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Contents

[1] Text with EEA relevance.

EN

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

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

DECISIONS

Corrigenda

[1] Text with EEA relevance.

II

(Non-legislative acts)

REGULATIONS

COMMISSION DELEGATED REGULATION (EU) 2017/323

of 20 January 2017

correcting Delegated Regulation (EU) 2016/2251 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ([1]), and in particular Article 11(15) thereof,

Whereas:

(1) Commission Delegated Regulation (EU) 2016/2251 ([2]) was adopted on 4 October 2016 and published on 15 December 2016. It lays down the standards for the timely, accurate and appropriately segregated exchange of collateral when derivatives contracts are not cleared by a central counterparty and includes a number of detailed requirements to be met for a group to obtain the exemption from posting margin for intragroup transactions. In addition to those requirements, where one of the two counterparties in the group is domiciled in a third country for which an equivalence determination under Article 13(2) of Regulation (EU) No 648/2012 has not yet been provided, the group has to exchange variation and appropriately segregated initial margins for all the intragroup transactions with the subsidiaries in those third countries. In order to avoid a disproportionate application of the margin requirements and taking into account similar requirements for clearing obligations, the Delegated Regulation provides for a delayed implementation of that particular requirement in order to allow enough time for completion of the process to produce the equivalence determination, while not requiring an inefficient allocation of resources to the groups with subsidiaries domiciled in third countries.

(2) In Article 37 of Delegated Regulation (EU) 2016/2251, the provision on applying the phase-in of the variation margin requirements to intra-group transactions in a way analogous to the provision in Article 36(2) (which relates to initial margin requirements) is missing. Two new paragraphs should therefore be added to Article 37, which is the Article specifying the phase-in schedule for variation margin requirements. Those paragraphs should be analogous to the existing paragraphs 2 and 3 of Article 36 so that where an intragroup transaction takes place between a Union entity and a third country entity, the exchange of variation margin is not required until three years after entry into force of the Regulation where there is no equivalence decision for that third country.

([1]) OJ L 201, 27.7.2012, p. 1.

([2]) Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (OJ L 340, 15.12.2016, p. 9).

Where there is an equivalence decision, the requirements should apply either four months after the entry into force of the equivalence decision, or according to the general timeline, whichever is later.

(3) The draft regulatory technical standards on which Delegated Regulation (EU) 2016/2251 is based, submitted by the European Supervisory Authorities to the Commission on 8 March 2016, included the same phase-in period for both initial and variation margins. The need for the correction is due to a technical error in the process leading to the adoption of Delegated Regulation (EU) 2016/2251 where the inclusion of the two paragraphs on the phase-in of the variation margin requirements to intra-group transactions was omitted.

(4) Delegated Regulation (EU) 2016/2251 should therefore be corrected accordingly.

(5) Delegated Regulation (EU) 2016/2251 entered into force on 4 January 2017. In order to avoid any discontinuity in the application of the phase-in periods for initial and variation margins, this Regulation should enter into force as a matter of urgency with retroactive application,

HAS ADOPTED THIS REGULATION:

Article 1

In Article 37 of Delegated Regulation (EU) 2016/2251, the following paragraphs 3 and 4 are added:

'3. By way of derogation from paragraph 1, where the conditions of paragraph 4 of this Article are met, Articles 9(1), 10 and 12 shall apply as follows:

(a) 3 years after the date of entry into force of this Regulation where no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;

(b) the later of the following dates where an equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country:

(i) four months after the date of entry into force of the decision adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;

(ii) the applicable date determined pursuant to paragraph 1.

4. The derogation referred to in paragraph 3 shall only apply where counterparties to a non-centrally cleared OTC derivative contract meet all of the following conditions:

(a) one counterparty is established in a third country and the other counterparty is established in the Union;

(b) the counterparty established in a third country is either a financial counterparty or a non-financial counterparty;

(c) the counterparty established in the Union is one of the following:

(i) a financial counterparty, a non-financial counterparty, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements and the third country counterparty referred to in point (a) is a financial counterparty;

(ii) either a financial counterparty or a non-financial counterparty and the third country counterparty referred to in point (a) is a non-financial counterparty;

(d) both counterparties are included in the same consolidation on a full basis in accordance to Article 3(3) of Regulation (EU) No 648/2012;

(e) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;

(f) the requirements of Chapter III are met.'.

Article 2

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

It shall apply from 4 January 2017.

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

Done at Brussels, 20 January 2017.

For the Commission
The President
Jean-Claude JUNCKER

COMMISSION REGULATION (EU) 2017/324

of 24 February 2017

amending the Annex to Regulation (EU) No 231/2012 laying down specifications for food additives listed in Annexes II and III to Regulation (EC) No 1333/2008 of the European Parliament and of the Council as regards specifications for Basic methacrylate copolymer (E 1205)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives ([1]), and in particular Article 14 thereof,

Having regard to Regulation (EC) No 1331/2008 of the European Parliament and of the Council of 16 December 2008 establishing a common authorisation procedure for food additives, food enzymes and food flavourings ([2]), and in particular Article 7(5) thereof,

Whereas:

(1) Commission Regulation (EU) No 231/2012 ([3]) lays down specifications for food additives listed in Annexes II and III to Regulation (EC) No 1333/2008.

(2) Those specifications may be updated in accordance with the common procedure referred to in Article 3(1) of Regulation (EC) No 1331/2008, either on the initiative of the Commission or following an application.

(3) On 21 November 2014, an application was submitted for the amendment of the specifications concerning the food additive basic methacrylate copolymer (E 1205). The application was made available to the Member States pursuant to Article 4 of Regulation (EC) No 1331/2008.

(4) The applicant has requested the definition of the food additive to be amended with regard to the short description of the manufacturing process due to a modernization of the manufacturing process. Following a thorough review of the particle size in the current specification, the applicant has requested a change in the particle size of the powder.

(5) The European Food Safety Authority ('the Authority') adopted an opinion on the safety of the proposed amendment of the specifications for basic methacrylate copolymer (E 1205) as a food additive ([4]). Based on the data provided by the applicant and taking into account the original evaluation of the substance in 2010 ([5]), the Authority concluded that the proposed amendments to the specifications of the food additive Basic methacrylate copolymer (E 1205) are not of a safety concern.

(6) Regulation (EU) No 231/2012 should therefore be amended accordingly.

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

HAS ADOPTED THIS REGULATION:

Article 1

The Annex to Regulation (EU) No 231/2012 is amended in accordance with the Annex to this Regulation.

([1]) OJ L 354, 31.12.2008, p. 16.
([2]) OJ L 354, 31.12.2008, p. 1.
([3]) Commission Regulation (EU) No 231/2012 of 9 March 2012 laying down specifications for food additives listed in Annexes II and III to Regulation (EC) No 1333/2008 of the European Parliament and of the Council (OJ L 83, 22.3.2012, p. 1).
([4]) *EFSA Journal* 2016;14(5):4490, p. 13.
([5]) *EFSA Journal* 2010;8(2):1513, p. 23.

Article 2

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

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

Done at Brussels, 24 February 2017.

For the Commission
The President
Jean-Claude JUNCKER

ANNEX

In the Annex to Regulation (EU) No 231/2012, the entries for food additive E 1205 Basic methacrylate copolymer are amended as follows:

(1) the entry for the definition is replaced by the following:

'**Definition**	Basic methacrylate copolymer is manufactured by thermic controlled polymerisation of the monomers methyl methacrylate, butyl methacrylate and dimethylaminoethyl methacrylate (dissolved in propan-2-ol), by using a free radical donor initiator system. An alkyl mercaptane is used as chain modifying agent. The polymer solution is extruded and granulated under vacuum to remove residual volatile components. The granules resulting are commercialized as such or undergo a milling step (micronisation).'

(2) the entry for the particle size is replaced by the following:

'Particle size of the powder (when used forms a film)	< 50 μm at least 95 % < 20 μm at least 50 % < 3 μm not more than 10 %'

COMMISSION IMPLEMENTING REGULATION (EU) 2017/325

of 24 February 2017

imposing a definitive anti-dumping duty on imports of high tenacity yarns of polyesters originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ([1]) ('the basic Regulation'), and in particular Article 11(2) thereof,

Whereas:

A. **PROCEDURE**

1. **Measures in force**

(1) By Regulation (EU) No 1105/2010 ([2]) the Council imposed a definitive anti-dumping duty on imports of high tenacity yarns of polyesters originating in the People's Republic of China ('the PRC' or 'China').

(2) The measures imposed took the form of an *ad valorem* duty with a residual rate set at 9,8 % while the companies on which anti-dumping duties were imposed received an individual duty rate ranging from 5,1 % to 9,8 %. Two companies were found not to be dumping in the original investigation.

2. **Request for an expiry review**

(3) Following the publication of a notice of impending expiry ([3]) of the anti-dumping measures in force, the Commission received a request for the initiation of an expiry review of these measures pursuant to Article 11(2) of the basic Regulation.

(4) The request was lodged on 31 August 2015 by CIRFS ('The European Manmade Fibres Association' or 'the applicant') on behalf of producers representing more than 25 % of the total Union production of high tenacity yarns of polyester.

(5) The request was based on the grounds that the expiry of the measures would be likely to result in a continuation and/or recurrence of dumping and injury to the Union industry.

3. **Initiation of an expiry review**

(6) Having determined, after having consulted the Committee established by Article 15(1) of the basic Regulation, that sufficient evidence existed for the initiation of an expiry review, the Commission announced on 28 November 2015, by a notice published in the *Official Journal of the European Union* ([4]) ('Notice of initiation'), the initiation of an expiry review pursuant to Article 11(2) of the basic Regulation.

([1]) OJ L 176, 30.6.2016, p. 21.
([2]) OJ L 315, 1.12.2010, p. 1.
([3]) OJ C 77, 5.3.2015, p. 9.
([4]) OJ C 397, 28.11.2015, p. 10.

4. **Investigation of the expiry review**

4.1. *Relevant periods covered by the expiry review investigation*

(7) The investigation of the likelihood of continuation or recurrence of dumping and injury covered the period from 1 October 2014 to 30 September 2015 (the 'review investigation period' or 'RIP'). The examination of the trends relevant for the assessment of the likelihood of continuation or recurrence of injury covered the period from 1 January 2012 to the end of the review investigation period (the 'period considered').

4.2. *Parties concerned by the investigation and sampling*

(8) The Commission officially advised the applicant, exporting producers and importers known to be concerned and the representatives of the exporting country concerned of the initiation of the expiry review.

(9) Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time-limits set in the Notice of initiation. No interested party requested a hearing with the Commission.

(10) In view of the apparent large number of Chinese exporting producers and unrelated importers in the Union, sampling was envisaged in the Notice of initiation in accordance with Article 17 of the basic Regulation.

(11) In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a representative sample, Chinese exporting producers and unrelated importers were requested to make themselves known within 15 days of the initiation of the review and to provide the Commission with the information requested in the Notice of initiation.

(12) No Chinese exporting producer cooperated with the investigation.

(13) In total six known unrelated importers were contacted at the stage of the publication of the Notice of initiation. Replies were received from 15 unrelated importers. In view of the large number of cooperating importers the Commission applied sampling. The Commission selected the sample on the basis of the largest representative volume of imports which could reasonably be investigated within the time available. The selected sample originally consisted of three companies and represented 29 % of the estimated import volume from the PRC to the Union and 85 % of the import volumes reported by the 15 respondents. A questionnaire reply was received only from one unrelated importer.

(14) In total 10 known users were contacted at the stage of the publication of the Notice of initiation. Replies were received from four of them. Sampling was not envisaged for users and the Commission decided to investigate all.

(15) Five Union producers which represented around 97 % of the Union production of high tenacity yarns of polyesters in the RIP cooperated with the Commission. In view of this small number, the Commission decided not to apply sampling.

4.3. *Questionnaires and verification*

(16) Questionnaires were sent to the five cooperating Union producers and to one producer in a potential analogue country, who agreed to cooperate.

(17) Verification visits were carried out at the premises of the following companies:

(a) Union producers:

— Brilen Tech SA, Spain

— Sioen Industries NV, Belgium

— DuraFiber Technologies (DFT) SAS, France

— DuraFiber Technologies (DFT) GmbH, Germany

— PHP Fibers GmbH, Germany

(b) Analogue country producer:

— DuraFiber Technologies, United States of America ('USA').

B. PRODUCT CONCERNED AND LIKE PRODUCT

1. Product concerned

(18) The product concerned is high tenacity yarn of polyesters (other than sewing thread), not put up for retail sale, including monofilament of less than 67 decitex originating in the PRC ('the product concerned' or 'HTY') currently falling within CN code 5402 20 00.

2. Like product

(19) The review investigation confirmed that the product concerned, high tenacity yarns of polyesters produced and sold by the Union industry on the Union market and high tenacity yarns of polyesters produced and sold in the analogue country (USA) have the same basic physical, technical and chemical characteristics and the same basic uses. Therefore these products are considered to be like products within the meaning of Article 1(4) of the basic Regulation.

C. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

(20) In accordance with Article 11(2) of the basic Regulation, the Commission first examined whether the expiry of the existing measures would be likely to lead to a continuation or recurrence of dumping from the PRC.

1. Cooperation from the PRC

(21) No Chinese exporting producer cooperated with the investigation. In the absence of cooperation from exporting producers in the PRC, the overall analysis, including the dumping calculation, was based on facts available pursuant to Article 18 of the basic Regulation. Therefore, the likelihood of a continuation or recurrence of dumping was assessed by using the expiry review request, combined with other sources of information, such as trade statistics on imports and exports (Eurostat and Chinese export data), the reply from the analogue country producer and other information publicly available ([1]).

