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**NON-CONFIDENTIAL  
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25 July 2021

By TRS

Dear Madam/Sir,

**Subject: Transition Review of Countervailing Measures on Certain Rainbow Trout Origination in Turkey (Case TS0002) - Comments on the Statement of Essential Facts**

This submission sets out the comments of *Selina Balık İşleme Tesisi İthalat İhracat ve Ticaret Anonim Şirketi* ("**Selina Balık**") to the Statement of Essential Facts ("**SEF**") dated 25 June 2021<sup>1</sup> which was published by the Trade Remedies Authority ("**TRA**") in the framework of the transition review "Case TS0002".

In particular, the present submission will demonstrate that - contrary to the conclusions reached by the TRA in the SEF - (i) the conditions for the variation of the currently applicable measure are not met, and therefore the measure should be revoked or, in the alternative, (ii) the TRA should establish an individual countervailing duty for Selina Balık.

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<sup>1</sup> Trade Remedies Authority, Statement of Essential Facts, Case TS0002, Transition review of countervailing measures applying to certain rainbow trout originating in Turkey, 25 June 2021, hereinafter Statement of Essential Facts or SEF, available here: <https://www.trade-remedies.service.gov.uk/public/case/TS0002/submission/27d378a3-89ab-4607-bec1-7c7ad6355110/document/7a47f75f-2ec6-46fc-ac44-bd405ce3b50d/>

## **1. THE COUNTERVAILING MEASURE SHOULD BE REVOKED**

### **1.1 Introduction**

Under the applicable UK law, i.e., the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019<sup>2</sup> (hereinafter “**UK TRR 2019**”), in the context of a transition review of an EU countervailing measure, the TRA must consider:

- (i) whether the application of the countervailing amount is necessary or sufficient to offset the importation of the relevant subsidised goods, pursuant to Regulation 99A(1)(a)(ii), and
- (ii) whether injury to the UK industry in the relevant goods would occur if the countervailing amount were no longer applied to those goods, pursuant to Regulation 99A(1)(b).

Considering the novelty of the UK legislation, which was enacted very recently and lacks of consolidated practice, and although the rules governing the so-called “transition reviews” do not find any direct correspondence in the WTO Agreement on Subsidies and Countervailing Measures<sup>3</sup> (“**SCM Agreement**”), Selina Balık considers it reasonable to interpret the wording of Regulation 99A(1) in light of Article 21.3 of the SCM Agreement, which provides that “*any definitive countervailing duty shall be terminated on a date not later than five years from its imposition [...] unless the authorities determine, in a review initiated before that date [...] that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury*” (emphasis added).

In other words, in Selina Balık’s view:

- (i) the sufficiency and necessity tests under Regulation 99A(1)(a)(ii), should be aimed at establishing whether the continued application of the countervailing amount is justified in light of the continued subsidization and/or the likelihood of a recurrence of that subsidisation, and
- (ii) the test under Regulation 99A(1)(b) should be aimed at establishing whether the injury suffered by the UK industry is likely to continue or recur should the measure be revoked.

The proposed interpretation seems the only reasonable reading of the wording of Regulation 99A(1) of the UK TRR 2019, and especially of the - rather unclear - “sufficiency” and “necessity” tests under Regulation 99A(1)(a)(ii), which would otherwise lack any meaningful purpose, and would therefore be ineffective.

Needless to say, the two above-mentioned criteria (i.e., (i) likelihood of continuation or recurrence of subsidization, and (ii) likelihood of continuation or recurrence of injury) should

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<sup>2</sup> UK Statutory Instruments, Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 (as amended), 6 March 2019

<sup>3</sup> Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 (hereinafter WTO SCM agreement).

be cumulatively met in order for a countervailing measure to be varied pursuant to Regulation 100A.

Bearing this in mind, Selina Balik respectfully submits that the TRA failed to demonstrate that the two criteria at stake are met in the present case, as explained more in detail below.

**1.2 The TRA failed to demonstrate that the “sufficiency” and “necessity” tests under Regulation 99A(1)(a)(ii)<sup>4</sup> are met**

**1.2.1 The TRA’s interpretation of the “sufficiency” and “necessity” tests under Regulation 99A(1)(a)(ii)<sup>5</sup> is manifestly ill-founded**

As already explained, Regulation 99A(1)(a)(ii) of UK TRR 2019 requires the TRA to determine whether “the application of the countervailing amount is necessary or sufficient to offset [...] the importation of the relevant subsidised goods” (emphasis added).

In this regard, at paragraphs 77-88 of the SEF, the TRA found that:

- (i) “the low levels of imports demonstrate that the current measure is sufficient to offset the importation of the relevant subsidised goods into the UK”,<sup>6</sup> and that
- (ii) due to low levels of imports from Turkey, it was impossible “to conclude whether the measure is necessary to offset the subsidized import of rainbow trout from Turkey”.<sup>7</sup>

As a matter of fact, these statements seem to suggest that under Regulation 99A(1)(a)(ii) the TRA is required to consider whether the measure is sufficient or needed to block or limit the importation of the goods under investigation into the UK.

