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**LEGAL OBLIGATIONS OF THE
COMMISSION CONCERNING THE
General Statistics &
PRODCOM DATA**

**Statement from
HOLST PORZELLAN GMBH
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1. INTRODUCTION

- (1) This paper provides an analysis of the standing requirement which forms part of the exercise by the European Commission (the "Commission") to determine whether the initiation of an investigation is warranted and whether the Union industry has been injured by imports from China. It addresses the practice of the Commission in the anti-dumping proceeding concerning imports of Ceramic Tableware and Kitchenware in the People's Republic of China, AD586 ("*Tableware*"), and whether the legal standard required of the Commission has been met at the start and throughout the investigation.

2. COMMISSION DETERMINATION OF STANDING OF THE UNION INDUSTRY

- (2) At two stages during the anti-dumping proceedings in *Tableware*, the Commission provided some explanation on how it has assessed and confirmed that the Complainants have satisfied *locus standi* concerning Union production. Specifically, the requirement that the Complainants account for at least 25% of Union production of the product concerned in the European Union ("EU") as required by Article 5(4) of the Council Regulation (EC) No 1225/2009 of 30 November 2009 ("the basic Regulation")¹. The two stages were: at the publication of the provisional regulation² on 15 November 2012 and the definitive disclosure³ on 25 February 2013 in the *Tableware* investigation.

2.1 Provisional regulation

- (3) At recital 107 of the provisional regulation, the Commission confirms the method they used to calculate the total Union production:

*"(107) All available information concerning Union producers, including the data reported in the complaint and subsequent submissions in respect of the producers that did not come forward in this investigation was used to establish the total Union production. **The total Union production of the like product was estimated by extrapolating data provided by the European and national associations, cross-checked with data provided by individual producers and also with research and statistical sources.**"⁴*

- (4) However, there are three problems with this statement which covers the methodology used:

¹ This was implemented from the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*Anti-Dumping Agreement*" or "*ADA*").

² Commission Regulation (EU) No 1072/2012 of 14 November 2012 imposing a provisional anti-dumping duty on imports of ceramic tableware and kitchenware originating in the People's Republic of China (the "*provisional regulation*"), [2012] O.J. L318/28.

³ Anti-dumping proceeding concerning imports of ceramic tableware and kitchenware originating in the People's Republic of China, AD586, General Disclosure Document, 25 February 2013 ("*definitive disclosure*").

⁴ *Supra* 1, recital 107.



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2.1.1 **Problem 1: The main data sources are estimates from national and EU associations**

- (5) The data sources used by the Commission to generate Union production figures are confirmed as "*European and national associations*" (the "Associations"). Nothing has been disclosed to the interested parties that can confirm that this data has been sourced directly from Union industry producers to ensure accuracy and validity.
- (6) The sources used were also referred to in the oral hearing by the Commission services for the unrelated importers on 13 January 2013. A senior Commission official, Mr. Arthur Braam ("Mr Braam"), referred to the document that contained information supplied by a national association for EU production of ceramic tableware and kitchenware⁵ as evidence that the level of production of the producers located in the EU was 240,200 tonnes during 2011, the Investigation Period ("IP"). This is the same document which was referred to at the oral hearing by the Commission services for the Chinese Chamber of Commerce for Import and Export of Light Industrial Products and Arts and Crafts ("CCCLA") on 26 February 2013. Specifically, the document confirms that the Associations have based their figures "*on the best knowledge of the market developed with the support of the Prodcop database for porcelain tableware and of our members*".
- (7) This means, that even the Associations opted to use PRODCOM data to determine the total EU production of the product concerned. However, rather than relying on an official source it is clear that the Associations had *estimated the data*, and only used PRODCOM data to supplement the estimated data to determine production of the Union industry (used to confirm that the standing requirement had been met).