(22) The absence of cooperation affected the comparison of the normal value with the export price of the various product types. In accordance with Article 18 of the basic Regulation, it was considered appropriate to establish both the normal value and the export price on a global basis.

(23) In accordance with Article 11(9) of the basic Regulation, the same methodology used to establish dumping in the original investigation was followed whenever it was found that circumstances had not changed.

([1]) In the present Regulation, all the publicly available information relied upon was included in sector-specific reports (PCI Fibres — World Synthetic Fibres Supply/Demand Reports for 2008 and 2013 — see recitals 42, 47, 52 below, as well as PCI Fibres — Technical Fibres Report, September 2014 and January 2015 — see recital 58 below), issued by a consultancy company named PCI Wood Mackenzie.

2. **Dumping during the review investigation period**

(a) *Analogue country*

(24) Normal value was determined on the basis of the prices paid in an appropriate market economy third country (the 'analogue country'), in accordance with Article 2(7)(a) of the basic Regulation.

(25) In the original investigation Taiwan was used as analogue country for the purposes of establishing the normal value with regard to the PRC. In the Notice of initiation the Commission informed interested parties that it envisaged using Taiwan as analogue country and invited parties to comment. The Notice of initiation also added that, according to the information available to the Commission, other market economy suppliers of the Union may have been located, inter alia, in the USA and the Republic of Korea.

(26) One interested party supported the choice of Taiwan as analogue country, because of the similar equipment and production process to the ones used by Chinese producers. However, no producer from Taiwan agreed to cooperate with the investigation.

(27) Based on the import statistics and information from the review request, in addition to Taiwan, the Commission considered a number of other countries as potential analogue countries, such as the Republic of Korea, India, Japan, and the USA ([1]). Requests for cooperation were sent to all known producers and associations from these countries. Only one producer in the USA (Dura Fibres) agreed to cooperate.

(28) The Commission found that the USA has a significant (8,8 %) conventional customs duty rate on imports of HTY from third countries, but no anti-dumping duties. Dura Fibres is the only producer of the product concerned in the USA having around 30 % market share during the review investigation period, it is subject to strong competition from exporting countries ([2]).

(29) In view of the above and in the absence of any further comments, the Commission concluded that the USA is an appropriate analogue country under Article 2(7)(a) of the basic Regulation.

(b) *Normal value*

(30) The information received from the cooperating producer in the analogue country was used as a basis for the determination of the normal value.

(31) In accordance with Article 2(2) of the basic Regulation, the Commission first examined whether the total volume of domestic sales of the like product to independent customers made by the cooperating producers in the USA was representative in comparison with the total export volume from the PRC to the Union, namely whether the total volume of such domestic sales represented at least 5 % of the total volume of export sales of the product concerned to the Union. On that basis, it was found that the domestic sales in the analogue country were representative.

(32) The Commission also examined whether the domestic sales of the like product could be regarded as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. Normal value was thus based on the actual domestic price, which was calculated as an average price of the domestic sales made during the review investigation period.

(c) *Export price*

(33) As stated in recital 15 above, the Chinese exporting producers did not cooperate in the investigation. Therefore, the export price was based on the best information available, in accordance with Article 18 of the basic Regulation.

([1]) The Republic of Korea together with China and Taiwan represents over 90 % of total imports of HTY during the review investigation period. India and Japan, although with limited import volumes, were considered because of the overall production volumes and the size of their domestic market.

([2]) Imports, including China, represented around 71 % of the total consumption in 2015 (source: US Department of Commerce and the US International Trade Commission).

(34) The CIF price at Union border was established on the basis of the statistics available on Eurostat. Volumes imported from Chinese producers who were found not to be dumping in the original investigation (about 40 % of the Chinese imports) were not considered for the determination of the export price.

(35) One interested party claimed that the volumes from Chinese producers who were found not to be dumping in the original investigation should not have been excluded from the dumping calculation because there is no provision in this sense in the basic Regulation. However, it is the Commission's practice ([1]), in application of the interpretation of the ADA provided by the WTO Dispute Settlement Body in the *Beef and rice* case ([2]), to exclude from the review companies in respect of which a *de minimis* dumping margin was found in the initial investigation. Therefore, the request is rejected.

(d) *Comparison*

(36) The Commission compared the normal value and the export price on an ex-works basis. Where justified by the need to ensure a fair comparison, the Commission adjusted the normal value and the export price for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation.

(37) Concerning domestic prices of the analogue country producer adjustments were made for domestic transportation costs and packing costs ([2 %-4 %] of the invoice value) and commissions [0,5 %-1,5 %]. As regards export prices, the ex-works factory value was determined by deducting from the CIF price at Union border the percentage for transport, insurance, handling and other allowances, as estimated in the request for review (12,98 %). With respect to the allowances for export sales, one interested party criticised the application of Article 18 of the basic Regulation and suggested that the allowances from the analogue country producer should be used instead of the estimate contained in the request for review. However, this suggested method does not seem to be appropriate as the allowances reported by the analogue country producer refer to domestic sales in the USA and they have no relevance for the estimation of export allowances from the PRC to the Union. Therefore, in the absence of other reliable information, the Commission relies on the estimate for export sales allowances provided in the request.

(e) *Dumping margin*

(38) On the basis of above, the dumping margin expressed as a percentage of the free-at-Union-frontier price, before duty, was found to be 54,4 %.

(39) Notwithstanding the significant difference between the dumping margin found in the original investigation and the one resulting from the current analysis, there has been no indication of a change in the exporting behaviour from the Chinese producers. On the contrary, it is plausible that the reason for the difference could mainly be found in the impossibility (due to the lack of cooperation from Chinese exporting producers) to perform a detailed analysis by product type.

(f) *Conclusion on dumping in the review investigation period*

(40) The Commission found that Chinese exporting producers continued to export the product concerned to the Union at dumped prices during the review investigation period.

3. **Evidence of likelihood of continuation of dumping**

(41) The Commission further analysed whether there was a likelihood of continuation of dumping should the measures lapse. When doing so, it looked into the Chinese production capacity and spare capacity, the behaviour of Chinese exporters on other markets, the situation on the domestic market of China and the attractiveness of the Union market.

([1]) See for example OJ L 343, 19.12.2008, recital 143.
([2]) See Appellate Body Report Mexico — Definitive Anti-Dumping Measures on Beef and Rice: Complaint with Respect to Rice (WT/DS295/AB/R), adopted on 20 December 2005, paragraphs 300-307.

(a) *Production and spare capacity in the PRC*

(42) The determination of spare capacity in China suffers from the lack of cooperation of Chinese exporting producers. In order to collect the largest amount of information possible, the Commission requested information from two Chinese exporters' associations (the China Chamber of International Commerce, 'CCOIC', and the China Chamber of Commerce for import and export of textiles, 'CCCT'), whose members account for more than half of the Chinese estimated production capacity. These associations sent a detailed reply, which however could not be verified due to the lack of cooperation from the exporting producers. The following paragraphs expose the information provided, and compare it with the other available information (from the review request and other available sources ([1])).

(43) According to CCOIC-CCCT, the spare capacity in China presented only a limited increase in the period 2012-RIP and could be estimated as evolving from a starting level of 150 000-250 000 metric tons (MT) in 2012 to a level of 200 000-300 000 MT in the review investigation period.

(44) The Commission services also performed a detailed spare capacity calculation on the basis of other available information. The main elements of this calculation are (i) installed capacity of Chinese producers; (ii) domestic demand; (iii) exports to other countries.

(45) Concerning the Chinese domestic consumption, all interested parties seem to agree on the data contained in the request. These data project a growth of domestic demand in China in the period considered (+ 20 %, from around 900 000 MT in 2012 to around 1 150 000 MT in 2015).

(46) Concerning Chinese export data, the Commission considered the Chinese export statistics, showing a growth of 47 % in the period 2012-RIP.

(47) Finally, concerning the estimate of Chinese production capacity, according to the complainant's request, which refers to an internationally recognised sector study ([2]), the Chinese capacity started at more than 1 600 000 MT in 2012 and reached around 2 400 000 MT in the review investigation period.

Table 1

(in 1 000 MT)	2012	2013	2014	RIP
Chinese capacity ([1])	1 633	1 828	2 126	2 370 ([2])
Domestic demand ([1])	896	985	1 057	1 158 ([2])
Exports ([3])	255	294	362	376
Capacity utilisation (%)	71	70	67	65
Spare capacity	482	549	707	836

([1]) Complainant's estimate.
([2]) The figure refers to calendar year 2015 as no precise determination was available for the RIP.
([3]) Chinese customs database.

(48) On the basis of this calculation, the spare capacity of the Chinese producers was estimated at more than 800 000 MT in the review investigation period, i.e. about seven times the total available EU market ([3]) and almost nine times the production volumes from EU producers (estimated at 92 461 MT).

([1]) See request for review, page 19 and PCI Fibres — World Synthetic Fibres Supply/Demand Reports for 2008 and 2013.
([2]) PCI Fibres — World Synthetic Fibres Supply/Demand Reports for 2008 (pages 393-410) and 2013 (pages 379-408).
([3]) The available EU market has been calculated by considering only the Union consumption which can still absorb Chinese products. Indeed, out of around 217 000 MT of estimated consumption in the Union in the RIP, around 98 000 MT were already covered by Chinese products (out of which, 39 741 MT not subject to the measures and 57 464 MT subject to the measures). Therefore, the available Union consumption is calculated at around 119 000 MT.

(49) In conclusion, there are reasons to believe that the capacity estimation proposed by CCOIC and CCCT would be too conservative. In particular, when compared with estimates of Chinese domestic demand and exports, these studies would lead to a capacity utilisation rate above 90 % for the years 2012 and 2013, which suggests that the production capacity for those years has been largely underestimated. In any case, also accepting this calculation, the existing spare capacity of Chinese producers would still amount to 200 000-300 000 MT, which is equal or higher than the total size of the European market (around 217 000 MT, of which around 98 000 MT already served by Chinese products).

(50) With respect to the calculation of capacity proposed by CCOIC and CCCT, the same associations contested the conclusion that their capacity estimation would be too conservative. In their view, in the absence of verified data both their estimate and the independent study should be considered as 'equally unreliable'. However, the estimate supplied by CCOIC and CCCT did not appear overestimated only with respect to the data contained in the independent study, but also to known or uncontested data such as domestic Chinese consumption and Chinese exports. For example, with respect to the year 2012, the Chinese associations estimated a Chinese actual production of 1 000 000 MT. However, for that year, the sum of Chinese domestic consumption (a data which is not contested by the associations) and export volumes (as extracted from the Chinese export database) amounted to 1 151 000 MT, i.e. 15,1 % higher than the estimated production figure. Therefore, in this case, the data provided by the two associations appears overly conservative as the reported production figures do not allow to sustain the calculated consumption.

(51) Moreover, while the data collected by the Chinese associations represents only roughly half of the producers in China, the independent study was supplied by a consultancy company with 30 years of experience in the field, which professionally provides its subscribers with forecasts and estimates on the fibres market. Therefore, taking into account both the source of the data and the reliability of the same (also compared with what was indicated by an independent study ([1])), it is not necessary to change the conclusion according to which the spare capacity calculation provided by the Chinese association would be too conservative. Nonetheless, it should be mentioned that even accepting the proposed calculation, as described in the following paragraph, the conclusion on spare capacity would not change.

(52) Therefore, on the basis of the calculations exposed above, it appears undeniable that the Chinese spare capacity is enormous and ranges (depending on the estimates) from a size representing 92-138 % of the size of the Union market, to around 385 %. If we compare the Chinese spare capacity to the part of Union market which is not yet served by Chinese products, it ranges from around 168-252 % to around 700 %. Finally, the Chinese spare capacity represents from 216-324 % to 904 % of the Union production of the product under investigation in the review investigation period.

(53) Therefore, the Commission concluded that Chinese producers dispose of enormous spare capacity, if compared to the size of the European market.

(b) *Attractiveness of the Union market*

(54) China exports significant quantities of the product concerned to third countries other than the Union, in particular to the USA, the Republic of Korea, Brazil, India and Turkey. Comparison on average price levels per kg showed that the average price on the main export markets in the review investigation period was in line or below the average sale price to the Union. In the USA market (second to the EU in exported volumes), the average price in the RIP is slightly below the European one (1,85 USD/kg v 1,89 USD/kg), while in the Korean market (third export market for the product concerned after the EU and USA) the average price is significantly lower (1,58 USD per kg, i.e. around 16 % lower than EU prices). With respect to these findings, one interested party claimed that there are three significant export markets of Chinese goods where the average prices are above the prices to the Union market, namely Canada (1,90 USD/kg), Indonesia (2,07 USD/kg) and Brazil (1,95 USD/kg). With respect to this claim, it should be firstly noticed that the difference in prices is relatively small (from + 0,5 % to + 9,4 %); moreover, the size of the exports on those markets is rather limited if compared to the exports to Europe. Indeed, while the Union market absorbed 30,3 % of Chinese exports in the RIP, Canada represents only 3,1 % of the total and Brazil 5,1 %. In addition to this, Indonesia, which is the country which highlights the highest difference in prices (+ 9,4 %), only represents 2 % of the Chinese exports, therefore the conclusions which can be taken from its prices are limited. Moreover, the interested party does not mention four other export markets presenting similar volumes of imports, i.e. India (5,6 %), Turkey (4,3 %), Taiwan (2,4 %), South

([1]) PCI Fibres — World Synthetic Fibres Supply/Demand Reports for 2008 (pages 393-410) and 2013 (pages 379-408).