However, it is respectfully submitted that such an interpretation of Regulation 99A(1)(a)(ii) is manifestly flawed and contrary to the provisions of the SCM Agreement, to which – it is worth recalling – the UK is party.

The purpose of any countervailing measure, including the measure subject to this transition review, is not to eliminate imports nor to keep them at low levels. Rather, the purpose of a countervailing measure should be limited to restoring “fair competition” by applying a duty corresponding to the amount of the countervailable subsidy benefited by the relevant exporters (or to the lower amount needed to remove the injury caused by the subsidised imports where the so-called “lesser duty rule” is applied).

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<sup>4</sup> UK Statutory Instruments, Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 (as amended), 6 March 2019.

<sup>5</sup> UK Statutory Instruments, Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 (as amended), 6 March 2019.

<sup>6</sup> Statement of Essential Facts, para. 87.

<sup>7</sup> Statement of Essential Facts, para. 88.

Read this way, the necessity and sufficiency tests (i.e., whether “*the application of the countervailing amount is necessary or sufficient to offset [...] the importation of the relevant subsidised goods*”) must be understood as referring to the **level of the measure**, and not to **the volume of imports**.

Therefore, the low level of imports in the present case bears no relevance in the context of the “sufficiency” and “necessity” assessment, which should rather focus on whether the measure is still needed to offset the current level of subsidization in the exporting country, i.e., Turkey.

In this regard it is worth recalling that, according to Article 19.4 of SCM Agreement, “[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist”. Moreover, Article 21.1 of the WTO SCM Agreement permits a WTO Member to maintain a countervailing duty “only as long as and **to the extent necessary to counteract** subsidisation which is causing injury”.<sup>8</sup> (emphasis added) The wording of Article 21.1 of the SCM Agreement mirrors Article 11.1 of the WTO Anti-Dumping Agreement (“**AD Agreement**”) concerning the “general necessity requirement” for anti-dumping review investigations as clarified by the WTO case-law. In particular, in *US-Anti-Dumping Measures on Oil Country Tubular Goods* the Panel concluded that “Article 11.1 of the AD Agreement establishes an overarching principle for duration and review of anti-dumping duties in force. It provides that an anti-dumping duty shall remain in force only as long as and **to the extent necessary to counteract** dumping which is causing injury. This principle applies during the entire life of an anti-dumping duty”<sup>9</sup> (emphasis added). Given the identical wording of Article 21.1 of the SCM Agreement and Article 11.1 of the AD Agreement, the Panel’s conclusions must apply *mutatis mutandis* to countervailing duties as well.

In light of the foregoing, it should be concluded that under Regulation 99A(1)(a)(ii) the TRA is required to verify whether the countervailing amount is justified, i.e., is **needed to counteract the current level of subsidisation** (in case it has been established that the relevant subsidization is continuing) **or the likely future level of subsidization** (in case it has been established that the relevant subsidization is likely to recur) and not whether the measure was needed or sufficient to eliminate the imports of the product concerned.

**1.2.2 To carry out the “sufficiency” and “necessity” tests the TRA must necessarily determine the level of subsidization**

In light of the foregoing, in order to apply the sufficiency and/or necessity test, **the TRA must necessarily determine the level of subsidisation (i.e., the subsidy margin) for the relevant Turkish producers, including Selina Balık**. Otherwise, it would be just impossible to determine whether the variation of the current measure under Regulation 100A is justified. Any other conclusion would be clearly at odd not only with Articles 21.1 and 21.3 of the SCM Agreement

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<sup>8</sup> WTO SCM Agreement, Article 21.1.

<sup>9</sup> WTO Appellate Body Report, *US —Anti-Dumping Measures on Oil Country Tubular Goods*, para. 115.

but also with Regulation 100A(3)(b), which provides that, in the context of a transition review, “the TRA must not make a recommendation comprising or including a countervailing amount that exceeds the amount of subsidy” (emphasis added). As a matter of fact, the only notable exception to this rule – which, as better illustrated in Section 2.1 below, does not apply in the present case – concerns the exceptional situations where it is not materially possible for the TRA to recalculate the subsidy amount (see Regulation 100A(4)(b)).

It follows that the TRA should have calculated a subsidy margin for Selina Balik (and the other cooperating exporters) in the context of the present review. This conclusion is further supported by the wording of Regulation 99A(1)(a)(ii) which, as explained, requires the TRA to determine whether “the application of the countervailing amount is necessary or sufficient to offset [...] the importation of the relevant subsidised goods” (emphasis added). Pursuant to Regulation 2, “subsidised imports means goods that benefit from a countervailable subsidy that are imported into the United Kingdom” (emphasis added). However, a subsidy is not countervailable when the amount of subsidy is less than 1 per cent *ad valorem* (or 2 per cent where the exporting country or territory is a developing foreign country or territory). This is confirmed by, *inter alia*, Regulation 68 which requires the TRA to revoke any existing measure “where, at any stage during a review, it determines that [...] the amount of subsidy is minimal” and which should be applied in the present case by virtue of Regulation 99(2)(a)(iii).