2.1.2 **Problem 2: The process of "Extrapolation"**

- (8) The total Union production was estimated by "*extrapolating*" data from another source by the Commission. The New Shorter Oxford English Dictionary defines the verb "*to extrapolate*" as follows:

*"Extend (a range of values, a curve) on the assumption that the trend exhibited inside the given part is maintained outside it; **assume the continuance of a known trend in inferring or estimating an unknown observed value.**"⁶*

- (9) As the definition states, extrapolation of data includes an assumption that a given trend will continue by inferring or estimating an unknown observed value. This means that the Commission in the *Tableware* investigation has made a large assumption that a given trend in Union production would continue, and increase by a certain rate, and have estimated unknown values.

⁵"EU production of ceramic tableware and kitchenware", Confindustria Ceramica, dated 20 June 2012, reference "t12.007557.6".

⁶ The New Shorter Oxford English Dictionary, Volume 1, A-M, at page 897.



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(10) The statement in the provisional regulation, that evidences the numerous estimations took place, is supported by the fact that during multiple oral hearings with the Commission it was confirmed that this amounts to an accepted and openly used method. During the oral hearing held by the Commission Services for both:

- Unrelated importers on 13 January 2013; and
- CCCLA on 26 February 2013;

it is was confirmed by Mr. Braam that the data used by the Commission Services to calculate the standing of the Union industry data was "*extrapolated*".

(11) It must be concluded, on the basis of the evidence available at that time, the total production of the product concerned in the EU was based on extrapolated data, which were in turn already estimated – *i.e.* an investigation was thus initiated on "estimates of estimates". This must have provided final data which is no longer an original, primary source and has become unreliable, subjective, and potentially grossly inaccurate.

2.1.3 Problem 3: The data was cross-checked with other unnamed sources

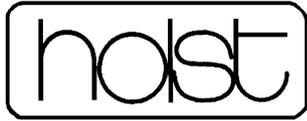
(12) At recital 107 of the provisional regulation, the Commission also makes reference to "*research and statistical sources*"⁷ used to cross-check the estimates produced by the Associations. A general reference to "*statistical sources*" provides no information on the type, reliability or accuracy of these particular sources of information, let alone what the sources are.

(13) To date, no evidence has been disclosed to the interested parties in *Tableware* either in direct correspondence, notes added to the non-confidential file, or at the various hearings addressing these "*statistical sources*". It is now clear, which was confirmed at the hearing of the CCCLA on 26 February 2013, that the Commission is unwilling to release these documents (*i.e.* the "*research and statistical sources*") to interested parties.

(14) To conclude, at the point following the publication of the provisional regulation, the Commission had:

- Relied on estimates provided by Associations (which was supplemented by PRODCOM data);
- Further estimated, the estimates used, to calculate total Union production; and
- Used unknown "*research and statistical sources*" to cross-check the data.

⁷ recital 71, provisional regulation.



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- (15) By providing these estimations and unknown sources the injury determination, based on this information, cannot be considered as an "*objective examination*" as per Article 3.2 of the basic Regulation, in any sense.

2.2 Definitive disclosure

- (16) The definitive disclosure further explained how Union production was determined, as follows:

"(79) In respect of this claim it is noted that the data source for the Union production figure was contained in recital (107) of the provisional Regulation, i.e. it is based on data provided by the European and national associations, cross-checked with data provided by individual producers and also with other statistical sources. The disparity between the PRODCOM statistics and the 240 200 figure derives from the fact that the product scope of this investigation does not fully match with the PRODCOM statistical data codes, i.e. it is much narrower. Therefore, there is no reason to doubt the result of the standing exercise.

