement has been adhered to, a rational private operator would, bearing in mind the sums involved, have invested sufficient resources to ensure compliance. This would involve controls of the basis for the prices presented by the BKK-group, including of how the direct and indirect costs were determined. ESA is furthermore convinced that a private purchaser would have initiated legal steps if faced with a supplier unwilling to document that its prices comply with the agreed compensation mechanism.

(171) As described in Section 3.3, the Municipality has questioned what it considers high pricing on the part of the BKK-group. The Municipality has further admitted that it cannot rule out that the compensation levels amount to overcompensation and that the lack of documentation on the basis for the prices charged is problematic. Moreover, the Municipality has entertained these concerns throughout the period covered by the formal investigation procedure.

(172) As regards the information presented by BKK Veilys, as presented in Section 4.1.3, this does not contain any specifics concerning the basis for the prices charged. In particular, the information does not set out the direct and indirect costs associated with the activities pertaining to operation and maintenance, and how these have been established. As far as the indirect cost are concerned, there is no information as to what allocation mechanism is in place, and why this is deemed appropriate. This lack of specificity is an indication that the compensation mechanism in the 1996 sales agreement has not been complied with.

([175]) Judgment of the Court of Justice of 3 July 2003, *Chronopost* v *Ufex and Others*, Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388, paragraphs 36-37.

([176]) *Ibid*, paragraphs 38-40.

(173) With respect to the figures from KOSTRA, as set forth in paragraph (69), these present each municipality's total costs per light point per year, including electricity. The figures show that throughout the period 2015-2019, the Municipality had the highest recorded costs of the 10 larger municipalities that are represented.

(174) Cost differences between municipalities may result from several factors, as explained in paragraphs (67)-(68) and (94) above. Neither the Norwegian authorities nor BKK Veilys have, however, provided information substantiating that the cost levels in KOSTRA are justified. BKK Veilys has merely asserted that particular factors affect the costs in Bergen, without documenting this further.

(175) ESA consequently finds that the figures from KOSTRA are an indication that the BKK-group has been overcompensated. However, the figures are not sufficiently detailed to conclude to what extent the overcompensation concerns maintenance and operation (measure (a)) or capital cost (measure (c)).

(176) In view of the above, the totality of the submitted information indicates that the compensation has most likely exceeded the level commensurate with the mechanism in the 1996 sales agreement. This reflects a failure on the part of the Municipality to take the necessary steps to ensure that this mechanism was complied with. As such, the Municipality has not acted as a private purchaser.

5.4.4.2. **The compensation in respect of the Municipality-owned infrastructure**

(177) As described in Sections 3.1.3, 3.1.4 and 3.1.5, the Municipality has owned, and continues to own, a number of streetlights along its municipal roads. Further, as set out in Section 3.1.4, the maintenance and operation of this Municipality-owned infrastructure has, with effect from 1 April 2020, been performed under a contract which the Municipality had tendered out.

(178) As evidenced by its invitation to tender for this contract, the Municipality was free to purchase the maintenance and operation of the Municipality-owned infrastructure from any willing provider and was not bound by any predefined compensation mechanism. ESA will therefore assess separately the compensation paid with respect to these activities.

(179) The information presented in Section 3.1.4 indicates that the award of the tendered-out contract followed a competitive, transparent, non-discriminatory, and unconditional procedure in line with EEA procurement law. The award decision was based on the lowest price, and there is nothing to indicate that the prevailing market rate was in fact lower than that achieved. On this basis, ESA finds that the compensation paid for maintenance and operation under the tendered-out contract has not conferred an advantage on the BKK-group ([177]).

(180) As concerns the compensation for activities performed before 1 April 2020, ESA observes that while the Municipality perceived the price level as high, it did not check whether the services could be procured at lower costs from another supplier. Instead, it accepted that the same price per streetlight was applied as for the infrastructure controlled by the BKK-group. Accordingly, ESA observes that the Municipality has not acted as a private purchaser would have done.

(181) Regarding the level of compensation, this was as mentioned the same per streetlight as for those streetlights controlled by the BKK-group. As observed in paragraph (176), the totality of the submitted information indicates that the compensation level has exceeded that allowed by the cost-based mechanism in the 1996 sales agreement. This also suggests that the Municipality has paid more than it would have done if procuring the services on the open market.

(182) There is nothing in the information submitted to indicate the contrary. As set forth in paragraphs (173) to (175), the figures from KOSTRA are indeed an indication that the BKK-group has been overcompensated. However, the figures are not sufficiently detailed to conclude to what extent the overcompensation concerns maintenance and operation (measure (a)) or capital cost (measure (c)).

([177]) Guidelines on the notion of State aid, cited in footnote 79, paragraphs 89-96.