Therefore, the TRA is required to calculate a subsidy margin for the relevant cooperating exporters in order to establish whether the goods are “subsidized” within the meaning of Regulation 99A(1)(a)(ii).

### *1.2.3 The TRA disposes of the information needed to calculate the countervailing amount*

As explained, in order to effectively apply the “sufficiency” and “necessity” tests, the TRA must necessarily determine the margin of subsidization for the cooperating Turkish exporters, including Selina Balik. The fact that the level of imports was low during the injury period and/or the investigation period bears no relevance in the context of this assessment.

First, the fact that Selina Balik did not export the product concerned to the UK during the period of investigation cannot prevent the TRA from determining an individual subsidy margin for Selina Balik based on the comprehensive information provided in Selina Balik’s questionnaire response. In fact, as the subsidy schemes offered to rainbow trout producers in Turkey are not contingent upon export performance and do not change based on the destination market, **the fact that the Turkish imports into the UK were low or zero in volume is just irrelevant for the subsidy margin calculation.**

Since the TRA has not argued in the course of the investigation that the information provided by Selina Balik (and/or the other cooperating exporting producers) could not be used for the purpose of the subsidy margin calculation, the TRA is respectfully requested to explain and substantiate why it was impossible to determine a subsidy margin for Selina Balik and/or the other cooperating exporting producers (in this regard, see also Section 2.1 below).

Second, the practice of the European Commission (the “**Commission**”) clearly demonstrates that it is possible to effectively assess the existence of continued subsidisation (or dumping) and/or the likelihood of recurrence of subsidisation (or dumping) also in the absence of export sales. To this end, the Commission normally examines whether the exports from the country concerned to third countries during the investigation period were subsidized or dumped.

For instance, in the expiry review of the anti-dumping measure on aluminium foils from, *inter alia*, Brazil, in the absence of imports into the Union during the investigation period the Commission analyzed Brazil’s exports to the US and concluded that was no likelihood of recurrence of dumping.<sup>10</sup> Similarly, in the expiry review of the anti-dumping measure on tube and pipe fittings from, *inter alia*, Malaysia, the Commission used Malaysian export data to the US for the calculation of dumping and for the assessment of continuation or recurrence of dumping, given that Malaysia did not export to the Union during the period of investigation. In its decision, the Commission indicated that, considering the similarities between markets of the product concerned in the US and in the Union, it was appropriate to use the exports sales into the US for a theoretical dumping level assessment.<sup>11</sup>

It follows that the TRA should be in the position to conduct a theoretical assessment regarding the level of subsidization in Turkey on the basis of the prices charged by Selina Balık (and/or the other cooperating exporters) when exporting to representative third countries, such as the European Union.

Third, it is worth noting that UK Steel, representing the UK domestic industry, expressed similar concerns regarding the Statement of Essential Facts in case *TD0003 - PSC Wire and Strands* case. With regards to the statement that “*due to insufficient levels of imports of the goods subject to the review, analysis as to whether the measures were necessary to offset dumping was not possible,*” UK Steel commented that “[i]nformation such as **export prices and volumes to third markets, prevalence of AD measures on the same product in other markets**, spare capacity in the domestic market, and the attractiveness of the UK market can all be used to conduct this likelihood analysis and allow the investigating authority to come to a conclusion, based on the best information available, as to whether the measures are still necessary to offset dumping”.<sup>12</sup> (emphasis added).

In light of the foregoing, it should be concluded that the SEF is manifestly ill-founded in so far as the TRA failed to determine the level of subsidization for Selina Balık and the other cooperating exporters.

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<sup>10</sup> Commission Implementing Regulation (EU) 2015/2384 of 17 December 2015 imposing a definitive anti-dumping duty on imports of certain aluminium foils originating in the People’s Republic of China and terminating the proceeding for imports of certain aluminium foils originating in Brazil following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009, OJ L 332, 18.12.2015, p. 63–90, recitals 36, 37, 47 and 48.

<sup>11</sup> Commission Implementing Regulation (EU) No 1283/2014 of 2 December 2014 imposing a definitive anti-dumping duty on imports of certain tube and pipe fittings, of iron or steel, originating in the Republic of Korea and Malaysia following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009, OJ L 347, 3.12.2014, p. 17–37, recitals 72-76.

<sup>12</sup> UK Steel response to TD0003 -PSC Wire and Strands Statement of Essential Facts, para.9. page 1.



#### 1.2.4 Conclusion

Based on the above, it is respectfully submitted that the TRA failed to properly carry out the necessity and sufficiency tests under Regulation 99A(1)(a)(ii). In particular, the TRA failed to substantively determine whether the measure is necessary to offset the alleged subsidisation since it did not establish a subsidy margin for Selina Balık and the other cooperating exporters.

Moreover, the TRA did not provide any meaningful reason explaining why the low level of imports allegedly made it impossible to conduct a calculation of the current level of subsidisation of the product concerned. The TRA had ample opportunity to make such analysis based on the reliable data submitted by the cooperating companies, *inter alia*, Selina Balık (in this regard, please see Section 2.1 below).