(80) Moreover, in the framework of the statutory analysis of an anti-dumping complaint and in accordance with Article 5(4) of the basic Regulation the Commission services carried out a thorough standing examination before initiation. The Commission analysed the data in the complaint and contacted all known Union producers and asked them to also provide data on production as well as their position with regards the complaint. Some 50 replied. Associations of producers provided information on production as well."⁸

- (17) When the definitive disclosure was published on 25 February 2013, no new sources providing information on the Union production of the product concerned were released to interested parties.
- (18) By reference to recital 107 of the provisional regulation, the definitive disclosure did not state that the data is estimated (as this was stated in the provisional regulation). The reference to additional "*research*" that was carried out was omitted from the definitive disclosure in the same fashion. Finally, the Commission fails yet again to address what "*other statistical sources*" are or where they are located.
- (19) The definitive disclosure also notes that the disparity between PRODCOM statistics (reporting total Union production at 313,187 tonnes⁹ for the IP) and the Commission's estimated statistics (reporting

⁸ Definitive disclosure, recitals 79-80.

⁹ This figure was established following the Complainant's calculation methodology of reducing 20% from all products classifiable under CN Code 6912 and adding this number to the total of CN Code 6911. That calculation method is outlined below:



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total Union production at 240,200 tonnes for the IP) is due to the fact that PRODCOM codes cover a variety of other products which are not covered by this investigation. To prove that this statement is incorrect, we have included a table obtained from Commission Regulation (EU) No. 907/2012 establishing for 2012 the 'Prodcom list' of industrial products provided for by Council Regulation (EEC) No. 3924/91¹⁰ and added a separate column to show that the descriptions in PRODCOM match these used in the Combined Nomenclature in the EU ("CN"). This Regulation clearly matches the relevant PRODCOM codes with the corresponding CN codes.

<i>PRODCOM</i>	<i>Description</i>	<i>External trade nomenclature reference for 2012 (HS/CN) CN Code description</i>	<i>CN 2012 Code Description</i>
<i>NACE: 23.41</i>	<i>Manufacture of ceramic household and ornamental articles</i>		
<i>CPA: 23.41.11</i>	<i>Tableware, kitchenware, other household articles and toilet articles, of porcelain or china</i>		
<i>23.41.11.30</i>	<i>Porcelain or china tableware and kitchenware (excluding electro thermic apparatus, coffee or spice mills with metal working parts)</i>	<i>6911 10</i>	<i>Tableware, kitchenware, other household articles and toilet articles, of porcelain or china: Tableware and kitchenware</i>

PRODCOM FIGURES (LAST UPDATED ON 13 JANUARY 2013)				
	2011	2010	2009	2008
CN CODE	TOTAL	TOTAL	TOTAL	TOTAL
6911	144,540,000	139,999,738	224,645,025	172,411,016
6912	210,808,650	216,033,887	214,961,371	317,583,355
6912-20%	168,646,920	172,827,110	171,969,097	254,066,684
6911+6912	355,348,650	356,033,625	439,606,396	489,994,371
6911+(6912-20%)	313,186,920	312,826,848	396,614,122	426,477,700

¹⁰ 2012 OJ L276/132 [link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:276:0001:0276:EN:PDF> accessed on 28 February 2013].



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CPA: 23.41.12	<i>Tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china</i>		
23.41.12.10	<i>Ceramic tableware, other household articles: common pottery</i>	6912 00 10	<i>Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china: Of common pottery</i>
23.41.12.30	<i>Ceramic tableware, other household articles: stoneware</i>	6912 00 30	<i>Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china: Stoneware</i>
23.41.12.50	<i>Ceramic tableware, other household articles: earthenware or fine pottery</i>	6912 00 50	<i>Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china: Earthenware or fine pottery</i>
23.41.12.90	<i>Ceramic tableware, other household articles : others</i>	6912 00 90	<i>Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china: Other</i>

- (20) In light of the above evidence, it is very doubtful that a large difference of approximately 73,000 tonnes is due to PRODCOM figures encompassing more products than the scope of the definition of the product concerned. It is more realistic to accept that the Commission's estimates, of estimated figures, which were used to calculate total Union production simply do not reflect the state of the Union industry.