(183) ESA has further considered the outcome of the tender for the services performed from 1 April 2020. However, as set out in paragraph (48), the tendered-out contract also encompassed the 12 000 LED fixtures installed on the BKK-owned network. The terms achieved under the tendered-out contract therefore does not amount to a meaningful comparator as regards the prices previously charged with respect to the Municipality-owned streetlights.

(184) ESA must consequently conclude on the basis of the remaining information available. As set out in paragraphs (180)-(182), the totality of this information indicates that the BKK-group has been overcompensated also with respect to those streetlights owned by the Municipality.

5.4.4.3. **Conclusion**

(185) On the basis of the above assessment, ESA concludes that the BKK-group has been overcompensated for maintenance and operation of streetlights along municipal roads in Bergen. As regards those streetlights owned by the BKK-group, this overcompensation is ongoing. With respect to the streetlights owned by the Municipality, the overcompensation is limited to activities performed until 1 April 2020.

(186) While the information submitted establishes that an advantage has been granted, it does not put ESA in a position to determine its amount. This is reflected in the recovery order set out in Section 10 below.

5.4.5. ***Measure (b) – the financing of 12 000 LED fixtures***

(187) As follows from the information presented in Sections 3.4 and 4.1.4 above, the LED fixtures were procured by the Municipality from an external supplier. Their ownership has not been, and will not be, transferred to the BKK-group. Accordingly, no advantage has been conferred by means of the Municipality not retaining its ownership to the LED fixtures.

(188) The Norwegian authorities and BKK Veilys have further clarified that the purchase of the LED fixtures amounted to an extraordinary upgrade that BKK Veilys was not obliged to undertake. On this basis, it can be concluded that no advantage has been conferred by means of the Municipality having relieved BKK Veilys from charges that it should have borne according to the terms of the contract(s).

(189) As regards the operation and maintenance of the LED fixtures, these tasks were included in the separate service contract that was tendered-out. The compensation under this contract has, for the reasons set out in paragraph (179), not conferred an advantage on the BKK-group.

(190) Based on the above, ESA finds that the financing of the 12 000 LED fixtures (measure (b)) has in itself not conferred an advantage on companies within the BKK-group. For the reasons set out in paragraphs (191) and (192) below, however, ESA underlines that it is necessary to take account of the installation of the LED fixtures when establishing the level of overcompensation under measures (a) and (c).

(191) To the extent that this installation has reduced the cost of operation and maintenance, without this leading to reduced compensation in line with the cost-based mechanism in the 1996 sales agreement, this would amount to overcompensation under measure (a). ESA notes in this respect that while the tendered-out contract encompasses the operation and maintenance of the LED-fixtures, it appears that the BKK-group is still compensated, under the contract described in paragraph (45), for the maintenance and operation of the infrastructure onto which these fixtures are installed. Moreover, it appears that the compensation level has remained the same as when the contract also encompassed those fixtures that were replaced with the LED-fixtures ([178]).

([178]) In the letter of 12 April 2021, filed as Document No 1194249, the Norwegian authorities stated on page 11 that '(t)he conditions and terms in the operating and maintenance agreement between the Municipality of Bergen and Veilys AS has not (…) changed due to the installation o(f) the LED fixtures.'

(192) As regards measure (c), it is necessary to take account of the LED-fixtures being owned by the Municipality when establishing the correct level of compensation under the return-regulation in the 1996 sales agreement. Given that the LED-fixtures are owned by the Municipality, they cannot be included in the capital base that is subject to compensation. Further, any remaining value of the fixtures that were replaced with the LED fixtures, should have been removed from this capital base.

5.4.6. ***Measure (c) – the compensation for capital cost***

5.4.6.1. **Introduction**

(193) As explained in Section 3.1.2, the compensation for capital cost is the second element in the mechanism established in the 1996 sales agreement. As further set out in Section 3.5, the capital cost related to the infrastructure is one of several cost components imbedded in the provision of streetlighting. Thus, if the Municipality had owned the infrastructure itself, it would have borne such capital costs first hand. Conversely, when the streetlighting is produced by recourse to an infrastructure owned by another legal entity, the capital cost vests with this entity. Based on this new information, ESA considers it commensurate with normal practise to compensate the infrastructure owner for capital cost.

(194) Pursuant to the mechanism in the 1996 sales agreement, the BKK-group is entitled to capital cost for the committed capital equal to the rate of return fixed by the NVE for the regulated power grid infrastructure. In the same way as for the compensation for maintenance and operation of the BKK-owned streetlights, ESA finds that if this element in the compensation mechanism was designed in a manner which, at the time of the conclusion of the sales agreement, limited the future remuneration to market rates, compensation subsequently calculated in accordance with it does not amount to an advantage ([179]).