In any event, Selina Balık is of the opinion that the historically low level of imports demonstrates that the measure is manifestly not needed to offset the importation of the goods subject to review, given that imports from Turkey have always been negligible (in this regard, see Section 1.3.2 below). It follows that the conclusions of the TRA at paragraphs 87-88 of the SEF are unsubstantiated and lack an adequate statement of reasons.

### **1.3 The injury test under Regulation 99A(1)(b)<sup>13</sup> is not met as the TRA's analysis is not supported by positive evidence**

Regulation 99A(1)(b) provides that “*in a transition review, the TRA must consider whether injury to the UK industry in the product concerned would occur if the countervailing amount were no longer applied to those goods.*”

In this regard, the TRA concluded, in essence, that “*Turkish imports have the potential to undercut the UK industry and build market share. While we cannot be wholly sure at whose expense that market share would be gained, it is likely that at least some would be at the expense of UK producers, either directly or because UK processors lose market share to imported processed products and provide less of a market for UK producers.*”<sup>14</sup>

However, Selina Balk submits that the TRA's conclusions are flawed and not supported by adequate evidence, for the reasons illustrated below.

#### 1.3.1 *The level of subsidisation is low*

In its SEF, the TRA concluded that “*Turkey is likely to continue to provide subsidies to Turkish rainbow trout producers*”,<sup>15</sup> but did not analyse the evolution of the level of subsidization during the injury period.

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<sup>13</sup> UK Statutory Instruments, Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 (as amended), 6 March 2019.

<sup>14</sup> Statement of Essential Facts, para. 206.

<sup>15</sup> Statement of Essential Facts, para. 162.

If the TRA had carried out such an assessment, it would have found that (i) the relevant legislative framework has substantially changed compared to the investigation period (calendar year 2013) taken into account when the measure was first adopted by the European Commission,<sup>16</sup> (ii) these legislative changes have determined a dramatic decrease of the overall level of subsidization, and (iii) such decrease in the level of subsidization is of lasting nature.

The above concerns in particular the direct subsidy scheme, which accounts for the largest share of the support granted to Turkish farmers of trout.

In 2013 the direct subsidy was set as follows: up to the production of 250 tonnes, 0,65 TL/kg; between 250 tonnes and 500 tonnes, the subsidy was set at 0,325 TL/kg and no subsidy was granted for the production above 500 tonnes.<sup>17</sup> These amounts were increased to, respectively, 0,75 TL/kg and 0,375 TL/Kg as from the year 2017.

Since 2016,<sup>18</sup> if the same natural person and legal entities have more than one fish farming establishment located within the same potential area (in the sea, in the same dam lake or dam lakes within the same region defined by the Ministry), these fish farming establishments are considered as a single fish farming establishment for the purpose of the direct subsidy scheme.

Since 2019,<sup>19</sup> the direct subsidy of 0,75 TL/kg is paid for a maximum of 350 tonnes of production, while no subsidy is granted for the production above 350 tonnes.

The combined effects of the legislative reforms of 2016 and 2019 has determined a significant decrease in the overall support as well as the average support per kilo of trout farmed in Turkey compared to the original investigation period (i.e., calendar year 2013). Such reduction in the level of subsidization is clearly of lasting nature, as it reflects the manifest intention of the Turkish Government of phasing-out the subsidy programmes for trout producers.

Importantly, the significant reduction in the level of subsidization was expressly acknowledged by the European Commission in the recent expiry review of the measure imposed by Implementing Regulation (EU) 2015/309 (case number R720), which concerned the same investigation period of this review (i.e., calendar year 2019). In particular, according to final regulation adopted by the Commission, the direct and indirect subsidy amount benefited from the two sampled exporting producers during the year 2019, expressed *ad valorem*, was 2,38% for Özpekler and 2,84% for GMS, while the aggregated amount of countervailable subsidies, expressed *ad valorem*, was 3,2% for Özpekler and 4,2% for GMS.<sup>20</sup> A simple comparison with

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<sup>16</sup> Commission Implementing Regulation (EU) 2015/309 of 26 February 2015 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain rainbow trout originating in Turkey, OJ L 56, 27.2.2015, p. 12–29.

<sup>17</sup> Decree of the Council of Ministers No. 2013/4463 on Agricultural Subsidies to be Granted in 2013, dated 07 March 2013 published in the Turkish Official Gazette 28612 of 8 April 2013 (applying retroactively as of 1 January 2013).

<sup>18</sup> Presidential Decree No. 2016/8791, published in the Turkish Official Gazette 29703 of 5 May 2016.

<sup>19</sup> Presidential Decree No. 2019/1691, published in the Turkish Official Gazette 30928 of 24 October 2019.