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3. **STANDING**

3.1 **Article 5.3 of the basic Regulation**

- (21) Article 5.3 of the basic Regulation requires the authorities to determine whether there is "*sufficient evidence*" to justify the initiation of an investigation. As well as investigating the substance of the Complaint, an investigating authority (*i.e.* the Commission) is obliged to pro-actively establish that the data provided by the Complainants to confirm standing is duly verified by other statistical sources. At this moment in time the investigation has been open and active for twelve months, yet this basic analysis, let alone any methodology adopted by the Commission, has not been disclosed to interested parties.
- (22) The Commission alleges that it discharged this burden by cross-checking the data sources containing production data which has been reported by Associations. How it discharges the obligation embedded in Article 5.3 of the basic Regulation is left to the investigating authority and is not disputed in this submission. Yet, the fact that these associations reported a figure of 240,200 tonnes in 2011 of the product concerned *does not correlate* with *official* statistical data on Union production provided by PRODCOM which total 313,187 tons for 2011.
- (23) The Commission noted in the definitive disclosure that it was not in possession of the final set of data for 2011 and therefore had to rely on data for 2010. Even so, it must be noted that the PRODCOM data for 2010 was fully accessible online (and already available at that point) and showed a total production of 312,827 tonnes for the year 2010. The difference between the data reported by the Complainants (and accepted in full by the Commission) for 2011 and the official PRODCOM data for 2010 – no less than 72,627 tonnes – should have raised the suspicion of the Commission.
- (24) A prudent investigating authority should and would have properly examined the accuracy of the data provided by the Complainants in line with its obligation under Article 5.3 basic Regulation. The fact that this investigating authority (*i.e.* the Commission) can neither evidence on neutral statistical datasets such as PRODCOM, nor through a methodological example with indexed numbers, how it verified the information for standing, and thereby that it discharged its obligation under Article 5.3 basic Regulation, finds that the Commission in gross violation of this provision. In effect, the Commission is implicitly admitting that it either did not study the data at all and merely paid lip-service to this obligation, or that it misinterpreted the Annex B.3.3 obligation to solely reduce production data of CN Codes 6912 by 20% and not the total of CN Codes 6911 and 6912.¹¹ Either

¹¹ Doing so would essentially make the Union production data somewhat reproducible, but no less valid. For your reference, the total production for CN Codes 6911 and 6912, without the 20% reduction in production totals of products falling within CN Code 6912, amounts to 355,348,650 kg (in 2011). A 20% deduction of the total figure (CN Codes 6911 and 6912), *i.e.* by 71,069,730.00 kg, amounts to a total of 284,278,920 kg. This is the only way we can explain the reported figure of 240,200,000 kg. Standing



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way, the suggestion that the Commission has discharged its obligation under Article 5.3 basic Regulation is not credible.

- (25) It is recalled that, as noted in *US – Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, investigating authorities are required, before opening an investigation, to satisfy themselves that the written request made was on behalf of domestic industry, *i.e.* by more than 25%.¹²
- (26) In this regard, recital 107 of the provisional regulation and recital 79 of the definitive disclosure acts as *prima facie* acknowledgment that the Commission estimated the total Union production of the like product and failed to examine whether the figure for total Union production was reliable and correct. As such, the Commission erred in commencing the investigation in the first place and violated Article 5.3 of the basic Regulation. This brings with it termination of the investigation as the only legally possible result, as this deficiency – which cannot legally be amended *ex-post-facto* – has fundamentally distorted the Commission's analysis.