(195) According to the judgment in *Chronopost*, as set out in paragraph (166), the assessment criterion for the cost of capital is whether the return exceeds an adequate return on the capital invested. The questions to be assessed is thus, first, whether the regulation in the 1996 sales agreement allows for an adequate, as opposed to an excessive, return. If that question is answered in the affirmative, it needs to be considered, second, if the compensation levels have adhered to this limitation.

(196) The regulation of return on capital in the 1996 sales agreement is composed of two elements: (i) an interest rate; and (ii) a capital base on which to apply the rate. The resulting amount represents the opportunity cost of capital and covers both the cost of equity financing and of debt.

(197) By way of introduction, ESA notes that the concept of opportunity cost of capital is commonly accepted and in line with the criterion of an adequate return on the capital invested. ESA will therefore proceed to assess the two elements of the regulation (the interest rate and the capital base).

5.4.6.2. **The interest rate**

(198) As touched upon in Section 3.1.1, power networks are natural monopolies and subject to sector-specific regulation in Norway. In accordance with this regime, the NVE fixes its reference rate so as to allow infrastructure owners a reasonable return on investments ([180]).

([179]) See paragraph(163) above with references to case-law.

([180]) NVE fact sheet No 3/2021, last updated on 14 December 2021. At the time of the adoption of this decision, the fact sheet was available on the following link: https://webfileservice.nve.no/API/PublishedFiles/Download/968a7fea-1dde-4094-836a-6ad8ef9aef7c/202119109/3425690.

(199) The NVE estimates the rate on an annual basis using the Weighted Average Cost of Capital ('WACC') methodology. The input parameters to the NVE's WACC estimate comprise several market related factors specific to the power network industry. These include, in particular, the equity-beta, industry credit premiums and optimal capital structure. The reference rate has been between 5-7 % in the past decade ([181]).

(200) According to the NVE, power grid operations are characterised by stable and predictable revenues and generally considered low risk. The equity beta parameter in the WACC is therefore estimated using listed companies with regulated income streams, such as various utility network providers ([182]).

(201) The concept of opportunity cost of capital is, as noted above, in line with the criterion that the price charged should allow for an adequate return on the capital invested. The WACC concept is furthermore a standard method for estimating such costs.

(202) The appropriate WACC for the services assessed in the case at hand should, however, reflect the opportunity cost of investing in streetlight infrastructure. The appropriate WACC should therefore reflect the risk involved in this activity.

(203) Similar to power networks, the concerned streetlight infrastructure amounts to a natural monopoly of substantial longevity. In view of the consistent demand for streetlighting on the part of the Municipality, the risk for income fluctuations is low. Moreover, considering that the Municipality is paying for electricity, the costs can also be expected to be stable.

(204) These factors indicate that the use of the NVE reference rate represented an appropriate proxy for the required market return for streetlight infrastructure operations. ESA has not received any information indicating the contrary.

(205) On this basis, ESA finds that the stipulation on the use of the NVE reference rate was commensurate with an adequate level of return, and therefore in line with *Chronopost*. However, as will be evident from the assessment below relating to the capital base, the submitted information does not establish how the compensation has been calculated in practise.

5.4.6.3. **The capital base**

(206) The 1996 sales agreement does not specify the methodology to be applied for establishing the committed capital that is the capital base. There is, however, nothing in its wording to indicate that the BKK-group is entitled to an excessive level of return in the form of monopoly rents. To the contrary, cost plus mechanisms, such as that included in the sales agreement, are normally used in regulated sectors to ensure that the compensation level is adequate. On this basis, ESA takes it that the stipulation that the NVE reference rate shall be applied on the committed capital, entails that the capital base shall be established in an appropriate manner ensuring an adequate level of return. Accordingly, this element is also commensurate with *Chronopost*.

(207) With respect to the question of how the mechanism has been practised, however, the submitted information does not establish how the eligible capital cost have been calculated. The Norwegian authorities have been unable to provide specifics and consider that control on their part has been made difficult by the lack of separate accounts. BKK Veilys has merely made general reference to the capital that could be involved in constructing a similar infrastructure. In the same way as for the compensation for operation and maintenance, this lack of precision is in itself indicative of the 1996 sales agreement not having been adhered to.

(208) Regard should further be had to the use of the NVE reference rate. As the NVE reference rate is a nominal interest rate already incorporating general inflation, applying it on a capital base established following a replacement cost-approach would entail compensating for general inflation twice ([183]). Under the NVE regulation, which the compensation mechanism is evidently reflecting, the NVE reference rate is accordingly applied to the book value of the power grid assets put into productive use, i.e. to their historical value less depreciation ([184]).

([181]) NVE fact sheet No 8/2021, last updated on 14 December 2021. At the time of the adoption of this decision, the fact sheet was available on the following link: https://webfileservice.nve.no/API/PublishedFiles/Download/6c8f4e29-3c0e-418c-a1b4-3d366df1bd71/202119109/3425693.