Africa (2,3 %). In all these countries the average prices were below the ones reported in the Union during the RIP, by percentages ranging from around 4 % to above 12 %. Therefore, the evidence provided was not sufficient to change the conclusion with respect to the attractiveness of the Union market in terms of prices.

(55) Although this comparison cannot be considered to be conclusive due to the lack of information on the product type mix, the level of the prices on the main export market seems to indicate that the existence of dumping practices could be structural and common also to other main markets of destination of the Chinese goods.

(56) The main evidence of the likelihood of continuation of dumping is, however, when Chinese export volumes to the EU are considered. Indeed, the evolution of export sales in the period 2012-RIP shows that the export of Chinese producers increased by 47 %. This holds true even when the analysis excludes the sales of the two exporters which were found not to be dumping in the original investigation and therefore they are not subject to the current anti-dumping measures. Indeed, export sales of the remaining companies in the same period followed a similar trend (+48 %). When the Commission compared this rate of growth to the more limited rate of growth of the domestic demand in the same period (+20 %), and to the much faster rate of growth of installed capacity in China (+54 % according to the exporters' associations, and +69 % according to the complainant), it became clear that Chinese companies have to rely on aggressive pricing strategies in their export market in order to achieve an acceptable level of capacity utilisation.

(57) With respect to these export figures, one interested party claimed that the share of Chinese exports directed to the Union market is decreasing. Indeed, the share of Chinese exports directed to the Union decreased in the period 2012-RIP from around 35 % to 30 %. With respect to this claim, it should firstly be mentioned that the EU keeps being the main export market for Chinese exporters. Moreover, this slight decrease is mainly a consequence of the good performance of Chinese exporters in other markets; a performance which seems to be caused also by aggressive pricing policies in those markets. For example, in the same period 2012-RIP, Chinese exports to the Republic of Korea (a market in which, as seen above, Chinese prices are lower than the prices in the EU in the RIP by around 16 %) increased by around 72 %. On the other hand, on the Indonesian market, which was mentioned above as an example of fair pricing (+ 9,4 % over the Union average price), the Chinese export performance suffered, with volumes decreasing by around 16 %. Therefore, in light of this analysis, the conclusion that Chinese companies have to rely on aggressive pricing strategies in their export market is confirmed.

(58) Furthermore, concerning the projections for the future, a sectorial independent study foresees that demand in China for manmade fibres (a wider product category, which includes the product concerned) will remain flat until at least 2018 ([1]). Another study also suggests that Chinese inventories are full, as a result from a fall in the raw material prices ([2]). This has made the downstream industry reduce their supply of high tenacity yarns to the minimum necessary, in order to avoid risks due to the fluctuations of prices.

(59) Therefore, it is likely that if the measures were allowed to lapse the Chinese exporting producers would keep engaging in aggressive pricing practices, in order to conquer additional market share in Europe for their significant over-capacity.

4. **Conclusion on dumping and likelihood of continuation of dumping**

(60) The investigation, relying on the best facts available, showed that Chinese producers have been dumping during the review investigation period. It was established that China disposes of enormous spare capacity (when compared with the size of the Union market). Moreover, given the slow growth of the Chinese domestic market, Chinese exporting producers need to keep entering the Union market with significant quantities of the product concerned in order to achieve an acceptable level of sales.

(61) Under these circumstances, it is concluded that, should the measures be allowed to lapse, it is very likely that the dumping practices, which were not stopped by the measures, would continue in the EU market.

([1]) PCI Fibres — Technical Fibres Report, January 2015, page 1.
([2]) PCI Fibres — Technical Fibres Report, September 2014, page 8.

D. **LIKELIHOOD OF A CONTINUATION OR RECURRENCE OF INJURY**

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

(62) During the review investigation period, the like product was manufactured by six Union producers who constitute the 'Union industry' within the meaning of Article 4(1) of the basic Regulation. None of them opposed the initiation of this review.

2. **Union consumption**

(63) The Commission established the Union consumption on the basis of the available import statistics, the actual sales of cooperating Union producers on the Union market and estimated sales of the non-cooperating Union producers. The definition of consumption relates to free market sales, inclusive of sales to related parties but exclusive of captive use. Captive use, that is, internal transfers of the like product within the integrated Union producers for further processing, have not been included in the Union consumption figure, because these internal transfers are not in competition with sales of independent suppliers in the free market. The sales to related companies were included in the Union consumption figure since, according to the data collected during the investigation, those related companies were free to purchase the product concerned also from other sources. In addition, the Union producers' average sales prices to related parties were found to be in line with the average sales prices to unrelated parties.

(64) On this basis, Union consumption developed as follows:

Table 2

Union consumption

	2012	2013	2014	RIP
Volume (tonnes)	196 478	209 076	222 306	217 171
Index	*100*	*106*	*113*	*111*

Source: Questionnaire replies and Article 14(6) database.

(65) Union consumption increased by 11 % from 196 478 tonnes in 2012 to 217 171 tonnes in the review investigation period. Consumption during most of the period considered was higher than the consumption of 205 912 tonnes in the investigation period of the original investigation (July 2008 to June 2009).

(66) One interested party claimed that the Commission services should have included captive sales into the determination of consumption and that by doing so the Chinese market share would have been stable. It suggests that the Commission services have wrongly distinguished between three markets, i.e. sales to unrelated companies, sales to related companies intended for free market sales and sales to related companies intended for captive use, whereas allegedly all these sales should have been included in the determination of Union consumption.

(67) First, it should be underlined that no distinction was made between three different markets. Captive use by related companies were excluded because these products are not put into free circulation on the EU market and do therefore not compete with imports. These sales merely consist in transfer of products to related entities for their incorporation into the production process of other products, not under investigation. That captive use therefore cannot be considered as part of the Union consumption of the product concerned.

(68) Secondly, in any event, the hypothetical addition of captive sales to Union consumption would not make the evolution of Chinese market share stable. On the contrary, the trend remains largely the same as shown below in Table 3.

3. **Imports subject to measures from the country concerned**

(a) *Volume and market share*

(69) It is recalled that in the original investigation, import volumes found not to be dumped were excluded from the analysis of the development of the imports from the PRC on the Union market and the impact on the Union industry.

(70) The volume and market share of dumped imports from China were established on the basis of the Article 14(6) database and developed as follows:

Table 3

Volume and market share of imports subject to measures

Country		2012	2013	2014	RIP
China	Volume (tonnes)	44 484	48 339	60 078	57 465
	Index	*100*	*109*	*135*	*129*
	Market share (%)	22,6	23,1	27	26,5
	Market share in relation to consumption plus captive use (%)	21,3	21,8	25,5	24,9

Source: Article 14(6) database.

(71) While Chinese dumped imports accounted for 18,8 % market share and 38 404 tonnes in the original investigation period, they have increased considerably over the period considered in this review. In fact, dumped imports from China increased from 44 484 to 57 465 tonnes over the period considered and accounted for a 26,5 % market share during the review investigation period.

(b) *Prices of imports subject to measures from the country concerned and price undercutting*

(72) Import prices were established on the basis of Article 14(6) database and on average decreased 12 % during the period considered.

Table 4

Prices of imports subject to measures

Country		2012	2013	2014	RIP
China	Average price (EUR/kg)	1,79	1,63	1,54	1,57
	Index	*100*	*91*	*86*	*88*

Source: Article 14(6) database

(73) Because of non-cooperation from Chinese producers, and therefore the lack of product-type-related export price data, the Commission could not make a detailed price comparison by product type. For these reasons, the undercutting calculations were performed based on a comparison between the average prices of the Chinese exports subject to measures and the average Union Industry's prices during the review investigation period. After adjusting for the conventional custom duty rate of 4 %, an undercutting margin of 22,7 % was established. The original investigation found a similar undercutting margin of 24,1 %. However, this margin was based on a comparable product type comparison, since Chinese exporters cooperated in that case.

(74) The Commission therefore concluded that there is a consistent behaviour on the part of the PRC exporters in undercutting the EU producers' prices.

(75) One interested party claimed that the non-dumped imports should have been included in the undercutting calculation.

(76) The Commission however considers that such inclusion is not warranted, based on the application of the interpretation of the ADA provided by the WTO Dispute Settlement Body in the *Beef and rice* case ([1]), as already mentioned above in recital 35.

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

(77) In accordance with Article 3(5) of the basic Regulation, the Commission examined the impact of the dumped imports on the Union industry based on the evaluation of all relevant economic indicators for an assessment of the state of the Union industry from 2012 to the end of the RIP.

(78) When doing so, the Commission distinguished between macroeconomic and microeconomic injury indicators. The macroeconomic indicators for the period considered were established, analysed and examined on the basis of the data provided for the Union industry. The microeconomic indicators were established on the basis of the data collected and verified at the level of the cooperating Union producers. Due to problems of reconciliation regarding the data of one subsidiary of the DuraFiber group after its reorganisation (DuraFiber Technologies (DFT) GmbH, Germany), its submitted data and questionnaire reply were excluded from the determination of the microeconomic indicators.

(79) One interested party claimed that the exclusion of DuraFiber Germany possibly had altered the injury indicators in a fundamental way.

(80) First it should be noted that the exclusion of the partially verified data from DuraFiber Germany only affected the establishment of the microeconomic indicators. The analysis of the macro indicators is therefore not affected. Furthermore, these micro indicators were based on the data of the remaining four Union producers representing around 80 % of the Union production. Therefore, the specific indicators remain representative for the Union industry. Finally, the partially verified data provided by DuraFiber Germany generally followed the trend of the microeconomic indicators of the four Union producers whose data were taken into account.

(81) In light of both considerations above, it is concluded that the exclusion of DuraFiber Germany from the analysis of the micro indicators did not change the injury indicators trends and the corresponding conclusions are therefore representative of the overall industry.

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

Macroeconomic indicators

(a) *Production, production capacity and capacity utilisation*

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

Table 5

Production, production capacity and capacity utilisation

	2012	2013	2014	RIP
Production volume (tonnes)	92 753	91 985	93 990	92 461

([1]) See Appellate Body Report Mexico — Definitive Anti-Dumping Measures on Beef and Rice: Complaint with Respect to Rice (WT/DS295/AB/R), adopted on 20 December 2005.

	2012	2013	2014	RIP
Production volume (*Index*)	*100*	*99*	*101*	*100*
Production capacity (tonnes)	109 398	108 869	108 690	110 285
Production capacity (*Index*)	*100*	*100*	*99*	*101*
Capacity utilisation (%)	85	84	86	84

Source: Questionnaire replies.

(84) During the period considered the production, production capacity and capacity utilisation remained stable.

(b) *Sales volume and market share*

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

Table 6

Sales volume and market share

	2012	2013	2014	RIP
Sales volume in the Union (tonnes)	67 527	69 407	68 007	65 733
Sales volume in the Union (*Index*)	*100*	*103*	*101*	*97*
Market share (%)	34,4	33,2	30,6	30,3

Source: Article 14(6) database and questionnaire replies.

(86) The Union industry's sales volume in the Union market decreased by -3 % and their respective market share declined by 4,1 percentage points, from 34,4 % to 30,3 % over the period considered.

(c) *Growth*

(87) While Union consumption increased by 11 % over the period considered, the sales volume of the Union industry decreased by – 3 %.

(d) *Employment and productivity*

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

Table 7

Employment and productivity

	2012	2013	2014	RIP
Number of employees	941	875	902	911
Number of employees (*Index*)	*100*	*93*	*96*	*97*

	2012	2013	2014	RIP
Productivity (unit/employee)	98,6	105,2	104,2	101,5
Productivity (unit/employee) (*Index*)	*100*	*107*	*106*	*103*

Source: Questionnaire replies.

(89) Employment decreased by – 3 % during the period considered. At the same time, productivity increased by 3 %, as shown in Table 7 in recital 88.

(e) *Magnitude of the dumping margin and recovery from past dumping*

(90) The dumping margin established for China in the original investigation was well above *de minimis* level. The investigation established that imports of high tenacity yarns of polyesters from China continued to enter the Union market at dumped prices. The dumping margin established during this review investigation period was also well above *de minimis* level, see recital 38. This coincided with an increase in volumes of dumped imports from China at decreasing prices, resulting in a gain of market share during the period considered. As a consequence, the Union industry lost both market share and sales volume during the same period. However, it managed to reduce its losses.

Microeconomic indicators

(f) *Prices and factors affecting prices*

(91) The average sales prices of the Union industry to unrelated customers in the Union developed over the period considered as follows:

Table 8

Average sales prices

	2012	2013	2014	RIP
Average unit selling price in the Union (EUR/kg)	2,39	2,31	2,23	2,17
Average unit selling price in the Union (*Index*)	*100*	*97*	*93*	*91*
Unit cost of production (EUR/kg)	2,50	2,43	2,26	2,19
Unit cost of production (*Index*)	*100*	*97*	*90*	*87*

Source: Questionnaire replies.

(92) The Union industry's unit selling price to unrelated customers in the Union decreased by 9 %. This is partially explained by the decrease of the unit cost of production by 13 %. Prices however decreased less than costs, which explain the positive impact in the profitability of the Union industry as shown below in recital 98.

(g) *Labour costs*

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

Table 9

Average labour costs per employee

	2012	2013	2014	RIP
Average labour costs per employee (EUR)	39 273	41 674	39 711	39 850
Average labour costs per employee (*Index*)	*100*	*106*	*101*	*101*

Source: Questionnaire replies.