3.2 Article 5.4 of the basic Regulation

- (27) As per Article 5.4 basic Regulation "*no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 % of total production of the like product produced by the Community industry.*"¹³ This means – as a minimum – that at the time of initiation of the investigation, the Complainants must account for at least 25% of total Union production of the product concerned.
- (28) This article therefore places certain affirmative obligations on investigating authorities to evaluate the evidence concerning standing. The numeric standards established in that article must be met prior to initiating an investigation. In this regard we refer to the Panel report in *European Communities — Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India* (WT/DS141/R):

*"6.213 The issues raised by the Indian claim in this regard are similar to those discussed above regarding Article 5.3 with respect to the lack of an express process requirement in Article 5.4 and the question of whether and how the determination of standing must be made known to the parties. **As with Article 5.3, Article 5.4 of the AD Agreement requires that the investigating authorities make certain determinations before an investigation may be initiated, and establishes the***

would also be established with 26%. Still, this calculation falls short of what the Complainants in Annex B.3.3 provided: namely that merely the total of CN Codes 6912 00 10, 6912 00 30, 6912 00 50, and 6912 00 90 be deducted by 20%. Production data reported to fall under CN Code 69 11 10 00 is to be left unaltered.

¹² GATT Panel, *US – Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, (ADP/47, 20 August 1990), at 5.10.

¹³ basic Regulation, Article 5.4.



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substance of the determinations to be made, including that the application is supported by producers accounting for at least 25 per cent of domestic production, but does not set out any specific requirements as to the process by which that determination must be made. In our view, whether the necessary examination of the degree of support for the application was carried out prior to the initiation can only be assessed by reference to the determination that was actually made, and the evidence before the authority at the time it made the determination. In this case, the EC investigating authority clearly concluded that the application was supported by producers accounting for more than 25 per cent of total EC production of bed linen, and we have before us documents which it asserts contain the relevant evidence on which it relied. We therefore turn first to the facts of this matter. Article 6.6 requires the authorities to satisfy themselves as to the accuracy of the information provided by interested parties upon which their findings are based."¹⁴
[Emphasis added]

- (29) By logical analogy, if the ADA requires authorities to determine that the application is supported by producers accounting for at least 25% of domestic production before a notice of initiation can be lodged, and if in turn it can be established that on the basis of updated data for the same year and the same data source the application was never supported by producers accounting for at least 25% of domestic production, the Commission has to terminate the investigation without further consideration. This is because an investigation based on a complaint supported by less than 25% of domestic production should never have commenced in the first place, and, like the present investigation, would be lanced with fundamental defects.
- (30) Before the lodging of the notice of initiation, full and impartial production data for 2010 and all other years preceding the investigation were available online. Hence, on the basis of the facts available at the time of the lodging of the notice of initiation, the Commission was in a position to doubt the validity of the claim that the Complainants accounted for at least 25% of the domestic production. It failed to conclusively discharge this obligation, as established above.
- (31) Support for the above conclusion is also provided by the Panel Report in *US – 1916 Act (Japan)*, which found that an investigation initiated pursuant to a complaint submitted by or on behalf of Community producers not meeting the representation requirement under Article 5.4 WTO Anti-Dumping Agreement ("ADA") is fundamentally flawed.¹⁵ This is even the case when the Commission, at the time of initiation, was not and could not have been aware that the complainants were not representative.¹⁶
- (32) To conclude, even if the Commission was not aware at the time of initiation of the investigation that the Complainants did not make up 25% of Union industry of the product concerned, it is now – in

¹⁴ recital 6.213 of *European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India* (WT/DS141/R).

¹⁵ *US – 1916 Act (Japan)*, WT/DS162/R, at paras 6.257, 6.261.

¹⁶ EU Anti-Subsidy Law & Practice, 2nd Edition, Dr. Konstantinos Adamantopoulos and Maria J. Pereyra, Second Edition, page 352.



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light of the undisputable evidence of the PRODCOM figures – under a WTO and EU law obligation to terminate the proceedings as this deficiency cannot be rectified *ex-post-facto*.

4. **INJURY**

- (33) The PRODOM data affects the ongoing analysis in the investigation as well as the assessment of standing at the start. The data has provided additional evidence, that what was used was unreliable, insufficient, and not representative of the total Union production. This has major implications for the injury determination by the Commission. The use of the data by the Commission affects both micro and macroeconomic factors which are used in the determination of injury of the Union industry as explained below.