([182]) *Ibid.*

([183]) NVE fact sheet No 8/2021, cited in footnote 181 above.

([184]) NVE fact sheet No 3/2021, cited in footnote 180 above.

(209) In this respect, ESA has taken note of the disagreement between the Municipality and the BKK-group. As set out in Section 3.5, it appears that while the Municipality has advocated the use of the book value for establishing the capital base, the BKK-group has argued in favour of using the assets' replacement cost. Further, it appears that this disagreement prevailed throughout the concerned period, and that the capital base may as a result have been established in a manner which is not commensurate with the regulation of adequate return in the compensation mechanism of the 1996 sales agreement.

(210) Lastly, the figures from KOSTRA, as presented in paragraph (69), show that throughout the period 2015-2019, the Municipality had the highest recorded costs for streetlighting of the 10 larger municipalities represented. While the figures are not sufficiently detailed to conclude to what extent the recorded costs concern maintenance and operation (measure (a)) or capital cost (measure (c)), this is an indication that the BKK-group has been compensated in excess of an adequate level of return.

(211) The totality of the submitted information therefore indicates that the compensation has most likely exceeded the adequate level of return allowed by the 1996 sales agreement. In the same way as with respect to the compensation for maintenance and operation (measure (a)), this reflects a failure on the part of the Municipality to take the necessary steps to ensure that the compensation mechanism was complied with. As such, the Municipality has not acted as a private purchaser.

5.4.6.4. **Conclusion**

(212) On the basis of the above assessment, ESA concludes that the BKK-group has been overcompensated for capital cost in respect of its streetlights along municipal roads in Bergen.

(213) While the information submitted establishes that an advantage has been granted, it does not put ESA in a position to determine its amount. This is reflected in the recovery order set out in Section 10 below.

5.5. SELECTIVITY

(214) In order to amount to State aid under Article 61(1) of the EEA Agreement, measures must be selective by favouring 'certain undertakings or the production of certain goods'.

(215) The measures concern companies in the BKK-group. Accordingly, they are selective in nature.

5.6. EFFECT ON TRADE AND COMPETITION

5.6.1. ***The legal test***

(216) An advantage granted to an undertaking only constitutes State aid under Article 61(1) of the EEA Agreement if it 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods', and only insofar as it 'affects trade' between EEA States. In order for these criteria to be fulfilled, it is not necessary to establish that competition is actually being distorted and that the aid has a real effect on trade between EEA States. It suffices to examine whether the aid is liable to distort competition and affect trade ([185]).

(217) As regards the condition pertaining to distortion of competition, it is noted in the Guidelines on the notion of State aid that such distortion can be excluded only where certain cumulative conditions are met. These conditions are: (a) that the service is subject to a legal monopoly established in compliance with EEA law; (b) that the legal monopoly not only excludes competition on the market, but also for the market; (c) that the service is not in competition with other services; and (d) that if the service provider is active in another market open to competition, cross-subsidisation can be excluded ([186]).

([185]) Judgment of the Court of Justice of 29 July 2019, *Istituto nazionale della previdenza sociale (INPS)* v *Azienda Napoletana Mobilità SpA*, C-659/17, EU:C:2019:633, paragraph 29 and the case-law cited.

([186]) Guidelines on the notion of State aid, cited in footnote 79, paragraph 188.

(218) In recent case-law, the Court of Justice has referred to the equivalent paragraph in the corresponding European Commission Notice on the notion of State aid ([187]). With respect to condition (b), that Court underlined that it does not suffice that the service is subject to a lawful legal monopoly. The legal monopoly must in addition exclude any possible competition to become the exclusive service provider ([188]).

(219) As for the condition concerning an effect on trade, such an effect is present where aid strengthens the position of an undertaking competing in trade between EEA States. However, it is not necessary that the beneficiary is involved in such trade. Where an EEA State grants aid to an undertaking, its internal activity may be maintained or increased so that the opportunities for undertakings established in other EEA States to penetrate the market are reduced. Accordingly, the local or regional character of services is not sufficient to exclude that the aid is liable to affect trade between EEA States ([189]).

5.6.2. ***Application of the legal test to the case at hand***

(220) Neither the Norwegian authorities nor BKK Veilys have submitted that the compensated activities have taken place within the remit of a lawfully established legal monopoly. Accordingly, a distortion of competition cannot be excluded on the basis of the cumulative conditions in the Guidelines on the notion of State aid, reiterated in paragraph (217) above.

(221) The compensated activities further include the operation and maintenance of streetlights. When the Municipality held a competition for such services, it received tenders from many different undertakings. There have also been multiple cases before the KOFA concerning contracts of this subject matter that were, or should have been, subject to EEA-wide tenders advertised in the TED-database ([190]). Accordingly, ESA observes that there are established markets in Norway for services pertaining to the operation and maintenance of streetlights. Moreover, these markets include contracts that may be of an EEA-wide interest.