(94) The average labour costs per employee remained stable over the period considered. This could be mainly explained by the increasing efforts of the Union industry to control the cost of production and maintain in this way its competitiveness.

(h) *Inventories*

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

Table 10

Inventories

	2012	2013	2014	RIP
Closing stocks (tonnes)	8 050	6 872	8 244	8 387
Closing stocks (*Index*)	*100*	*85*	*102*	*104*
Closing stocks as a percentage of production (%)	8,7	7,5	8,8	9,1

Source: Questionnaire replies.

(96) In the period considered, the Union industry's stocks increased overall by 4 %. A significant part of the high tenacity yarns of polyesters production consists of standard products. The Union industry therefore has to maintain a certain level of stock in order to be in a position to swiftly satisfy the demand of its customers. The closing stock as a percentage of the production remained relatively stable, following the evolution of the Union's industry production.

(i) *Profitability, cash flow, investments, return on investments and ability to raise capital*

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

Table 11

Profitability, cash flow, investments and return on investments

	2012	2013	2014	RIP
Profitability of sales in the Union to unrelated customers (% of sales turnover)	– 4,7	– 5,3	– 1,4	– 1,1

	2012	2013	2014	RIP
Cash flow (EUR)	– 2 993 463	– 4 156 375	– 4 895 147	– 2 111 763
Cash flow (Index)	*– 100*	*– 139*	*– 164*	*– 71*
Investments (EUR)	2 313 235	1 284 905	3 511 528	12 801 375
Investments (*Index*)	*100*	*56*	*152*	*553*
Return on investments (%)	– 4,3	– 4,2	– 2,0	– 1,4

Source: Questionnaire replies.

(98) The Commission established the profitability of the Union industry by expressing the pre-tax net profit of the sales of the like product to unrelated customers in the Union as a percentage of its turnover. Profitability was still negative, although it improved from – 4,7 % to – 1,1 % during the period considered. This is however still lower than the target profit of 3 % established in the original investigation.

(99) The net cash flow is the Union industry's ability to self-finance their activities and it was negative during the period considered. Although the indicator registered a significant improvement of 29 %, it is still negative. This raises concerns as to the ability of the Union industry to carry on the necessary self-financing of its activities.

(100) Investments increased significantly during the period, primarily to meet maintenance needs, with a small part corresponding to modernisation, which caused a small impact on capacity expansion.

(101) The return on investments is the net profit as a percentage of the gross book value of investments. This indicator increased from – 4,3 % to – 1,4 % over the period considered as a result of the increasing profitability and stagnation in investments during the period considered.

(102) Taking into account the negative profitability and negative cash flow, the industry's ability to raise capital remained very limited.

(j) *Conclusion on injury*

(103) During the period considered, most of important injury indicators pertaining to the Union industry showed a negative trend. Its market share decreased by 4,1 percentage points from 34,4 % to 30,3 %, sales volume and the unit sales price in the EU declined 3 % and 9 %, respectively. At the same time, employment decreased 3 %, export sales volume to unrelated companies decreased 28 %, and the corresponding unit export sales prices decreased 17 %. Productivity increased 2,9 %.

(104) Despite the above trends, the profitability improved from – 4,7 % to – 1,1 % during the period considered. Although this is a considerable improvement compared to the profitability of the Union Industry during the IP of the original investigation (1 July 2008 to 30 June 2009) which was – 13,3 %, profitability is still negative. This loss-making situation of the Union industry resulted in a continuous negative return on investment. Nevertheless, the cash flow improved.

(105) The original investigation concluded that the market share of 18,8 % of the Chinese imports that were found to be dumped and undercut the Union industry's sales prices by 24,1 % were sufficient to cause material injury to the Union industry. Comparable situation was found during the review investigation period. Chinese dumped imports represented 26,5 % of the market share and undercut the Union industry's sales prices by 18,6 % as explained below in recital 110.

(106) One interested party claimed that the Union industry does not suffer material injury, as production, production capacity and capacity utilisation remain stable. The evolution of other indicators such as sales volumes and market share are considered tainted by the wrong definition of consumption as alleged in recital 66.

(107) The allegation of a wrongful determination of consumption was rebutted in recital 67. Moreover, according to Article 3(5) of the basic Regulation not any one or more of the relevant injury factors can necessarily give decisive guidance. The fact that some factors remained stable does therefore not alter the conclusions on injury.

(108) For the above reasons, it is concluded that the Union industry is still suffering from material injury within the meaning of Article 3(5) of the basic Regulation.

5. **Causality**

(109) Given the above findings of material injury, the Commission examined whether the dumped imports from China caused material injury to the Union industry. The Commission also examined whether other known factors could at the same time have injured the Union industry.

5.1. *Effects of the dumped imports*

(110) The Union Industry remains in a situation of fragile partial recovery and it is considered that, despite the measures in force, Chinese dumped imports continued to cause material injury. Indeed, even when taking into consideration the combined effect of the post importation costs of 2,7 % as verified at the level of cooperating unrelated importers, the conventional custom duty rate of 4 % and the anti-dumping duties paid during the review investigation period, the average prices of Chinese dumped imports were still found to significantly undercut the average Union industry sales price by 18,6 %. These imports also continued to increase in the last years, and this had a negative impact on the market overall by depressing prices and contributing to the reduction of market share of the Union industry. The continued pressure exercised on the Union market did not allow the Union industry to fully benefit from the decline in raw material costs.

(111) An interested party claimed the absence of a correlation between Chinese prices and the state of the Union industry.

(112) That analysis was however based on trends established for the period 2011-2015 which are different from the period considered in the current investigation, which is from 2012 to RIP (ending in September 2015). This analysis could therefore not be taken into consideration. In any event, it should be noted that the Chinese dumped import prices generally decreased over the period considered and were undercutting the Union industry prices. The fact that for certain year (the RIP) the Chinese export price increased and the situation of the Union industry did not deteriorate, does not put the validity of that observation into question. The claim is therefore rejected.

5.2. *Effects of other factors*

(113) Based on the information collected during the investigation, the proportion of captive production was found not to be significant. Approximately only 15 % of the Union industry's production is used captively. In general, a higher volume of production leads to economies of scale, which is beneficial for the producer concerned. Only a small part of the Union industry is vertically integrated and the captive production is used for further processing into value added products in the downstream industry. The investigation did not point to any production problem linked to these downstream products. Given the above considerations, the Commission considers that the captive production of the Union industry did not have any negative impact on its financial situation.

(114) Major exporting countries to the Union are Republic of Korea, Taiwan, Switzerland, Belarus and Turkey. Total imports of the product concerned from third countries including imports not subject to measures from China increased by 11 % (from 84 467 to 93 973 tonnes) over the period considered, representing 43,3 % of the Union consumption. During the same period, the average unit import price has been steadily decreasing

from 2,19 EUR to 2,09 EUR per kg, a decrease of 4 %. A trend of decreasing import prices was also found in most of other third country exporters to the Union market (Korea – 7 %, Switzerland – 15 %, Belarus – 13 %, Turkey – 6 %). At the same time, unit import prices of the imports not subject to measures from PRC only declined by 3 %.

Table 12

Imports from third countries

Country		2012	2013	2014	RIP
China (imports not subject to measures)	Volumes (tonnes)	29 109	33 865	36 977	39 742
	Index	*100*	*116*	*127*	*137*
	Market share (%)	14,8	16,2	16,6	18,3
	Average price (EUR/kg)	1,75	1,72	1,69	1,69
	Index	*100*	*99*	*97*	*97*
Republic of Korea	Volumes (tonnes)	27 948	31 145	33 048	32 545
	Index	*100*	*111*	*118*	*116*
	Market share (%)	14,2	14,9	14,9	15,0
	Average price (EUR/kg)	2,15	2,13	2,03	2,01
	Index	*100*	*99*	*95*	*93*
Taiwan	Volumes (tonnes)	10 153	9 599	9 251	8 364
	Index	*100*	*95*	*91*	*82*
	Market share (%)	5,2	4,6	4,2	3,9
	Average price (EUR/kg)	1,78	1,91	1,85	1,90
	Index	*100*	*107*	*104*	*107*
Switzerland	Volumes (tonnes)	5 610	5 263	4 895	5 190
	Index	*100*	*94*	*87*	*93*
	Market share (%)	2,9	2,5	2,2	2,4
	Average price (EUR/kg)	4,30	4,09	4,01	3,66
	Index	*100*	*95*	*93*	*85*
Belarus	Volumes (tonnes)	3 384	3 189	3 344	2 374
	Index	*100*	*94*	*99*	*70*
	Market share (%)	1,7	1,5	1,5	1,1
	Average price (EUR/kg)	2,13	2,06	1,99	1,86
	Index	*100*	*97*	*93*	*87*

Country		2012	2013	2014	RIP
Turkey	Volumes (tonnes)	1 443	1 545	1 455	1 594
	Index	*100*	*107*	*101*	*110*
	Market share (%)	0,7	0,7	0,7	0,7
	Average price (EUR/kg)	2,95	2,66	2,65	2,77
	Index	*100*	*90*	*90*	*94*
Total third countries including imports not subject to measures from China	Volumes (tonnes)	84 467	91 330	94 222	93 973
	Index	*100*	*108*	*112*	*111*
	Market share (%)	43,0	43,7	42,4	43,3
	Average price (EUR/kg)	2,19	2,15	2,10	2,09
	Index	*100*	*98*	*96*	*96*

Source: Article 14(6) database.

(115) As shown in Table 12, the market share of the imports from other countries and the decrease in the prices of the imports from China not subject to measures were not so significant as to be considered the cause of the Union industry's injury during the review investigation period.

(116) The Commission received comments in respect to the reasons for the current negative situation of the Union industry such as the evolution in the prices of the raw material, lack of investments and modernisation, mismanagement and lack of vision, outdated production methods, lack of large-scale plants and low quality of the produced products. The investigation showed that the situation of the Union industry could not be attributed to these reasons. Rather, it revealed that the Union industry continued to operate effectively in a very competitive market, optimising the use of the existing assets, without investing heavily in capacity expansion and modernisation, managing in that way to increase its profitability after the imposition of the definitive measures in 2010. Thus, these claims were rejected.

(117) One interested party claimed that the Union industry's allegedly significant investments affected the cash flow and the profit of the Union industry and that such effect should not have been attributed to Chinese imports and that these factors should have been incorporated in a separate non-attribution analysis.

(118) In the first place, despite the investments made during the RIP, the profit and cash flow of the Union industry improved, illustrating that such investments were warranted and had a positive effect. Secondly, profit can only be influenced by the pro rata *temporis* depreciations related to the investments and the financial costs borne by the companies while financing the investments. Finally, as depreciations are deductible costs that are not accompanied by a cash outflow, the cash flow of the Union industry cannot be directly affected by them, only the financial costs would have an effect.

(119) Some parties also claimed that there was either a lack of injury caused by the Chinese dumped imports over the period considered, or that injury was caused by imports from other countries. Since it was found that the prices of the Chinese dumped import continued to undercut the Union industry's prices and were lower than the import prices from the other countries, this claim was rejected.

(120) One interested party claimed that the Commission should have better explained the impact of other factors of causality in its so-called non-attribution analysis.

(121) In this respect, it should be pointed out that the purpose of the non-attribution analysis is to establish whether the observed causal link between dumped imports and the Union industry's material injury could have been broken by another factor, making the causality unlikely or even impossible. None of the factors taken into consideration had such quality and the claim is therefore rejected.

5.3. *Conclusion on causation*

(122) Even though other factors might also contribute to the injury, these were not found to be sufficient to break the causal link between dumped imports from China and the Union industry's injury.

E. **LIKELIHOOD OF CONTINUATION OF INJURY**

(123) It was found that the Chinese exporters had excessive spare capacity during the period considered as indicated in recital 50 when compared to the size of the European market.

(124) During the period considered the Chinese exports to the Union market increased significantly 29 %. As mentioned in recital 54, China exported the product concerned to the Union market mainly at higher prices than to the rest of the world. The investigation found no evidence that this situation will change at least in the short run. Therefore, the Union market was found to be rather attractive to Chinese exporters because of the opportunity to export significant quantities at higher prices than to the rest of the world.

(125) The investigation showed that 60 % of the Chinese imports were made at dumped prices and that there was a likelihood of continuation of dumping should the measures be allowed to lapse. The Chinese dumped imports continued to significantly undercut the prices of the Union producers at the similar levels as in the initial investigation. Specifically, the Chinese imports subject to measures were found to undercut by 22,8 %, demonstrating an aggressive behaviour in pricing. This is likely to cause further depression to the prices and jeopardise the fragile recovery of the Union industry. Thus, there is a clear risk that material injury to the Union industry will continue should measures be allowed to lapse.

(126) In the light of the foregoing, it is concluded that the repeal of measures on the imports from China would in all likelihood result in the continuation of material injury to the Union industry.

F. **UNION INTEREST**

(127) In accordance with Article 21 of the basic Regulation, the Commission examined whether maintaining the existing anti-dumping measures against China would be against the interest of the Union. 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.

(128) All interested parties were given the opportunity to make their views known pursuant to Article 21(2) of the basic Regulation.

(129) On this basis the Commission examined whether, despite the conclusions on the likelihood of recurrence of dumping and injury, compelling reasons existed which would lead to the conclusion that it was not in the Union interest to maintain the existing measures.