<sup>20</sup> Commission Implementing Regulation (EU) 2021/823 of 20 May 2021 imposing a definitive countervailing duty on imports of certain rainbow trout originating in Turkey following an expiry review pursuant to Article 18 of Regulation (EU) 2016/1037 of the European Parliament and of the Council, OJ L 183, 25.5.2021, p. 5–34.



the subsidy amounts established during the original investigation shows that, in the investigation period the level of subsidization has more than halved compared to 2013.

The above shows that the level of subsidisation in Turkey is low. Therefore, TRA's finding that *"[i]t is likely that Turkish exporters would see the UK market as profitable due to the cost advantage they have as a result of subsidies. The UK industry cannot compete with the cost advantage of subsidised imports and would not be able to increase efficiency in the face of strong competition from new market entrants"*<sup>21</sup> appears highly questionable. As a matter of fact, the advantage enjoyed by the Turkish producers because of the subsidy schemes is negligible, and their potential to export to new markets such as the UK by applying aggressive pricing strategy - also taking in consideration the market power of the UK supermarkets and the high transportation costs - is clearly limited.

For this reason, the TRA's intended recommendation to maintain a countervailing duty up to 9.5% *ad valorem* is manifestly disproportionate and unjustified in light of the actual level of subsidization in Turkey.

### *1.3.2 The UK is definitively not an attractive market for Turkish exporters*

According to the TRA, *"Turkish exporters have explicitly stated that they wish to import to the UK. These exporters have the spare capacity to expand without having to do so at the expense of other export markets, and could make use of, or make amendments to, existing distribution channels without significant cost. Cost and price analysis indicate that the Turkish exporters would be able to compete on the UK market. Analysis of historic imports indicates that Turkey is able to export to the UK across multiple goods variants including fresh, frozen, and smoked. Considering these factors, we consider it likely that were the measure no longer applied there would be imports of the relevant subsidised goods"*.<sup>22</sup>

Selina Balık respectfully submits that the above conclusions are blatantly flawed and not supported by adequate evidence.

First, it should be noted that the negligible level of imports (whose market share was ranging between 4% and 8% during the injury period)<sup>23</sup> clearly demonstrates that, in general, the UK market is not attractive for producers of rainbow trout established in third countries. This conclusion not only is supported by the positive evidence in the file, but it is also confirmed by simple considerations such as (i) the presence of a strong domestic industry, especially in Scotland, and (ii) the high transportation costs caused by the insularity of the UK.

The conclusion regarding the lack of attractiveness of the UK market also applies, *a fortiori*, to the Turkish producers. In this regard, suffices it to note that during the injury period (i.e., from 2016 to 2019) Turkish imports of rainbow trout into the UK were close to zero. As a matter of fact, the imports of Turkish trout into the UK have been close to zero in the last twenty years,

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<sup>21</sup> Statement of Essential Facts, para. 160.

<sup>22</sup> Statement of Essential Facts, paras. 163-164.

<sup>23</sup> Statement of Essential Facts, Figure 2 on page 18.

i.e., before and after the adoption of the countervailing measure under review (which occurred in February 2015), as illustrated in the chart below.

Table-1: Rainbow trout imports (tonnes) from Turkey into the UK between 2000-2019

YEAR	IMPORTED QUANTITY IN TONNES (UK)
2000	0
2001	0
2002	0
2003	0
2004	0
2005	0
2006	0
2007	0
2008	1
2009	0
2010	0
2011	0
2012	7
2013	0
2014	12
2015	8
2016	3
2017	0
2018	41
2019	0

Source: Eurostat

Contrary to what was argued by the TRA, **the above figures indisputably demonstrate that, should the measure be revoked, the volume of imports from Turkey would likely remain very limited, not to say negligible.**

Second, a simple comparison of annual import volumes of rainbow trout from Turkey to the UK and to other neighbour markets such as the EU Member States clearly demonstrates that even when the UK was part of the EU (and therefore the same measures applied in both the EU and the UK), the Turkish producers exported to the EU Member States and not to the UK.

Table-2: Annual import volumes (tonnes) of rainbow trout from Turkey to the UK and to EU Member States

YEAR	EXPORTS TO THE UK (TONS)	EXPORT TO THE EU-27 (TONS)
2010	0	895
2011	0	591
2012	7	13,799
2013	0	17,395

<b>2014</b>	12	16,295
<b>2015</b>	8	13,620
<b>2016</b>	3	15,445
<b>2017</b>	0	16,119
<b>2018</b>	41	13,140
<b>2019</b>	0	13,124

Source: Eurostat

This should be considered “positive evidence” within the meaning of Article 15.1 of the SCM Agreement that the UK market is not attractive for Turkish exporters of the goods subject to review since there are other markets, such as the EU Member States, which are by far more attractive for Turkey due to a number of reasons including the size of the market, the geographical proximity and the lower transportation cost. These factors were completely overlooked by the TRA. In particular, the TRA seems to have completely ignored that the high transportation costs to ship the goods to the UK constitutes a significant barrier for the Turkish exporting producers.