(222) As set forth in paragraph (54), companies in the BKK-group are additionally active on a number of other markets. In spite of this, the Norwegian authorities are unable to exclude that the other economic activities have been cross-subsidised.

(223) In light of the above, ESA is convinced that the advantages conferred upon the BKK-group are liable to distort competition by allowing it to maintain or strengthen its markets presence.

(224) Considering that local authorities in Norway regularly tender-out contracts for maintenance and operation of streetlights through EEA-wide tenders, it is furthermore realistic that undertakings established in other EEA States would consider increasing their market presence in Norway as regards such activities. The advantages conferred on the BKK-group may, however, allow it to maintain or extend its activities at the expense of these competitors. To the extent that cross-subsidisation has taken place, the same is likely true for economic activities in other markets open to competition.

(225) On this basis, ESA finds that the overcompensation is also liable to affect trade.

([187]) The European Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ C 262, 19.7.2016, p. 1).
([188]) Judgment of the Court of Justice of 19 December 2019, *Arriva Italia Srl and Others* v *Ministero delle Infrastrutture e dei Trasporti*, C-385/18, EU:C:2019:1121, paragraphs 57-58.
([189]) *INPS*, cited in footnote 185, paragraphs 30-31 and the case-law cited.
([190]) Cases 2021/1439, 2021/367, and 2015/71, cited in footnote 148.

5.6.3. ***Conclusion***

(226) In view of the above considerations, ESA concludes that the overcompensation is liable to distort competition and affect trade.

5.7. CONCLUSION CONCERNING THE PRESENCE OF STATE AID

(227) As follows from the above considerations, ESA concludes that the overcompensation for maintenance and operation (measure (a)) and capital cost (measure (c)) constitutes State aid within the meaning of Article 61(1) of the EEA Agreement.

6. *INDIVIDUAL AID OR AID SCHEME*

(228) Article 1(d) of Part II of Protocol 3 defines an 'aid scheme' as '[…]any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.' The term 'individual aid' is defined in letter (e) of the same Article as '[…] aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme.'

(229) As concerns that aid granted in respect of the infrastructure controlled by the BKK-group, it comprises, as set out in Sections 5.4.4.1 and 5.4.6, amounts exceeding the compensation allowed under the mechanism set out in Section 7(c) of the 1996 sales agreement. Neither the Norwegian authorities nor BKK Veilys have identified any pre-existing act allowing for such overcompensation.

(230) Similarly, as regards the aid concerning the maintenance and operation of the Municipality-owned infrastructure, as identified in Section 5.4.4.2, the Norwegian authorities and BKK Veilys have not purported that this compensation was granted on the basis of an act as defined in Article 1(d) of Part II of Protocol 3. In line with this, the information submitted during the formal investigation procedure contains no indication that the aid was granted on the basis of such an act.

(231) On this basis, ESA concludes that the aid concerned is individual aid, as defined in Article 1(e) of Part II of Protocol 3.

7. *PROCEDURAL REQUIREMENTS*

(232) Pursuant to Article 1(3) of Part I of Protocol 3, '[t]he EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. […] The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision'.

(233) ESA was first informed of the aid already granted by virtue of the complaint. The aid is therefore unlawful within the meaning of Article 1(f) of Part II of Protocol 3.

8. *COMPATIBILITY*

(234) It follows from Article 61(1) of the EEA Agreement that, unless provided otherwise, State aid measures are incompatible with the functioning of the Agreement. The Norwegian authorities have not put forward any arguments to the effect that the concerned measures amount to compatible aid.

(235) The derogation under Article 61(2) of the EEA Agreement is inapplicable as the aid is not furthering any of the aims listed in this provision. For the same reason, Article 61(3)(a) and (b) of the EEA Agreement do not apply to the case at hand.

(236) In respect of its Article 61(3)(c), ESA notes that the aid measures involve overcompensation exceeding the level of compensation necessary to induce the concerned economic activities. It follows from settled case-law that aid which improves the financial situation of the beneficiary, without being necessary for the attainment of the objectives specified in Article 61(3), cannot be considered compatible with the EEA Agreement ([191]). Therefore, as the overcompensation was not necessary to induce the economic activities in question, it is incompatible with Article 61(3)(c) of the EEA Agreement.

(237) As for the derogation in Article 59(2) of the EEA Agreement, ESA observes, as established in Section 5.4.2.2, that the companies in the BKK-group have not had, and do not have, a public service obligation to discharge with respect to the concerned services. Since the compensation is not granted in respect of an undertaking entrusted with a SGEI, the derogation in Article 59(2) is not applicable.