1. **Interest of the Union industry**

(130) The Union industry has consistently lost market share and has suffered material injury during the period considered. It nevertheless improved its profitability to a level which is close to break-even (but still negative) whilst sales remained almost at the same level. This development towards stability in the market is most likely attributable to the measures in place. Should measures be repealed, the Union industry would in all likelihood be found in an even worse situation.

(131) It was therefore concluded that maintaining the measures in force against China would be in the interest of the Union industry.

2. **Interest of importers/traders**

(132) Fifteen unrelated importers filled in sampling forms at the stage of initiation, so it was decided to apply provisions on sampling. Three importers were selected and were asked to fill in a questionnaire. Ultimately, only one importer submitted a questionnaire reply which was verified.

(133) The investigation revealed that the company imported from only one Chinese producer subject to measures, with whom it has a long-term business relationship. The investigation showed that the impact of the measures in force on the company was not significant. This is confirmed by the fact that the importer decided not to change source of supply despite the imposition of the original measures.

3. **Interest of users**

(134) Twenty-five users came forward at the initiation stage and requested to fill in questionnaires. Ultimately, questionnaire replies were received from only four users. They were all visited and their submitted data was verified. However, it is noticeable that there was considerably less participation by the user industry in this expiry review than there was when measures were first imposed. In the original investigation 33 users cooperated with the investigation whereas only four participated in the expiry review. The majority of users appear to have been able to adjust to the imposition of the measures with little detriment to their operations.

(135) For one user, which was active in the sewing thread industry, the Commission found that the impact of the current measures on its costs and profitability was not significant. For the other three users, all of which import HTY from China and which were active in the weaving industry (belts, strap, lashings, etc.), it was found that although the impact of the current measures on their costs was small, the impact on profitability was more pronounced, since these companies conduct their business at very low profit margins. Nevertheless, the impact of the duties appeared to be limited as there were many alternative available suppliers with competitive prices.

(136) Users who made submissions, commented on problems they experience with the Union producers, such as lack of capacity, lack of certain qualities and untimely deliveries. The users claimed that the existing measures (0 %-9,8 %) in conjunction with the regular import duty of 4 % benefit their competitors to import into the EU market downstream products at lower prices since their competitors do not need to pay duties for their raw materials (product concerned). They believe that this situation will lead to a further transfer of downstream operations to locations outside the EU and put at stake the future of allegedly 4 000 employees in their industry. The investigation found that the evidence supporting these claims and alleged risks could not support that these were recurrent and structural problems in respect of the Union industry.

(137) It should first be recalled that the cooperation from the users in this investigation was quite limited as compared to the cooperation in the original investigation (33 users cooperated at that time), and therefore the above problems are most likely not common to all the users operating on the Union market.

(138) As to the specific claims of the cooperating users, the investigation showed that the Union industry still has enough idle capacity (capacity utilisation during the review investigation period was 84 %) and offers a wide range of products and qualities. Furthermore, in addition to the five producers in the EU, there are many alternative suppliers from other third countries with competitive prices and wide range of products, including Chinese imports not subject to the anti-dumping duties. Given the relatively low anti-dumping duty level and the fact that a large portion of Chinese imports are not subject to measures also makes it unlikely the measures in force would be the determinant factor for the alleged relocation of the downstream industries. Finally, the evidence of untimely deliveries was negligible.

(139) With respect to the capacity utilisation of the Union industry during the review investigation period, one interested party claimed that a level of 84 % capacity utilisation represents close to full capacity and thus there was not enough available idle capacity.

(140) The investigation revealed that the average waste production of the Union industry was around 6 % of total production during the RIP, corresponding in that way to a theoretical maximum capacity utilisation of 94 %, which is a more reasonable estimation of full capacity utilisation than the 84 % mentioned in the claim. On the basis of the remaining idle capacity of at least 10 %, the claim was rejected.

(141) The same interested party claimed that the Union producers and the non-Chinese producers are incapable of satisfying the total demand and the size of single orders of the European user industry.

(142) It should be noted that the continuation of the measures does not change the existing underlying market conditions. The investigation did not reveal any fundamental changes in users' demands regarding order sizes or quality. Moreover, it is an established fact that the Union industry cannot fulfil market demand by itself and that imports are necessary in this respect. Furthermore, and more importantly, the objective of anti-dumping measures is to restore a level playing field and fair trade conditions amongst all parties concerned by removing the material injury caused by Chinese dumped imports. There is therefore no need for the Union Industry to be able to supply the Union market on its own. In the present case, there are imports from many different sources, and imports subject to measures also continued despite the existence of the measures. Continuation of the measures in their current form and at their current level therefore does not prohibit users of obtaining Chinese product. In this context, the provisions of the anti-dumping Regulation were respected and as a consequence the argument should be rejected.

(143) It was also claimed that the European producers have not taken advantage of the anti-dumping duties to increase their production capacity or modernise their equipment which made them incapable of maintaining their market share in a growing market and brought them in an extremely comfortable position without trying to be competitive.

(144) It should firstly be recalled, as mentioned above that the objective of anti-dumping measures is to remove injurious dumping, and there is no legal requirement that the Union industry should restructure or modernise.

(145) In any event, as already shown in recital 138 the Union industry was capable of increasing its sales as there was enough available idle capacity. In addition, the positive evolution of the profitability reveals that the production methods of the Union industry are still competitive in a market that is protected from dumping practices. Furthermore, the situation of the Union industry cannot be considered as extremely comfortable at all, as the investigation showed that the Union industry continued to suffer material injury during the period considered by losing market share and making losses. It is exactly the fragile situation of the Union industry caused at least partially by past dumping practices and the continued undercutting of its prices that prevented the Union industry from investing heavily in capacity expansion and more pronounced modernisation.

(146) Another claim regards the delocalisation of downstream industries due to the existence of the anti-dumping duties. The claim was supported by referring to an earlier submission and hearing in which the same allegation was made.

(147) It should be noted that the investigation found that the impact on the profitability of the sampled users was limited and thus cannot be considered the determinant for the delocalisation of the Union user industry. Furthermore, the continuation of the measures occurs at the same level as before. Finally, the submission accompanying the hearing does not enumerate any companies that have effectively delocalised.

(148) A claim regarding the economic hardship linked to the switching of suppliers of the product concerned due to the long period needed for the testing phase and the risk of losing clients in case of unstable quality and irregular deliveries was put forward by one importer.

(149) In this respect, it should be noted that a period of almost six years elapsed during which the measures were in force, and that this can be considered sufficient time for an importer to find alternative suppliers, even against the background of time-consuming testing.

4. **Conclusion on Union interest**

(150) Based on the above, the investigation concluded that the impact of the measures on the users and importers is not significant and thus there are not any obvious reasons for terminating the measures based on Union interest.

G. **ANTI-DUMPING MEASURES**

(151) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend that the existing measures be maintained. They were also granted a period to submit comments subsequent to that disclosure. The submissions and comments were duly taken into consideration.

(152) It follows from the above that, as provided for by Article 11(2) of the basic Regulation, the anti-dumping measures applicable to imports of high tenacity yarns of polyester originating in China, imposed by Regulation (EU) No 1105/2010 should be maintained.

(153) In order to minimise the risk of circumvention due to the high difference in the duty rates, it is considered that special measures are needed in this case to ensure the proper application of the anti-dumping duties. These special measures, which apply to companies for which an individual duty rate is introduced, include the following: the presentation to the customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in Article 1, paragraph 3 of this Regulation. Imports not accompanied by such an invoice shall be made subject to the residual anti- dumping duty applicable to all other producers.

(154) 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 [1]. 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 notice informing about the change of name will be published in the *Official Journal of the European Union*.

(155) This Regulation is in accordance with the opinion of the Committee established by Article 15(1) of Regulation (EU) 2016/1036,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of high tenacity yarn of polyesters (other than sewing thread), not put up for retail sale, including monofilament of less than 67 decitex originating in the People's Republic of China, falling within CN code 5402 20 00.

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 manufactured by the companies listed below shall be as follows:

Company	Duty (%)	TARIC additional code
Zhejiang Guxiandao Industrial Fibre Co. Ltd	5,1	A974
Zhejiang Hailide New Material Co. Ltd	0	A976
Zhejiang Unifull Industrial Fibre Co. Ltd	5,5	A975
Companies listed in the Annex	5,3	A977
Hangzhou Huachun Chemical Fiber Co. Ltd	0	A989

[1] European Commission, Directorate-General for Trade, Directorate H, Rue de la Loi/Wetstraat 170, 1040 Bruxelles/Brussel, BELGIQUE/BELGIË.

Company	Duty (%)	TARIC additional code
Oriental Industries (Suzhou) Ltd	9,8	A990
All other companies	9,8	A999

3. The application of the individual duty rate specified for the company mentioned in paragraph 2 shall be conditional upon presentation to the customs authorities of the Member States 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 high tenacity yarn of polyesters sold for export to the European Union covered by this invoice was manufactured by (company name and address) (TARIC additional code) in the People's Republic of China. I declare that the information provided in this invoice is complete and correct.' If no such invoice is presented, the duty rate applicable to 'all other companies' shall apply.

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

Article 2

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

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

Done at Brussels, 24 February 2017.

For the Commission
The President
Jean-Claude JUNCKER

ANNEX

Chinese cooperating exporting producers not sampled (TARIC Additional Code A977):

Company name	City
Heilongjiang Longdi Co. Ltd	Harbin
Jiangsu Hengli Chemical Fibre Co. Ltd	Wujiang
Hyosung Chemical Fiber (Jiaxing) Co. Ltd	Jiaxing
Shanghai Wenlong Chemical Fiber Co. Ltd	Shanghai
Shaoxing Haifu Chemistry Fibre Co. Ltd	Shaoxing
Sinopec Shanghai Petrochemical Co. Ltd	Shanghai
Wuxi Taiji Industry Co. Ltd	Wuxi
Zhejiang Kingsway High-Tech Fiber Co. Ltd	Haining City

COMMISSION IMPLEMENTING REGULATION (EU) 2017/326

of 24 February 2017

amending for the 261st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations

THE EUROPEAN COMMISSION,

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

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

Whereas:

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

(2) On 22 February 2017, the Sanctions Committee of the United Nations Security Council decided to add four natural persons to the list of persons, groups and entities to whom the freezing of funds and economic rsources should apply. Annex I to Regulation (EC) No 881/2002 should therefore be amended accordingly.

(3) In order to ensure that the measures provided for in this Regulation are effective, it should enter into force immediately,

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

This Regulation shall enter into force on the day 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, 24 February 2017.

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

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

ANNEX

In Annex I to Regulation (EC) No 881/2002, the following entries are added under the heading 'Natural persons':

(a) 'Bassam Ahmad Al-Hasri (alias: a) Bassam Ahmad Husari b) Abu Ahmad Akhlaq c) Abu Ahmad al-Shami). Date of birth: a) 1.1.1969 b) approximately 1971. Place of birth: a) Qalamun, Damascus Province, Syrian Arab Republic b) Ghutah, Damascus Province, Syrian Arab Republic c) Tadamon, Rif Dimashq, Syrian Arab Republic. Nationality: a) Syrian b) Palestinian. Address: Syrian Arab Republic (Southern. Location as of July 2016). Date of designation referred to in Article 7d(2)(i): 22.2.2017.'

(b) 'Iyad Nazmi Salih Khalil (alias: a) Ayyad Nazmi Salih Khalil b) Eyad Nazmi Saleh Khalil c) Iyad al-Toubasi d) Iyad al-Tubasi e) Abu al-Darda' f) Abu-Julaybib al-Urduni g) Abu-Julaybib). Date of birth: 1974. Place of birth: Syrian Arab Republic. Nationality: Jordan. Passport No: a) Jordan 654781 (approximately issued in 2009) b) Jordan 286062 (issued on 5.4.1999 at Zarqa, Jordan, expired on 4.4.2004). Address: Syrian Arab Republic (Coastal area of. Location as of April 2016). Date of designation referred to in Article 7d(2)(i): 22.2.2017.'

(c) 'Ghalib Adbullah Al-Zaidi (alias: a) Ghalib Abdallah al-Zaydi b) Ghalib Abdallah Ali al-Zaydi c) Ghalib al Zaydi). Date of birth: a) 1975 b) 1970. Place of birth: Raqqah Region, Marib Governorate, Yemen. Nationality: Yemeni. Date of designation referred to in Article 7d(2)(i): 22.2.2017.'

(d) 'Nayif Salih Salim Al-Qaysi (alias: a) Naif Saleh Salem al Qaisi b) Nayif al-Ghaysi). Date of birth: 1983. Place of birth: Al-Baydah Governorate, Yemen. Nationality: Yemeni. Passport No: Yemen 04796738. Address: a) Al-Baydah Governorate, Yemen b) Sana'a, Yemen (previous location). Date of designation referred to in Article 7d(2)(i): 22.2.2017.'

COMMISSION IMPLEMENTING REGULATION (EU) 2017/327

of 24 February 2017

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

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

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

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

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

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

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

Done at Brussels, 24 February 2017.