Third, the above conclusions are not called into question by the statements of Özpekler – quoted in the SEF – declaring that “*if there is an opportunity, Özpekler Group will export to UK in the future*”.<sup>24</sup> Apart from the fact that this is an obvious statement that any business would make (all businesses would like to sell their products in as many markets as possible), it is perhaps useful to recall that a simple statement cannot be taken as “positive evidence” as required by Article 15.1 of the WTO SCM Agreement. It follows that any conclusion reached by the TRA on the basis of, *inter alia*, Özpekler’s statement is clearly and manifestly flawed.

### 1.3.3 The undercutting/underselling analysis is inaccurate and unreliable

Additionally, Selina Balık respectfully submits that the TRA’s undercutting/underselling analysis is inaccurate and unreliable.<sup>25</sup> In particular, Selina Balık wonders why the TRA relied upon Eurostat statistics – whose reliability is questionable - in order to calculate the average selling price of trout in the UK and in Turkey, rather than using the more detailed and accurate information provided by Selina Balık as well as the other cooperating exporters in their questionnaire replies, which was verified by the TRA itself in the course of the investigation.

In particular, the TRA could have easily calculated the average selling price charged by the cooperating Turkish producers when selling to the EU as a reliable benchmark to determine the likely selling price for future UK sales. Moreover, the cooperating UK producers could (and should) have provided the information necessary to calculate the non-injurious price in the UK.

<sup>24</sup> Statement of Essential facts, para. 155.

<sup>25</sup> Statement of Essential Facts, para. 218 and Figure 6 on page 44.

Selina Balık respectfully asks the TRA to explain why this was not done and, instead, generic Eurostat statistics were used for the purpose of the undercutting/underselling analysis, which thus appears completely unreliable and not representative of the actual market conditions.

The above is even more true considering that the use of Eurostat data likely prevented the TRA from taking into due account the price difference arising from the different presentations of rainbow trout (i.e., fresh, frozen, fillets, etc.). It follows that the TRA's undercutting/underselling analysis is highly deficient, inaccurate, and unreliable. This affects, in turn, the TRA's conclusions regarding the likelihood of injury.

#### *1.3.4 The TRA failed to carry out a proper non-attribution analysis*

By virtue of Article 15.5 of the SCM Agreement, the TRA “**shall [...] examine any known factors other than the subsidized imports** which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.”<sup>26</sup>

Bearing the above in mind, Selina Balık respectfully submits that the TRA failed to carry out a proper non-attribution analysis. In this regard, the TRA's attention is brought to the following.

As mentioned above, the UK industry holds a uniquely high market share (92% in the investigation period) in the UK rainbow trout market. Such undisputed circumstance, together with other factors analysed in the SEF such as (i) the consumer preferences, (ii) the downwards pressure on prices by the UK supermarkets, (iii) the increase (92% over the injury period) of imports from countries other than Turkey, points to the conclusion that the alleged vulnerable situation of the UK industry was not caused by imports from Turkey, which are clearly absent.

In the same vein, the possible future injury suffered by the UK industry by virtue of the factors outlined above should not be attributed to imports of rainbow trout from Turkey. In other words, it seems extremely unlikely that the revocation of the measure may impact the UK industry more than these factors. In particular, it would be unreasonable to argue that imports from Turkey (should the measure be revoked) may increase of such an extent to harm the UK industry more than imports from other countries such as France or Denmark which (i) have an higher market share, (ii) significantly increased during the injury period,<sup>27</sup> (iii) are better placed to export to the UK in light of their geographical position, quality of their products and the

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<sup>26</sup> WTO SCM Agreement, Article 15.5.

<sup>27</sup> Statement of Essential Facts, Table 1 on page 21.

existing sales channels, and (iv) are characterised by average selling prices which are lower than the average selling price in the UK.<sup>28</sup>

In light of the foregoing, Selina Balık claims that the TRA's non attribution analysis is ill-founded and inaccurate.

### *1.3.5 Conclusion*

As extensively discussed, the level of subsidisation in Turkey has decreased over the years and is currently more than halved compared to the levels of the original investigation. Imports of rainbow trout from Turkey during the injury period were extremely low, and virtually absent during the investigation period. The UK industry holds a market share of 92%, while the available data show that the UK is not an attractive market for Turkey.

As a matter of fact, Turkey has historically exported negligible volumes to the UK, also before the imposition of the measures by the EU. This is due, notably, to the high transportation costs which were not taken into account by the TRA. Moreover, there are other countries, such as France and Denmark, that are better placed to export to the UK due to the higher quality of their products, their historical presence in the UK market and their geographical proximity.

Therefore, Selina Balık finds it difficult to understand how the TRA overconfidently concluded that the revocation of the measure would likely cause injury to the UK industry. On the contrary, all the available evidence, and namely the complete absence of imports during the investigation period and before shows that there is no material injury nor likelihood of recurrence of injury caused by imports from Turkey. As a matter of fact, the low level of imports clearly shows that the measure is not needed to offset the importation of goods since the imports are zero.

## **1.4 Conclusion**

In light of the foregoing, Selina Balık respectfully requests the TRA to recommend the revocation of the measures pursuant to Regulation 100B.