(238) On the basis of these considerations, ESA finds that the overcompensation for maintenance and operation (measure (a)) and capital cost (measure (c)) cannot be declared compatible with the functioning of the EEA Agreement.

9. *CONCLUSION*

(239) For the reasons set out above, ESA concludes that the overcompensation for maintenance and operation (measure (a)) and capital cost (measure (c)), paid to companies in the BKK-group, in respect of streetlights along municipal roads within the Municipality, amounts to unlawful State aid that is incompatible with the functioning of the EEA Agreement.

(240) The overcompensation for maintenance and operation (measure (a)), concerns, first, the streetlight infrastructure controlled by the BKK-group ([192]). In respect of this infrastructure, the overcompensation comprises those elements exceeding the costs eligible for compensation under the mechanism in Section 7(c) of the 1996 sales agreement.

(241) Second, the overcompensation for maintenance and operation (measure (a)) concerns services in respect of the streetlight infrastructure owned by the Municipality. For these services, the overcompensation equates to those sums exceeding the market price that could have been obtained on the open market.

(242) The finding of unlawful and incompatible overcompensation for maintenance and operation (measure (a)), is limited to the period from 1 January 2016. In respect of the streetlight infrastructure controlled by the BKK-group, the overcompensation is ongoing. As concerns the streetlight infrastructure owned by the Municipality, it comprises activities performed until 1 April 2020.

(243) With respect to the compensation for capital cost (measure (c)), the unlawful and incompatible State aid is that compensation exceeding the adequate level of return allowed by the mechanism in Section 7(c) of the 1996 sales agreement. As this finding is not limited to the period from 1 January 2016, it comprises all overcompensation awarded within the limitation period of 10 years ([193]). The limitation period was interrupted when ESA forwarded the complaint to the Norwegian authorities, and invited them to comment on it, by letter dated 1 June 2017 ([194]).

([191]) See in that regard the Judgment of the Court of Justice of 15 April 2008, *Nuova Agricast Srl* v *Ministero delle Attività Produttive*, C-390/06, EU:C:2008:224, paragraph 68 and the case-law cited.

([192]) Based on the submitted information, it is ESA's understanding that these streetlights are currently owned by Veilys AS.

([193]) Article 15 of Part II of Protocol 3. See also the judgment of the Court of Justice of 6 October 2005, *Scott SA* v *Commission*, C-276/03, EU:C:2005:590.

([194]) Document No 858239.

10. *RECOVERY*

(244) The EFTA Court has held that the obligation to abolish incompatible aid is designed to re-establish the previously existing situation ([195]). That objective is attained once the recipient has repaid the amounts granted by way of unlawful and incompatible aid, thereby forfeiting the advantage it enjoyed over its competitors ([196]). It further follows from settled case-law that, when ordering the recovery of aid declared incompatible with the functioning of the EEA Agreement, ESA is not required to fix the exact amount of the aid to be recovered ([197]).

(245) Part II of Protocol 3 contains detailed rules on recovery. In keeping with case-law, its Article 14(1) establishes an obligation on ESA to order recovery of unlawful and incompatible aid unless this would be contrary to a general principle of law. It also provides that the State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible.

(246) Pursuant to Article 14(2), the recoverable aid shall include interest calculated from the date on which the aid was at the disposal of the beneficiary until the date of its recovery. As stipulated in Article 14(3), recovery shall further be effected without delay and in accordance with the applicable procedures under national law. Those national procedures must allow the immediate and effective execution of the recovery decision.

(247) Additional implementing provisions concerning recovery are included in Decision No 195/04/COL of 14 July 2004 ([198]). ESA has also issued Guidelines on the recovery of unlawful and incompatible aid ([199]).

(248) On the basis of the foregoing assessment, and in line with the above stipulations on the recovery of unlawful and incompatible aid, ESA has therefore adopted this decision,

HAS ADOPTED THIS DECISION:

Article 1

The overcompensation for maintenance and operation (measure (a)) and capital cost (measure (c)), paid to companies in the BKK-group in respect of streetlights along municipal roads within the Municipality, amounts to unlawful State aid that is incompatible with the functioning of the EEA Agreement.

([195]) *The Principality of Liechtenstein and Others*, cited in footnote 128, paragraph 142; Judgment of the EFTA Court of 8 October 2012 in Joined Cases E-10/11 and E-11/11 *Hurtigruten ASA* v *EFTA Surveillance Authority* [2012] EFTA Court Report p. 758, paragraph 286.

([196]) Judgment of the Court of Justice of 17 June 1999, *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraphs 64-65; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord, PIL and others and Norway* v *EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 121 at paragraph 178; Judgment of the Court of Justice of 7 March 2002, *Italy* v *Commission*, C-310/99, EU:C:2002:143, paragraph 98.