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

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

ANNEX

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

(EUR/100 kg)

CN code	Third country code (1)	Standard import value
0702 00 00	EG	232,7
	IL	75,4
	MA	97,0
	TR	98,9
	ZZ	126,0
0707 00 05	MA	79,2
	TR	203,1
	ZZ	141,2
0709 91 00	EG	113,1
	ZZ	113,1
0709 93 10	MA	54,0
	TR	166,7
	ZZ	110,4
0805 10 22, 0805 10 24, 0805 10 28	EG	43,1
	IL	76,8
	MA	48,2
	TN	56,4
	TR	75,0
	ZA	196,8
	ZZ	82,7
0805 21 10, 0805 21 90, 0805 29 00	EG	100,8
	IL	127,6
	JM	95,8
	MA	103,0
	TR	87,7
	ZZ	103,0
0805 22 00	IL	112,1
	MA	95,4
	ZZ	103,8
0805 50 10	EG	71,3
	TR	74,4
	ZZ	72,9
0808 30 90	CL	175,7
	CN	112,2
	ZA	125,1
	ZZ	137,7

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

DECISIONS

COUNCIL DECISION (EU) 2017/328

of 21 February 2017

amending Decision 1999/70/EC concerning the external auditors of the national central banks, as regards the external auditors of the Bank of Greece

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, and in particular to Article 27.1 thereof,

Having regard to the Recommendation of the European Central Bank of 22 December 2016 to the Council of the European Union on the external auditors of the Bank of Greece (ECB/2016/46) ([1]),

Whereas:

(1) The accounts of the European Central Bank (ECB) and of the national central banks of the Member States whose currency is the euro are to be audited by independent external auditors recommended by the Governing Council of the ECB and approved by the Council.

(2) The mandate of the current external auditors of the Bank of Greece will expire after the audit for the financial year 2016. It is therefore necessary to appoint external auditors as from the financial year 2017.

(3) The Bank of Greece has selected Deloitte Certified Public Accountants S.A. as its external auditors for the financial years 2017 to 2021.

(4) The Governing Council of the ECB has recommended that Deloitte Certified Public Accountants S.A. should be appointed as the external auditors of the Bank of Greece for the financial years 2017 to 2021.

(5) Following the recommendation of the Governing Council of the ECB, Council Decision 1999/70/EC ([2]) should be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

In Article 1 of Decision 1999/70/EC, paragraph 12 is replaced by the following:

'12. Deloitte Certified Public Accountants S.A. are hereby approved as the external auditors of the Bank of Greece for the financial years 2017 to 2021.'.

Article 2

This Decision shall take effect on the date of its notification.

([1]) OJ C 3, 6.1.2017, p. 1.
([2]) Council Decision 1999/70/EC of 25 January 1999 concerning the external auditors of the national central banks (OJ L 22, 29.1.1999, p. 69).

Article 3

This Decision is addressed to the ECB.

Done at Brussels, 21 February 2017.

For the Council
The President
E. SCICLUNA

COMMISSION DECISION (EU) 2017/329

of 4 November 2016

on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover

(notified under document C(2016) 6929)

(Only the Hungarian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) In July 2014, the Commission became aware that Hungary had adopted a legislative act on the basis of which turnover from advertising activities is taxed (hereinafter: 'the advertisement tax'). By letter of 13 August 2014, the Commission sent an information request to the Hungarian authorities, to which they replied by letter of 2 October 2014. By letter of 1 December 2014, the Hungarian authorities were asked another set of questions, in response to which they submitted additional information by letter of 16 December 2014.

(2) By letter of 2 February 2015, the Hungarian authorities were informed that the Commission would consider issuing a suspension injunction decision in accordance with Article 11(1) of Council Regulation (EC) No 659/1999 ([2]). By letter of 17 February 2015, the Hungarian authorities submitted their comments on that letter.

(3) By decision of 12 March 2015, the Commission informed Hungary that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty (hereinafter: 'the Opening Decision') and issue a suspension injunction in accordance with Article 11(1) of Regulation (EC) No 659/1999 in respect of the measure.

(4) The Opening Decision and suspension injunction were published in the *Official Journal of the European Union* ([3]). The Commission invited interested parties to submit their comments on the measure.

(5) The Commission received comments from three interested parties. It forwarded them to the Hungarian authorities who were given the opportunity to react.

(6) On 21 April 2015, the Hungarian authorities sent a draft proposal to the Commission for an amendment of the advertisement tax. On 8 May 2015, the Commission requested information from Hungary as regards the planned amendment.

([1]) OJ C 136, 24.4.2015, p. 7.

([2]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1), repealed and replaced by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

([3]) Cf. footnote 1.

(7) On 4 June 2015, Hungary amended the advertisement tax, without prior notification to — or authorisation by — the Commission. On 5 July 2015, the amendments entered into force.

(8) By letter of 6 July 2015, Hungary provided observations on the Opening Decision and on interested parties' comments, as well as clarifications on the amendment to the advertisement tax.

2. **DETAILED DESCRIPTION OF THE ADVERTISEMENT TAX**

2.1. *SCOPE OF THE TAX AND TAX BASE*

(9) On 11 June 2014, Hungary adopted Act XXII of 2014 on Advertisement Tax (hereinafter: 'the Act'), with further amendments on 4 July and 18 November 2014. The Act introduced a new special tax on turnover derived from the publication of advertisements in Hungary and applies in addition to existing business taxes, in particular income tax. According to Hungary, the purpose of the Act is to promote the principle of public burden sharing.

(10) The advertisement tax is due on turnover derived from the publication of advertisements in the media spaces specified under the Act (e.g. in media services; in press materials; on outdoor advertising media; on any vehicle or immovable property; in printed material; and on the internet). The tax applies to all media undertakings and the taxable person is in principle the publisher of the advertisement. The territorial scope of the tax is Hungary.

(11) The tax base to which the tax is applied is the turnover of the publisher derived from the advertising services provided by it, without deduction of any costs. The tax base of affiliated companies is aggregated. Therefore, the applicable tax rate is determined by the advertising turnover derived by the entire group in Hungary.

(12) There is a special tax base for self-advertising, i.e. advertisement relating to the publisher's own products, goods, services, activities, name and appearance. In this case, the tax base to which the tax is applied is the costs directly incurred by the publisher in connection with publishing the advertisement.

2.2. *PROGRESSIVE TAX RATES*

(13) The Act laid down a progressive rates structure with rates ranging from 0 % and 1 % for companies with small or medium-sized advertising turnover to 50 % for companies with high advertising turnover as follows:

— for the part of the turnover below HUF 0,5 billion: 0 %

— for the part of the turnover between HUF 0,5 billion and 5 billion: 1 %

— for the part of the turnover between HUF 5 billion and 10 billion: 10 %

— for the part of the turnover between HUF 10 billion and 15 billion: 20 %

— for the part of the turnover between HUF 15 billion and 20 billion: 30 %

— for the part of the turnover above HUF 20 billion: 50 %.

(14) The top bracket was increased from 40 % to 50 % as from 1 January 2015 by Act LXXIV of 2014 on the modification of certain tax and related legislation and the Act CXXII of 2010 on the National Tax and Customs Administration, which amended the Act.

2.3. *DEDUCTION OF LOSSES CARRIED-FORWARD FROM THE 2014 TAX BASE*

(15) Under the Act, companies could deduct from their 2014 tax base 50 % of the losses carried-forward from the previous years under corporate and dividend tax law or personal income tax law.

(16) An amendment of 4 July 2014 to that Act limits that deduction to companies that were not profit-making in 2013 (i.e. only if the amount of pre-tax profit in the 2013 business year is zero or negative). Therefore, companies that carried forward losses from previous years, but were profit-making in 2013, are not eligible for the deduction. According to Hungary, the objective of the amendment is to prevent tax avoidance and circumvention of tax obligations.

(17) The possibility to deduct losses carried-forward applies only to the tax due for 2014. It does not apply to the tax due for 2015 or the following years.

2.4. *DETERMINATION OF THE TAX LIABILITY AND DECLARATION*

(18) According to the Act, the taxpayer determines its tax liability by self-assessment and returns a declaration to the tax authority by the last day of the fifth month following the tax year.

2.5. *PAYMENT OF THE TAX*

(19) The Act provides that the taxpayer shall determine and declare its tax liability, and pay the tax by the last day of the fifth month following the tax year.

(20) For 2014, the tax was due pro rata from the entry into force of the Act on 18 July 2014 on the basis of the advertising turnover of 2014. The taxpayer had to determine and declare a tax advance for 2014 (based on its advertising turnover of 2013) by 20 August 2014, and pay it in two equal instalments by 20 August 2014 and 20 November 2014.

(21) According to the provisional data received from the Hungarian authorities, as of 28 November 2014, a total amount of HUF 2 640 100 000 (~ EUR 8 500 000) was collected in tax advances for 2014. Approximately 80 % of the total tax revenue collected from those advances was paid by one group of companies.

2.6. *THE AMENDMENTS INTRODUCED BY ACT LXII OF 2015 OF 4 JUNE 2015*

(22) By Act LXII of 2015 of 4 June 2015, after the Opening Decision had been adopted, Hungary amended the Advertisement Tax Act by replacing the progressive scale of six tax rates ranging from 0 % to 50 % by a dual rate system as follows:

— 0 % applicable on the part of the turnover that does not exceed HUF 100 million, and

— 5,3 % applicable on the turnover that exceeds HUF 100 million.

(23) The amendment introduces an optional retroactive application back to the entry into force of the Act in 2014. In other words, taxpayers can choose, for the past, to be subject either to the new dual rate system or to remain subject to the old progressive scale of six tax rates.

(24) The provisions on deduction from the 2014 tax base of losses carried-forward, which is limited to companies that were not profit-making in 2013, remain unchanged.

3. **THE FORMAL INVESTIGATION PROCEDURE**

3.1. *GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE*

(25) The Commission opened the formal investigation procedure because it considered at that stage that the progressivity of the tax rates and the provisions on the deduction of losses carried-forward from the tax base as laid down in the Act constituted State aid.

(26) The Commission considered that the progressive tax rates differentiate between undertakings with high advertisement revenues (and thus larger undertakings) and undertakings with low advertisement revenues (and thus smaller undertakings), and grant a selective advantage to the latter based on their size. The Commission had doubts whether ability to pay, which has been referred to by Hungary, could serve as the guiding principle for turnover taxes. The Commission therefore considered, on a preliminary basis, that the progressive character of the advertisement tax rate under the Act constituted State aid, since all the other criteria for such a qualification also seemed to be fulfilled.

(27) The Commission also considered that the provisions of the Act allowing the deduction of past losses carried-forward under corporate and dividend tax law or personal income tax law from the tax due and, in particular, the limitation to undertakings that were not profit-making in 2013, differentiate between companies that are, in the light of a turnover-based tax, in a comparable situation. It considered that the provisions appear to grant a selective advantage to undertakings which were not profit-making in 2013 compared to undertakings which were not profit making the years before or have not been loss making at all. The Commission considered that differential treatment not to be justified by the nature and logic of the tax system, in particular since Hungary has argued that the advertisement tax is based on the idea that the mere receipt of advertisement revenues justifies taxation. The Commission therefore considered that those provisions constitute State aid, since all the other criteria for such a qualification seemed to be fulfilled.

(28) The measures did not appear compatible with the internal market.

3.2. *COMMENTS FROM INTERESTED PARTIES*

(29) The Commission received comments from three interested parties.

(30) The *Hungarian Advertising Association* described the state of the advertisement industry in Hungary and expressed concerns about the advertisement tax as such. It considers that the tax places an additional burden on a sector already hit by decreasing revenues. It points out that any advertisement tax on small media companies can drive those companies out of the market because of their low profit margins.

(31) *TV2*, a Hungarian private TV operator, submitted comments only on the deduction of past losses carried-forward for corporate and personal income tax purposes. TV2 considers that the provision concerning the offsetting of past losses is non-selective because it falls within the scope of discretion of a Member State to design a turnover-based tax while at the same time taking into account elements of a tax based on the ability to pay. If the Commission were to find an element of selectivity in the rules on the deduction of past losses, this element could only be the further restriction to companies that were not profit-making in 2013, but not the general rule allowing for the deduction of past losses.

(32) *RTL* agrees with the Commission's assessment in the Opening Decision. It submitted that there are two additional elements of selectivity created by the advertisement tax: (i) the tax would benefit public broadcasters over commercial broadcasters, because the former are allegedly primarily financed through State funding and therefore less affected by the tax; (ii) the tax would benefit Hungarian-owned broadcasters over international players because Hungarian-owned broadcasters allegedly have typically lower advertising revenues than larger international players.

3.3. *POSITION OF THE HUNGARIAN AUTHORITIES*

(33) The Hungarian authorities contest that the measures constitute aid. In essence, they argue that the ability to pay is not only reflected by the profitability of an undertaking, but also by its market share and therefore its turnover. Hungary argues that progressive tax rates for a turnover-based tax are justified by the ability to pay and that it falls within the national competence to define the precise rate brackets. Hungary considers that the transitional measure for companies not profitable in 2013 is justified because for those companies the tax burden would be too high without this measure.

(34) Hungary contests the selective nature of the tax scheme, in particular, by arguing that there is no derogation from the reference system, since the system of reference in the case of progressive taxes is the combination of the tax base and the corresponding tax rates. Therefore, companies in the same legal and factual situation (that have the same tax base) are subject to the same amount of tax.

3.4. *COMMENTS FROM HUNGARY ON INTERESTED PARTIES' COMMENTS*

(35) Hungary stated that the submission of the Hungarian Advertisement Association correctly describes the functioning of the Hungarian advertisement market and, in particular, draws conclusions that smaller undertakings and new entrants are in a more difficult position than larger undertakings with higher turnover. Therefore, the position of smaller players in the advertisement market is not comparable with that of larger publishers which have the ability to pay more and should bear a progressively higher tax burden.