## **2. THE TRA SHOULD HAVE CALCULATED AN INDIVIDUAL COUNTERVAILING DUTY FOR SELINA BALIK**

Selina Balık reiterates that the measure should be revoked since the essential prerequisites to impose a countervailing duty are not met in the present case, as explained in detail in the previous section. However, should the TRA conclude that the measure must be varied pursuant to Regulation 100A, Selina Balık respectfully requests the calculation of an individual countervailing duty in accordance with Regulation 100A(3)(b).

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<sup>28</sup>

Statement of Essential Facts, Figure 6 on page 44.

## **2.1 The TRA holds sufficient information to calculate Selina Balık's subsidy margin**

At the outset it should be recalled that, as detailed in the previous section, the TRA should carry out a subsidy margin calculation in order to properly ascertain whether the goods are “subsidised” and whether a countervailing duty is *sufficient* or *necessary* to offset the impact of such subsidies. Even if the TRA has established that certain subsidy schemes offered to rainbow trout producers in Turkey continue to exist, this does not rule out the need for a proper subsidy calculation. This is because, for instance, the average subsidy margin for Turkey or the individual subsidy margin calculated for each cooperating exporter producer could be below or equal to a *de minimis* level, which would automatically require the revocation of the measure pursuant to Regulation 68 and Regulation 99(2)(a)(iii).

As a matter of fact, it should be pointed out that the calculation of an individual countervailing duty for Selina Balık is mandatory under Regulation 100A(3)(b), which provides that, in the context of a transition review, *“the TRA must not make a recommendation comprising or including a countervailing amount that exceeds the amount of subsidy”*.

The only notable exception to this rule, according to Regulation 100A(4)(b), concerns the situations where it is not materially possible for the TRA to recalculate the subsidy amount. However, this exception is clearly not applicable in the present case, since the TRA holds all the necessary information to calculate the subsidy margin for Selina Balık.

First, as already explained, the fact that Selina Balık did not export the product concerned into the UK during the period of investigation bears no relevance, since the subsidy schemes available to Turkish rainbow trout producers are not contingent upon export performance and the level of support does not change based on the destination market. As a matter of fact, the subsidy schemes at stake are all linked to the production, and not the sales of the goods under review. Therefore, the TRA would be able to accurately calculate a subsidy margin for Selina Balık irrespective of whether the product concerned was exported to the UK.

Second, the fact that Selina Balık is not a farmer of trout and therefore is not a direct recipient of certain schemes (in particular, the direct subsidy scheme) does not prevent the TRA from calculating a subsidy margin for Selina Balık. As a matter of fact, the TRA may use the information provided by the Turkish Government on the average subsidy per kg of trout farmed in Turkey during the investigation period for that purpose. For the sake of completeness, it should be pointed out that an identical calculation was carried out by the European Commission in the framework of the original investigation (Case AS606).<sup>29</sup> In particular, in EU Regulation 1195/2014, the Commission explained that *“[t]he total benefit per company was the average direct subsidy amount received during the investigation period for the own farmed live fish and the average subsidy amount granted by the GOT, calculated on the basis of the total*

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More information on Case AS606 - Trout (certain rainbow) is available on the European Commission's Trade Defence Webpage: [https://trade.ec.europa.eu/tdi/case\\_details.cfm?id=2025](https://trade.ec.europa.eu/tdi/case_details.cfm?id=2025)



*subsidies conferred and divided by the total amount of trout production in Turkey for the purchased live fish*".<sup>30</sup> Therefore, the total benefit for the company Ternaeben – which was an exporter, but not a farmer of trout – was determined on the basis of the average subsidy amount per kg of trout produced granted in the investigation period by the Government of Turkey. Needless to say, nothing prevents the TRA to follow the same methodology in the present investigation.

Third, the possibility to calculate Selina Balık's individual subsidy margin (and therefore to adopt an individual countervailing duty) is not called into question by the fact that Selina Balık's related suppliers of live fish (namely *Ayhan Alp and Selina Fish*) did not take part in the investigation by replying to the exporter questionnaire. As a matter of fact, at the beginning of the investigation Selina Balık's related suppliers have offered to cooperate with the TRID in this transition review. However, the cooperation of these two related suppliers was deemed unnecessary by the TRID.<sup>31</sup> Therefore, Selina Balık respectfully assumes that the TRA has received and holds all the data necessary to calculate an individual subsidy margin for Selina Balık as part of Selina Balık's questionnaire response. Any other conclusion would amount to a blatant infringement of the basic procedural rights of Selina Balık.

Fourth, in the course of the investigation Selina Balık has deployed its best efforts to ensure full cooperation with the TRID and the TRA. Selina Balık submitted a response to the exporter questionnaire, even though it did not export rainbow trout into the UK during the period of investigation.<sup>32</sup> Selina Balık then replied to a deficiency notice published by the TRID<sup>33</sup> within the given time-limits.<sup>34</sup> Afterwards, the TRID sent a number of additional requests for information<sup>35</sup> and in parallel, it conducted remote meetings to verify the information provided by Selina Balık.<sup>36</sup> The outcome of the verification was successful, as witnessed by the Verification Report published by the TRA.<sup>37</sup> At no point of the investigation Selina Balık was warned by the investigating authority that the information it provided was not sufficient to calculate Selina Balık's individual subsidy margin.