([197]) See the Guidelines on recovery of unlawful and incompatible State aid, cited in footnote 199 below, at paragraph 36 with references to the Judgment of the Court of Justice of 12 October 2000, *Spain* v *Commission*, C-480/98, EU:C:2000:559, paragraph 25, and the Judgment of the Court of Justice of 2 February 1988, *Kwekerij Gebroeders van der Kooy BV and others* v *Commission*, Joined Cases C-67/85, C-68/85, and C-70/85, EU:C:1988:38. See also the Judgment of the Court of Justice of 13 February 2014, *Mediaset SpA* v *Ministero dello Sviluppo economico*, C-69/13, EU:C:2014:71, at paragraph 21 with references to case-law.

([198]) EFTA Surveillance Authority Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (OJ L 139, 25.5.2006, p. 37), and EEA Supplement No 26/2006, 25.5.2006, p. 1, as amended by EFTA Surveillance Authority Decision No 789/08/COL of 17 December 2008 amending College Decision No 195/04/COL on the implementing provisions referred to under Article 27 in Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice as regards the standard forms for notification of aid (OJ L 340, 22.12.2010, p. 1), and EEA Supplement No 72/2010, 22.12.2010, p. 1.

([199]) EFTA Surveillance Authority Decision No 788/08/COL of 17 December 2008 amending, for the sixty-seventh time, the procedural and substantive rules in the field of State aid by introducing a new chapter on recovery of unlawful and incompatible State aid (OJ L 105, 21.4.2011, p. 32), and EEA Supplement No 23/2011, 21.4.2011, p. 1. The Guidelines correspond to the Commission Notice Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ C 272, 15.11.2007, p. 4).

Article 2

The overcompensation for maintenance and operation (measure (a)) concerns, first, the streetlight infrastructure controlled by the BKK-group. In respect of this infrastructure, the overcompensation comprises those elements exceeding the costs eligible for compensation under the mechanism in Section 7(c) of the 1996 sales agreement.

Second, the overcompensation for maintenance and operation (measure (a)) concerns services in respect of the streetlight infrastructure owned by the Municipality. For these services, the overcompensation equates to those sums exceeding the market price that could have been obtained on the open market.

Article 3

The overcompensation for capital cost (measure (c)) comprises the compensation in excess of the adequate level of return allowed by the mechanism in Section 7(c) of the 1996 sales agreement.

Article 4

With respect to the compensation for maintenance and operation (measure (a)), the finding of unlawful and incompatible overcompensation is limited to the period from 1 January 2016. As concerns the streetlight infrastructure controlled by the BKK-group, this overcompensation is ongoing. In respect of the streetlight infrastructure owned by the Municipality, the overcompensation comprises activities performed until 1 April 2020.

Article 5

As regards the compensation for capital cost (measure (c)), the aid found unlawful and incompatible comprises all overcompensation awarded within the limitation period of 10 years in Article 15 of Part II of Protocol 3. This limitation period was interrupted when ESA forwarded the complaint to the Norwegian authorities, and invited them to comment on it, by letter dated 1 June 2017.

Article 6

The Norwegian authorities shall take all necessary measures to recover the unlawful and incompatible aid referred to in Articles 1, 2, 3, 4 and 5.

The aid to be recovered shall include interest and compound interest, calculated from the date on which the aid was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of Article 9 of the EFTA Surveillance Authority Decision No 195/04/COL, as amended.

Article 7

Recovery shall be effected without delay and in accordance with the procedures under the national law of Norway, provided that they allow for the immediate and effective execution of this decision.

The Norwegian authorities must ensure that the recovery of aid is implemented within 4 months from the date of notification of this Decision.

Article 8

The Norwegian authorities shall, within 2 months from the date of notification of this Decision, submit the following information to ESA:

1. the total amount (principal and recovery interests) to be recovered;

2. the dates on which the sums to be recovered were put at the disposal of the concerned companies in BKK-group;
3. a report on the progress made and the measures taken to comply with this Decision.

Article 9

Should the Norwegian authorities encounter serious difficulties preventing them from respecting either one of the deadlines set out in Articles 7 and 8, they must inform ESA of these difficulties. Provided that the Norwegian authorities have presented an appropriate justification, ESA may prolong the deadlines in accordance with the principle of loyal cooperation.

Article 10

This Decision is addressed to the Kingdom of Norway.

For the EFTA Surveillance Authority,

Arne RØKSUND
President
Responsible College Member

Stefan BARRIGA
College Member

Árni Páll ÁRNASON
College Member

Melpo-Menie JOSÉPHIDÈS
Countersigning as Director,
Legal and Executive Affairs

CORRIGENDA

Corrigendum to Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of 'do no significant harm', specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports

(Official Journal of the European Union L 196 of 25 July 2022)

On page 1, in the title:

for: 'Commission Delegated Regulation (EU) 2022/... of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of 'do no significant harm', specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in precontractual documents, on websites and in periodic reports',

read: 'Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of 'do no significant harm', specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in precontractual documents, on websites and in periodic reports'.