(36) Hungary agrees with the comments of TV2 and points out that it follows from the judgment of the Court of Justice in the Gibraltar case that profitability as a taxation criterion is a general tax measure because it results from a random fact.

(37) Hungary disagrees with the arguments of RTL on the grounds already explained in its previous submissions. Hungary further explains that the Act treats public and commercial broadcasters equally and any publication of advertisement for remuneration is subject to the same tax liability.

4. **ASSESSMENT OF THE AID**

4.1. *PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU*

(38) According to Article 107(1) of the TFEU, 'save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(39) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage to its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

4.1.1. STATE RESOURCES AND IMPUTABILITY TO THE STATE

(40) To constitute State aid, a measure must be imputable to a Member State and financed through State resources.

(41) Since the contested measures result from an Act of the Hungarian Parliament, it is clearly imputable to the Hungarian State.

(42) As regards the measure's financing through State resources, where the result of a measure is that the State forgoes revenues which it would otherwise have to collect from an undertaking in normal circumstances, that condition is also fulfilled ([4]). In the present case, Hungary waives resources it would otherwise have to collect from undertakings with a lower level of relevant turnover (and thus smaller undertakings), if they had been subject to the same level of tax as undertakings with a higher turnover (and thus larger undertakings).

4.1.2. ADVANTAGE

(43) According to the case-law of the Union Courts, the notion of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking ([5]). An advantage may be granted through different types of reduction in a company's tax burden

([4]) Case C-83/98 P *France* v *Ladbroke Racing Ltd and Commission* EU:C:2000:248 and EU:C:1999:577, paragraphs 48 to 51. Likewise, a measure allowing certain undertakings a tax reduction or to postpone payments of tax normally due can amount to State aid, see Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others*, paragraph 46.

([5]) Case C-143/99 *Adria-Wien Pipeline*, EU: C: 2001:598, paragraph 38.

and, in particular, through a reduction in the applicable tax rate, taxable base or in the amount of the tax due ([6]). Although a tax reduction does not involve a positive transfer of resources from the State, it gives rise to an advantage by virtue of the fact that it places the undertakings to which it applies in a more favourable financial position and results in a loss of income to the State ([7]).

(44) The Act lays down progressive rates of taxation that apply to the annual turnover derived from the publication of advertisements in Hungary depending on the brackets into which an undertaking's turnover falls. The progressive character of those rates has the effect that the percentage of tax levied on an undertaking's turnover increases progressively depending on the number of brackets within which that turnover falls. This has the result that undertakings with low turnover (smaller undertakings) are taxed at a substantially lower average rate than undertakings with high turnover (larger undertakings). Being taxed at this substantially lower average tax rate mitigates the charges that undertakings with low turnover have to bear as compared to undertakings with high turnover and therefore constitutes an advantage to the benefit of smaller undertakings over larger undertakings for the purposes of Article 107(1) of the Treaty.

(45) Equally, the possibility under the Act to deduct losses carried-forward for corporate or personal income tax purposes constitutes an advantage for those undertakings that were not profit-making in 2013, since it reduces their tax base and thus their tax burden as compared to undertakings that cannot benefit from that deduction.

4.1.3. SELECTIVITY

(46) A measure is selective if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) of the Treaty. For fiscal schemes the Court of Justice has established that the selectivity of the measure should in principle be assessed by means of a three-step analysis ([8]). First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is prima facie selective), it must be established, in the third step of the analysis, whether the derogatory measure is justified by the nature or the general scheme of the reference tax system ([9]). If a prima facie selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) of the Treaty.

4.1.3.1. ***System of reference***

(47) The reference system constitutes the framework against which the selectivity of a measure is assessed.

(48) In the present case, the reference system is the application of a special advertisement tax on turnover derived from the provision of advertising services, i.e. the full remuneration received by publishers for the publication of advertisements, without deduction of any costs. The Commission does not consider that the progressive rate structure of the advertisement tax can form a part of that reference system.

(49) As the Court of Justice has specified ([10]), it is not always sufficient to confine the selectivity analysis to whether a measure derogates from the reference system as defined by the Member State. It is also necessary to evaluate whether the boundaries of that system have been designed by the Member State in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings over others. Otherwise,

([6]) See Case C-66/02, *Italy* v *Commission*, EU: C: 2005:768, paragraph 78; Case C-222/04, *Cassa di Risparmio di Firenze and Others*, EU: C: 2006:8, paragraph 132; Case C-522/13, *Ministerio de Defensa and Navantia*, EU: C: 2014:2262, paragraphs 21 to 31. See also point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

([7]) Joined Cases C-393/04 and C-41/05, *Air, Air Liquide Industries Belgium* EU: C: 2006:403 and EU: C: 2006:216, paragraph 30 and Case C-387/92 *Banco Exterior de España* EU: C: 1994:100, paragraph 14.

([8]) See, for example, Case C-279/08 P *Commission* v *Netherlands (NOx)* EU:C:2011:551; Case C-143/99 *Adria-Wien Pipeline* EU: C: 2001:598, Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* EU:C:2011;550 and EU:C:2010:411, Case C-308/01 *GIL Insurance* EU:C:2004:252 and EU:C:2003;481.

([9]) Commission Notice on the application of the State aid rules to measures relating to direct business taxation.

([10]) Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom* EU:C:2011:732.

instead of laying down general rules applying to all undertakings from which a derogation is made for certain undertakings, the Member State could achieve the same result, side stepping the State aid rules, by adjusting and combining its rules in such a way that their very application results in a different burden for different undertakings ([11]). It is particularly important to recall in that respect that the Court of Justice has consistently held that Article 107(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them in relation to their effects, and thus independently of the techniques used ([12]).

(50) The progressive tax structure introduced by the Act appears deliberately designed by Hungary to favour certain undertakings over others. Under the progressive tax structure introduced under the Act, the undertakings publishing advertisements are subject to different tax rates progressively increasing from 0 % towards 50 %, depending on the brackets into which their turnover falls. Consequently, a different average tax rate applies to undertakings subject to the advertisement tax depending on the level of their turnover.

(51) The effect of the progressive rate structure introduced by the Act is therefore that different undertakings are subject to different levels of taxation (expressed as a proportion of their overall annual advertisement turnover) depending on their size, since the amount of advertisement turnover achieved by an undertaking correlates to a certain extent with the size of that undertaking.

(52) Because each company is taxed at a different rate, it is not possible for the Commission to identify one single reference rate in the advertisement tax. Hungary did not present any specific rate as the reference rate or 'normal' rate and did not explain either why a higher rate would be justified for undertakings with a high level of turnover, nor why lower rates should apply to undertakings with lower levels of advertisement turnover.

(53) The stated objective of the advertisement tax is to promote the principle of public burden sharing. In light of that objective, the Commission considers all operators subject to the advertisement tax to be in a comparable legal and factual situation. As a consequence, unless it is duly justified, all operators should be treated equally and pay the same proportion of their turnover, regardless of their level of turnover. The Commission observes that the consequence of the application of a single tax rate to all operators is already that those with higher turnovers contribute more to the State budget than those with low turnovers. Hungary has advanced no convincing argument justifying the discrimination between those types of undertakings by progressively imposing a proportionately higher tax burden on those with a higher advertisement turnover. Hungary has therefore deliberately designed the advertisement tax in such a manner so as to arbitrarily favour certain undertakings, namely those with a lower level of turnover (and thus smaller undertakings), and disadvantage others, namely larger undertakings ([13]).

(54) The reference system is therefore selective by design in a way that is not justified in light of the objective of the advertisement tax, which is to promote the principle of public burden sharing and collect funds for the State budget.

(55) In the same manner, the possibility of deducting past losses carried-forward for corporate and personal income tax purposes from the 2014 tax base, cannot be considered as part of the reference system in this case for at least two reasons. On the one hand, the tax is based on the taxation of turnover as opposed to profit-based tax, which means that costs are normally not deductible from the tax base of a turnover tax. The Hungarian authorities have not been able to explain in this case how this possibility of deduction of costs could be linked to the objective or the nature of the turnover tax. On the other hand, the possibility of deduction is only offered to undertakings, that were not profit-making in 2013. It's not a general rule of deduction and this possibility of deduction appears as being arbitrary or at least not consistent enough to be part of a reference system.

(56) In the Commission's view, the reference system for the taxation of advertisement turnover should be a tax on advertisement turnover which would comply with State aid rules i.e. where:

— advertisement turnovers are subject to the same (single) tax rate,

— no other element is maintained or introduced that would provide a selective advantage to certain undertakings

([11]) Ibid, paragraph 92

([12]) Case C-487/06 P *British Aggregates* v *Commission* EU:C:2008:757, paragraphs 85 and 89 and the case-law cited, and Case C-279/08 P *Commission* v *Netherlands* (NOx) EU:C:2011:551, paragraph 51.

([13]) Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* EU:C:2011:732.

4.1.3.2. ***Derogation from the system of reference***

(57) As a second step, it is necessary to determine whether the measure derogates from the reference system in favour of certain undertakings which are in a similar factual and legal situation in light of the intrinsic objective of the system of reference.

(58) The progressivity of the advertisement tax rate structure creates a differentiation amongst undertakings carrying out the activity of publication of advertisement in Hungary based on the scale of their advertisement activity, as reflected in their advertisement turnover.

(59) Indeed, due to the progressive character of the rates laid down by the Act, undertakings with turnover falling in lower brackets are subject to substantially lower taxation than undertakings with turnover falling in higher brackets. As a result, undertakings with low turnover are subject to both substantially lower marginal tax rates and substantially lower average tax rates as compared to undertakings with high levels of turnover, and therefore to substantially lower taxation for the same activities. In particular, the Commission notes that for undertakings with higher advertising turnovers the taxation of turnover falling in the top brackets (30 %/40 %/50 %) is exceptionally high and therefore results in a very substantial differential treatment.

(60) Moreover, the data on the tax advance payments submitted by the Hungarian authorities on 17 February 2015 show that the 30 % and 40 %/50 % tax rates applicable to advertising turnover falling within the two highest brackets have effectively only applied to one undertaking in 2014 and that this undertaking has paid approximately 80 % of the total revenue of the tax advances received by the Hungarian State. Those figures demonstrate the concrete effects of the differential treatment of undertakings under the Act and the selective character of the progressive rates laid down in it.

(61) Hence, the Commission considers that the progressive rate structure introduced by the Act derogates from the reference system consisting of the imposition of an advertisement tax on all operators involved in the publication of advertisements in Hungary in favour of undertakings with lower turnover.

(62) The Commission also considers the possibility for undertakings that were not profit-making in 2013 to deduct from the 2014 tax base past losses carried-forward for corporate and personal income tax purposes to derogate from the reference system, i.e. from the general rule to tax operators on the basis of their turnover from advertisement. The tax is based on the taxation of turnover as opposed to a profit-based tax, which means that costs are normally not deductible from the tax base of a turnover tax.

(63) In particular, the restriction of the deduction of losses to undertakings that were not profit-making in 2013 differentiates between, on the one hand, undertakings that had losses carried-forward, and were not profit-making in 2013 and, on the other hand, undertakings that were profit-making in 2013 but could have had losses carried-forward from previous fiscal years. Moreover, the provision does not limit the losses that can be offset against the advertisement tax liability to those incurred in 2013, but allows an undertaking that was not profit-making in 2013 to use losses carried-forward from previous years as well. Furthermore, the Commission considers that the deduction of losses already existing at the time of the adoption of the Advertisement Tax Act entails selectivity because the allowance of that deduction could favour certain undertakings with substantial losses carried-forward.

(64) The Commission considers that the provisions of the Act allowing — under the conditions laid down in the Act — the deduction of losses carried-forward differentiate between undertakings that are in a comparable legal and factual situation in light of the objective of the Hungarian advertisement tax.

(65) Therefore, the Commission considers that the measures are prima facia selective.

4.1.3.3. ***Justification by the nature and general scheme of the tax system***

(66) A measure which derogates from the reference system is not selective if it is justified by the nature or general scheme of that system. This is the case where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system ([14]). It is for the Member State to provide such justification.

([14]) See for example Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* EU:C:2011;550 and EU:C:2010:411, paragraph 69.

Progressivity of the rates

(67) The Hungarian authorities have argued that the turnover and the size of an undertaking reflect the ability of that undertaking to pay and therefore that an undertaking with high advertising turnover has a higher ability to pay than an undertaking with lower advertising turnover. The Commission considers that the information provided by Hungary established neither that the turnover of a group of companies is a good proxy for its ability to pay nor that the pattern of progressivity of the tax is justified by the nature and general scheme of the tax system.

(68) It is a natural consequence of (single-rate) turnover taxes that the bigger the turnover of a company is, the more tax it pays. As opposed to taxes based on profit ([15]), a turnover-based tax is however not intended to take into account — and indeed does not take into account — any of the costs incurred in the generation of that turnover. Therefore, in the absence of specific evidence to the contrary, the level of turnover generated cannot automatically be considered as reflecting the ability to pay of the undertaking. Hungary has not demonstrated the existence of the alleged relationship between turnover and ability to pay nor that such relationship would be correctly mirrored in the pattern of progressivity (from 0 % to 50 % of turnover) of the advertisement tax.

(69) The Commission considers that progressive rates for taxes on turnover could only be justified exceptionally, that is if the specific objective pursued by a tax indeed requires progressive rates. Progressive turnover taxes could, for example, be justified if the externalities created by an activity that the tax is supposed to tackle also increase progressively — i.e. more than proportionately — with its turnover. However, Hungary did not provide any justification of the progressivity of the tax by the externalities possibly created by advertisement.