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<sup>30</sup> Commission Implementing Regulation (EU) No 1195/2014 of 29 October 2014 imposing a provisional countervailing duty on imports of certain rainbow trout originating in Turkey OJ L 319, 6.11.2014, p. 1–35, see recital 63.

<sup>31</sup> See **[CONFIDENTIAL – Sensitive data relating to the correspondence between the TRA and Selina Balık are not susceptible for summary]**.

<sup>32</sup> Questionnaire Reply, submitted on 22 June 2020 via TRS portal, available here:

**[CONFIDENTIAL – Sensitive data relating to Selina Balık's sales, accounting and business data. Please refer to the non-confidential version of Selina Balık's questionnaire response for inspection]**

<sup>33</sup> Deficiency Notice - Selina Balık, published on 17 July 2020 via TRS portal. **[CONFIDENTIAL – Sensitive data relating to Selina Balık not published in the Open File is not susceptible for summary]**

<sup>34</sup> Reply to Deficiency Notice of 17 July 2020, submitted on 24 July 2020 via TRS portal. **[CONFIDENTIAL – Sensitive data relating to Selina Balık's sales, accounting and business data. Please refer to the non-confidential version of Selina Balık's deficiency response for inspection]**

<sup>35</sup> Selina Balık - Information Request **[CONFIDENTIAL – Sensitive data relating to Selina Balık not published in the Open File is not susceptible for summary]**.

<sup>36</sup> See Verification Report published on 11 May 2021 via TRS portal. **[CONFIDENTIAL – Sensitive data relating to Selina Balık's sales, accounting and business data. Please refer to the non-confidential version of Selina Balık's verification report for inspection]**

<sup>37</sup> Verification Report Selina Balık final Non-Confidential, published by the TRA via TRS Portal on 2 June 2021. **[CONFIDENTIAL – Sensitive data relating to Selina Balık's sales, accounting and business data. Please refer to the non-confidential version of Selina Balık's verification report for inspection]**

In light of the foregoing, Selina Balık fails to understand how the TRA can argue at a very late stage of the investigation – after having had all the opportunities to send additional requests for information to Selina Balık – that it does not have enough information to recalculate the countervailing amount in the present case. Since the TRA was satisfied with Selina Balık's questionnaire reply and has never argued that the information provided by Selina Balık could not be used for the purpose of the subsidy margin calculation, the TRA is respectfully requested to determine a subsidy margin for Selina Balık. In order to facilitate the task of the TRA, Selina Balık is pleased to attach hereto a calculation of its own individual subsidy margin, based on the information provided during the investigation (see **Annex 1 [CONFIDENTIAL – Certain parts contain sensitive data relating to Selina Balık's production and subsidies and thus are redacted]**). As the TRA will appreciate, the attached calculation clearly shows that all the data needed to calculate Selina Balık's countervailing amount are in the file.

In light of the above, Selina Balık is confident that the TRA will reconsider its decision not to calculate a countervailing amount for the Turkish exporters which cooperated in this review. As rightly argued by the other cooperating exporting producer, Özpekler, *"this approach of the investigating authority of the UK makes cooperation futile and rewards non-cooperation"*.<sup>38</sup>

As a matter of fact, the TRA's refusal to recalculate Selina Balık's countervailing amount would amount not only to an infringement of the substantive provisions of the UK TRR 2019 (see section 1 above) but also a blatant violation of Selina Balık's right of defence and of the procedural rules set out in the UK TRR 2019 and in the SCM Agreement.

## **2.2 Conclusion**

In light of the above, Selina Balık respectfully submits that the TRA's conclusion that *"it has not been possible to recalculate the countervailing amount due to insufficient data"*<sup>39</sup> is manifestly ill-founded. Should the TRA decide to recommend the variation of the currently applicable measure pursuant to Regulation 100A, the countervailing measure should be recalculated for Selina Balık, given that the recalculation is the "preferred method" of the TRA.<sup>40</sup>

## **3. CONCLUSION**

In light of the foregoing, Selina Balık respectfully submits that the TRA should modify its preliminary conclusions and:

- recommend the revocation of the measures pursuant to Regulation 100B or, in the alternative;

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<sup>38</sup> Comments of Özpekler İnşaat Taahhüt Dayanıklı Tüketim Malları Su Ürünleri Sanayi ve Ticaret Ltd. Şti. regarding the Statement of Essential Facts on Transition Review of Countervailing Measures on Certain Rainbow Trout Originating in Turkey "Case TS0002", 13 July 2021, para. 49.

<sup>39</sup> Statement of Essential Facts, para. 289.

<sup>40</sup> Statement of Essential Facts, para. 88.

- recalculate the countervailing amount for Selina Balik pursuant to Regulation 100A(3).