Corrigendum to Commission Delegated Regulation (EU) 2021/2268 of 6 September 2021 amending the regulatory technical standards laid down in Commission Delegated Regulation (EU) 2017/653 as regards the underpinning methodology and presentation of performance scenarios, the presentation of costs and the methodology for the calculation of summary cost indicators, the presentation and content of information on past performance and the presentation of costs by packaged retail and insurance-based investment products (PRIIPs) offering a range of options for investment and alignment of the transitional arrangement for PRIIP manufacturers offering units of funds referred to in Article 32 of Regulation (EU) No 1286/2014 of the European Parliament and of the Council as underlying investment options with the prolonged transitional arrangement laid down in that Article

(Official Journal of the European Union L 455 I of 20 December 2021)

On page 1, in the title:

for: '**Commission Delegated Regulation (EU) 2021/… of 6 September 2021 amending the regulatory technical standards laid down in Commission Delegated Regulation (EU) 2017/653 as regards the underpinning methodology and presentation of performance scenarios, the presentation of costs and the methodology for the calculation of summary cost indicators, the presentation and content of information on past performance and the presentation of costs by packaged retail and insurance-based investment products (PRIIPs) offering a range of options for investment and alignment of the transitional arrangement for PRIIP manufacturers offering units of funds referred to in Article 32 of Regulation (EU) No 1286/2014 of the European Parliament and of the Council as underlying investment options with the prolonged transitional arrangement laid down in that Article**',

read: '**Commission Delegated Regulation (EU) 2021/2268 of 6 September 2021 amending the regulatory technical standards laid down in Commission Delegated Regulation (EU) 2017/653 as regards the underpinning methodology and presentation of performance scenarios, the presentation of costs and the methodology for the calculation of summary cost indicators, the presentation and content of information on past performance and the presentation of costs by packaged retail and insurance-based investment products (PRIIPs) offering a range of options for investment and alignment of the transitional arrangement for PRIIP manufacturers offering units of funds referred to in Article 32 of Regulation (EU) No 1286/2014 of the European Parliament and of the Council as underlying investment options with the prolonged transitional arrangement laid down in that Article**'.

Corrigendum to Commission Delegated Regulation (EU) 2022/2580 of 17 June 2022 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be provided in the application for the authorisation as a credit institution, and specifying the obstacles which may prevent the effective exercise of supervisory functions of competent authorities

(Official Journal of the European Union L 335 of 29 December 2022)

On page 66, in recital 14:

for: 'This Regulation should apply from XX.XX.XXXX in order to grant the competent authorities and applicant credit institutions sufficient time to comply with the requirements laid down in this Regulation.',

read: 'This Regulation should apply from 18 July 2023 in order to grant the competent authorities and applicant credit institutions sufficient time to comply with the requirements laid down in this Regulation.'.

On page 75, in Article 13:

for: 'This Regulation shall apply from XX.XX.XXXX.',

read: 'This Regulation shall apply from 18 July 2023.'.

Corrigendum to Commission Implementing Regulation (EU) 2022/2581 of 20 June 2022 laying down implementing technical standards for the application of Directive 2013/36/EU of the European Parliament and of the Council with regard to provision of information in applications for authorisation of a credit institution

(Official Journal of the European Union L 335 of 29 December 2022)

On page 86, in footnote 2:

for:	'Commission Delegated Regulation (EU) 2022/2580 of 17 June 2022 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be provided in the application for the authorisation as a credit institution, and specifying the obstacles which may prevent the effective exercise of supervisory functions of competent authorities (OJ L 335, XX.XX.XXXX, p. 64).',
read:	'Commission Delegated Regulation (EU) 2022/2580 of 17 June 2022 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be provided in the application for the authorisation as a credit institution, and specifying the obstacles which may prevent the effective exercise of supervisory functions of competent authorities (OJ L 335, 29.12.2022, p. 64).'.

On page 87, in Article 3:

for:	'This Regulation shall apply to applications for authorisation as a credit institution submitted on or after XX.XX.XXXX.',
read:	'This Regulation shall apply to applications for authorisation as a credit institution submitted on or after 18 July 2023.'.

On page 87, in Article 4:

for:	'This Regulation shall apply from the XX.XX.XXXX.',
read:	'This Regulation shall apply from 18 July 2023.'.

On page 88, in Annex, in footnote 1:

for:	'OJ L 335, XX.XX.XXXX, p. 64.',
read:	'OJ L 335, 29.12.2022, p. 64.'.

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