Deduction of losses carried-forward

(70) As regards the deduction of losses carried-forward for undertakings that were not profit-making in 2013, such deduction cannot be justified as a measure to prevent tax avoidance and the circumvention of tax obligations. The measure introduces an arbitrary distinction between two groups of companies that are in a comparable legal and factual situation. Since the distinction is arbitrary and not in line with the nature of a turnover based tax, as described in recitals 62 and 63, it cannot be considered a consistent anti-abuse rule that would justify a differential treatment.

Conclusion on the justification

(71) As a consequence, the Commission considers that ability to pay cannot serve as a guiding principle for the Hungarian advertisement turnover tax. Accordingly, the Commission does not consider the measures to be justified by the nature and general scheme of the tax system. Therefore, the measures confer a selective advantage on advertisement companies with a lower level of turnover (and thus smaller undertakings) and to undertakings that were not profit-making in 2013 and could deduct losses carried-forward from the 2014 tax base.

4.1.4. POTENTIAL DISTORTION OF COMPETITION AND EFFECT ON INTRA-UNION TRADE

(72) According to Article 107(1) of the Treaty, a measure must distort or threaten to distort competition and have an effect on intra-Union trade to constitute State aid.

(73) The measures apply to all undertakings deriving turnover from the publication of advertisements in Hungary. The Hungarian advertisement market is open to competition and characterised by the presence of operators from other Member States, so that any aid in favour of certain advertisement operators is liable to affect intra-Union trade. Indeed, the measures have an influence on the competitive situation of the undertakings subject to the tax. The measures relieve undertakings with lower levels of turnover and undertakings that were not profit-making in 2013 from a tax liability they would otherwise have had to pay, had they been subject to the same advertisement tax as undertakings with a high level of turnover and/or undertakings that were profit-making in 2013. Therefore, the aid granted under those measures constitutes operating aid in that it relieves those undertakings

([15]) See Commission notice on the application of the State aid rules to measures relating to direct business taxation, para. 24. The statement on the redistributive purpose that can justify a progressive tax rate is explicitly only made as regards taxes on profits or (net) income, not as regards taxes on turnover.

from a charge that they would normally have had to bear in their day-to-day management or normal activities. The Court of Justice has consistently held that operating aid distorts competition ([16]), so that any aid granted to those undertakings should be considered to distort or threaten to distort competition by strengthening their financial position on the Hungarian advertisement market. Consequently, the measures distort or threaten to distort competition and have an effect on intra-Union trade.

4.1.5. CONCLUSION

(74) Since all the conditions laid down by Article 107(1) of the Treaty are met, the Commission concludes that the advertisement tax laying down a progressive tax rates structure and the deduction of losses carried-forward from the 2014 tax base limited to companies that were not profit-making in 2013, constitutes State aid within the meaning of that provision.

4.2. *COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET*

(75) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty ([17]) and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty ([18]). However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty ([19]).

(76) The Commission notes that the Hungarian authorities did not provide any argument liable to establish that the measures would be compatible with the internal market and that Hungary did not comment on the doubts expressed in the Opening Decision as regards the compatibility of the measures. The Commission considers that none of the exceptions provided for in the aforementioned provisions of the Treaty apply, since the measures do not appear to aim to achieve any of the objectives listed in those provisions.

(77) Consequently, the measures cannot be declared compatible with the internal market.

4.3. *IMPACT OF THE 2015 AMENDMENT OF THE ADVERTISEMENT TAX ON THE STATE AID ASSESSMENT*

(78) The advertisement tax introduced by Act XXII of 2014 — as described in the Opening Decision — stopped to apply as of the date of the Commission decision to open the formal investigation and issue a suspension injunction. However, the 2014 advertisement tax was modified by the Hungarian authorities in June 2015, without prior notification and/or approval by the Commission, and therefore the tax continued to apply in its amended version. The Commission considers that the amended version of the advertisement tax is based on the same principles as the initial tax and contains — to a certain extent at least — the same features described in the Opening Decision that led the Commission to open a formal investigation. As a consequence, the Commission considers that the amended version of the advertisement tax falls within the scope of the Opening Decision. In this section, the Commission assesses whether — and to what extent — the amended version of the tax alleys the doubts expressed in the Opening Decision respect of the initial advertisement tax.

(79) While the 2015 amendment addresses some of the State aid concerns expressed by the Commission in the Opening Decision, it does not fully address them all.

([16]) Case C-172/03 *Heiser* EU:C:2005:130, paragraph 55. See also Case C-494/06 P *Commission* v *Italy and Wam* EU:C:2009:272, paragraph 54 and the case-law cited and C-271/13 P *Rousse Industry* v *Commission* EU:C:2014:175, paragraph 44. Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* EU:C:2011:368, paragraph 136. See also Case C-156/98 *Germany* v *Commission* EU:C:2000:467, paragraph 30, and the case-law cited.

([17]) The exceptions provided for in Article 107(2) TFEU concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

([18]) The exceptions provided for in Article 107(3) TFEU concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

([19]) Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission* EU:T:2007:253, paragraph 34.

(80) First, the new tax rates structure still provides for an exemption for companies (groups) with a turnover below HUF 100 million, approx. EUR 325 000 (0 % rate applies) while the others will pay 5,3 % for the part of their turnover above HUF 100 million. In practice this means that progressivity is maintained in the taxation of companies with an advertisement turnover bigger than the threshold.

(81) The new threshold under which the 0 % rate applies (HUF 100 million) is lower than the one under which the 0 % tax rate applied according to the old legislation (which was HUF 500 million). However, it results in non-collection of taxes up to approx. EUR 17 000 per year (5,3 % × EUR 325 000).

(82) The Commission gave Hungary the opportunity to justify the application of a 0 % tax rate to advertisement turnover below HUF 100 million by the logic of the tax system (e.g. administrative burden). However, Hungary did not bring forward arguments to demonstrate that the cost of collection of the tax (administrative burden) would outweigh the amounts of tax collected (up to around EUR 17 000 of tax per year).

(83) Second, the amendment introduces an optional retroactive application back to the entry into force of the tax in 2014: for the past, taxpayers can choose to apply either the new system or the old one.

(84) This means that, in practice, companies that have been subject to the tax rate of 0 % and 1 % in the past will not be retroactively taxed at the rate of 5,3 % as it is unlikely that they will opt in to pay more taxes. Therefore, the optional retroactive effect of the modified tax allows companies to escape the payment of the tax under the new system, and provides an economic advantage to those who will not opt for the 5,3 % rate.

(85) Third, the deduction from the 2014 tax base of past losses carried-forward limited to companies that have not made profit in 2013 remains unchanged. The State aid concerns expressed in the Opening Decision are therefore not addressed in the amended scheme and remain valid.

(86) As a consequence, the Commission considers that the 2015 amendments to the Advertisement Tax Act only partially address the concerns spelled out in the Opening Decision concerning the 2014 Advertisement Tax Act. Indeed the amended act features the same elements that the Commission considered entailing State aid in respect of the previous scheme. Even though the number of applicable rates and brackets has been reduced from 6 to 2 and the highest rate substantially lowered from 50 % to 5,3 %, the tax has remained progressive, its progressivity has remained unjustified and the deduction of losses carried-forward continues to apply as it did before. This assessment is valid for the future but also for the past, i.e. since the entry into force of the amended Act on 5 July 2015 and possibly, with retroactive effect back to the entry into force of the Act in 2014.

(87) Therefore, the 2015 amendments to the advertisement tax do not affect the Commission's conclusion that the advertisement tax still entails unlawful and incompatible State aid.

4.4. *RECOVERY OF AID*

(88) As already stated in recital 78, the Commission considers that the Opening Decision also covers the amended scheme. Therefore, this decision concerns the Advertisement Tax Act as in force at the time of the Opening Decision, i.e. 12 March 2015, as well as its amendments of 5 June 2015.

(89) The measures have not been notified to — or been declared compatible with the internal market by — the Commission. Those measures constitute State aid within the meaning of Article 107(1) of the Treaty and new aid within the meaning of Article 1(c) of Regulation (EU) 2015/1589. Since those measures have been put into effect in violation of the standstill obligation laid down in Article 108(3) of the Treaty, they also constitute unlawful aid within the meaning of Article 1(f) of Regulation (EU) 2015/1589.

(90) The consequence of the finding that the measures constitute unlawful and incompatible State aid is that the aid has to be recovered from its recipients pursuant to Article 16 of Regulation (EU) 2015/1589.

(91) As regards the progressivity of the tax rate, recovery of the aid means that Hungary needs to treat all undertakings equally as if they had been subject to a single fixed rate. By default, the Commission considers that the single fixed rate to be 5,3 % as determined by Hungary in the amended version of the tax unless Hungary

decides, within two months from the date of adoption of the present decision, to set a different level for the single tax rate that will apply retroactively to all undertakings over the whole period of application of the advertisement tax (original and amended versions) or to abolish the advertisement tax retroactively as of the date of its entry into force.

(92) As regards the aid granted to undertakings that were not profit-making in 2013 resulting from the deduction of losses carried-forward, Hungary has to recover the difference between the tax due by application of the fixed tax rate to the entire advertisement turnover of the companies subject to the tax without any deduction of losses, and the tax actually paid. This difference corresponds to the tax that has been avoided following the deduction.

(93) As stated in recital 56, the reference system for the taxation of advertisement turnover would be a tax where:

— all advertisement turnovers are subject to the tax (no optionality), without the deduction of any loss carried-forward,

— turnovers are subject to the same (single) tax rate; by default, this single rate is set at 5,3 %,

— no other element is maintained or introduced that would provide a selective advantage to certain undertakings.

(94) As regards recovery, this means that for the period between the entry into force of the advertisement tax in 2014 and the date of the its abolishment or replacement by a scheme which would be fully in line with State aid rules, the amount of aid received by the companies with advertisement turnover should be calculated as the difference between:

— on the one hand, the amount of tax (1) that the undertaking should have paid under the application of the reference system in line with State aid rules (with a single tax rate of, by default, 5,3 % to the entire advertisement turnover without the deduction of any loss carried-forward),

— on the other hand, the amount of tax (2) that the undertaking was liable to pay or had already paid.

(95) To the extent that the difference between amount of tax (1) and amount of tax (2) is positive, the amount of aid should be recovered including recovery interest as of the date the tax was due.

(96) There would be no need for recovery if Hungary abolishes the tax system with retroactive effect as of the date of the entry into force of the advertisement tax in 2014. This would not prevent Hungary from introducing for the future, e.g. from 2017, a tax system which is not progressive and does not differentiate between economic operators subject to the tax.

5. **CONCLUSION**

(97) The Commission finds that Hungary has unlawfully implemented the aid in question in breach of Article 108(3) of the Treaty.

(98) Hungary has either to abolish the unlawful aid scheme or replace it with a new scheme which is in line with State aid rules.

(99) Hungary must recover the aid.

(100) However, the Commission observes that the tax advantage, i.e. the tax saved, that results from the application of the HUF 100 million threshold might comply with Commission Regulation (EU) No 1407/2013 ([20]) (hereinafter: '*de minimis* Regulation'). The ceiling that a group of companies can receive is EUR 200 000 per 3-year period, all *de minimis* support taken into account. In order to comply with the *de minimis* rules, all other conditions laid down in the *de minimis* Regulation should be met. In case the advantage resulting from the exemption complied with the *de minimis* rules, it shall not be qualified as unlawful and incompatible State aid and shall not be recovered.

([20]) Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

(101) This decision is adopted without prejudice to possible investigations on the compliance of the measures with the fundamental freedoms laid down in the Treaty, notably the freedom of establishment as guaranteed by Article 49 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted under the Hungarian Advertisement Tax Act, including after its amendment of 5 June 2015, through the application of a turnover tax with progressive rates and the possibility, for companies that were not profit-making in 2013, to deduct losses carried-forward from their 2014 tax base, unlawfully put into effect by Hungary in breach of Article 108(3) of the Treaty on the Functioning of the European Union is incompatible with the internal market.

Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by the Regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 ([21]) or Council Regulation (EU) 2015/1588 ([22]) whichever is applicable at the time the aid is granted.

Article 3

Individual aid granted under the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by a Regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98 repealed and replaced by Regulation (EU) 2015/1588 or by any other approved aid scheme is compatible with the internal market, up to maximum aid intensities applicable to that type of aid.

Article 4

1. Hungary shall recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries, as stated in recitals 88 to 95.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([23]) as amended by Regulation (EC) No 271/2008 ([24]).

4. Hungary shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this decision.

Article 5

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.

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

([22]) Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1).

([23]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

([24]) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

2. Hungary shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 6

1. Within two months following notification of this Decision, Hungary shall submit the following information:

(a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

(b) the total amount (principal and recovery interests) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Hungary shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to Hungary.

Done at Brussels, 4 November 2016

For the Commission
Margrethe VESTAGER
Member of the Commission

CORRIGENDA

Corrigendum to Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

(Official Journal of the European Union L 180 of 29 June 2013)

On page 50, Article 34(5), fourth sentence:

for: 'If the research carried out by the requested Member State which did not respect the maximum time limit withholds information which shows that it is responsible, that Member State may not invoke the expiry of the time limits provided for in Articles 21, 23 and 24 as a reason for refusing to comply with a request to take charge or take back.',

read: 'If the research carried out by the requested Member State which did not respect the maximum time limit yields information which shows that it is responsible, that Member State may not invoke the expiry of the time limits provided for in Articles 21, 23 and 24 as a reason for refusing to comply with a request to take charge or take back.':

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