4.1 **Microeconomic factors**

- (34) At recital 120 of the provisional regulation, the Commission notes that its analysis of the microeconomic indicators which include: stocks, sale prices (and hence price undercutting), profitability, cash flow, investments, return on investments, ability to raise capital, wages and cost of production, was carried out at the level of the "*sampled Union producers*".
- (35) This sample represents "*over*" (it is unlikely to be a large amount more) 20% of the estimated total Union production. The Commission's assessment of Union production used sources which underestimated the true amount which gave the appearance that the Complainants represent a major proportion (and did not represent under 25%) of Union industry as defined by Article 5.4 basic Regulation. Based on *de facto* Union production, as evidenced by PRODCOM data, the Complainants thus never made up the required 25% for initiation of an investigation or for an injury analysis based on "*a major proportion*" of the Union industry as required by Article 4.1 of the basic Regulation.
- (36) An injury analysis based on a sample of approximately 20% of estimated Union production does not amount to the required "*major proportion*" of the Union industry. In fact, in light of the actual total Union production, as noted above, this sample will make up significantly less of *de facto* Union production. The inclusion of complaining companies in the sample therefore gravely distorts the representativeness of the sample when microeconomic factors are assessed.



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4.2 **Macroeconomic factors**

- (37) The provisional regulation, states that the macroeconomic indicators including: production, production capacity, capacity utilisation, sales volume, market share, employment, productivity and magnitude of dumping margin, are all "*assessed at the level of the Union industry*".¹⁷ It goes further and confirms "*assessment was based on the information provided by European associations, cross-checked with data provided by Union producers and available official statistics*".¹⁸
- (38) We can deduce that the problems associated with the data used to determine the Union industry, clearly also affect the injury analysis by the Commission. The fact that the data from the Associations has been confirmed as incorrect in comparison with official PRODCOM data, as it factors in estimates, will be reflected in the assessment of the macroeconomic indicators above distorting them.
- (39) To conclude, the obligation on the Commission to present an objective analysis of the injury determination under Article 3.2 of the basic Regulation is seriously impacted and, in addition to the reasons stated above, must result in the Commission terminating the investigation in its entirety as this flaw cannot be cured *ex-post-facto*.

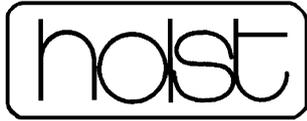
5. **CONFIDENTIALITY**

5.1 **Article 19.2 of the basic Regulation**

- (40) Under Article 19.2 basic Regulation, the Commission is under an obligation to furnish non-confidential summaries of any confidential information it uses during the investigation. These summaries must be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.
- (41) The Commission failed to abide by this obligation under Article 19.2 basic Regulation by not disclosing:
- A sufficiently detailed explanation of the methodology used in determining whether the Complainants accounted for 25% of total EU production of the product concerned;
 - A non-confidential summary of the "*research*" used to determine this standing; and
 - A non-confidential summary of the "*statistics*" used to determine this standing.

¹⁷ Provisional regulation, recital 119.

¹⁸ *Ibid.*



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- (42) These meaningful summaries had to be submitted to the non-confidential public file directly after the commencement of the investigation (such as with the Complaints Office's determination on standing). They were not and as a result the Commission falls short of this elementary obligation under the basic Regulation and the ADA, which evidences a deficiency so fundamental in nature that it cannot be cured *ex-post-facto*.

5. **CONCLUSION**

- (43) On the basis of the above, we conclude that the Commission has violated fundamental provisions of EU and WTO law. The Commission has failed to adequately discharge the legal standard in relation to the standing requirement in an anti-dumping investigation. This has also distorted the Commission's determination of injury to the Union industry.
- (44) Consequently, given these deficiencies cannot be cured *ex-post-facto*, the only possible remedy to account for this, even at this late stage of the anti-dumping proceeding must be to terminate with immediate effect the entire investigation to ensure that the rules regarding procedure and the rights of defence of the interested parties are effectively ensured.

END