Commission Implementing Regulation (EU) 2019/1329 of 6 August 2019 invalidating invoices issued by Zhejiang Sunflower Light Energy Science & Technology Ltd in breach of the undertaking repealed by Implementing Regulation (EU) 2017/1570

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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)], and in particular Articles 8 and 14 thereof,

Having regard to Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union[(2)], and in particular Articles 13 and 24 thereof,

Having regard to Council Implementing Regulation (EU) No 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China[(3)], and in particular Article 3 thereof,

Having regard to Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China[(4)], and in particular Article 2 thereof,

Having regard to Commission Implementing Regulation (EU) 2017/366 of 1 March 2017 imposing definitive countervailing duties on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China following an expiry review pursuant to Article 18(2) of Regulation (EU) 2016/1037 of the European Parliament and of the Council and terminating the partial interim review investigation pursuant to Article 19(3) of Regulation (EU) 2016/1037[(5)],

Having regard to Commission Implementing Regulation (EU) 2017/367 of 1 March 2017 imposing a definitive anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from 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 and terminating the partial interim review investigation pursuant to Article 11(3) of Regulation (EU) 2016/1036[(6)],

Having regard to Commission Implementing Regulation (EU) 2017/1570 of 15 September 2017 amending Implementing Regulation (EU) 2017/366 and Implementing Regulation (EU) 2017/367 imposing definitive countervailing and anti-dumping duties on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China and repealing Implementing Decision 2013/707/EU confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures[7],

Whereas:

A. UNDERTAKING AND OTHER MEASURES

(1) By Implementing Regulation (EU) No 1238/2013, the Council imposed a definitive anti-dumping duty on imports into the Union of modules and cells ('the product concerned') originating in or consigned from the People's Republic of China (the 'PRC'). By Implementing Regulation (EU) No 1239/2013, the Council also imposed a definitive countervailing duty on imports into the Union of the product concerned.

(2) The China Chamber of Commerce for Import and Export of Machinery and Electronic Products ('the CCCME') submitted, on behalf of a group of exporting producers, a price undertaking to the Commission. By Decision 2013/423/EU[8], the Commission accepted that price undertaking with regard to the provisional anti-dumping duty. Following the notification of an amended version of the price undertaking by a group of exporting producers together with the CCCME, the Commission confirmed by Implementing Decision 2013/707/EU of 4 December 2013[9] the acceptance of the price undertaking as amended for the period of application of anti-dumping and countervailing definitive measures ('the undertaking'). The undertaking was accepted, inter alia, for Zhejiang Sunflower Light Energy Science & Technology Ltd covered by the TARIC additional code B914 ('Zhejiang Sunflower').

(3) The Commission also adopted a Decision clarifying the implementation of the undertaking[10] and 15 regulations withdrawing the acceptance of the undertaking for several exporting producers[11].

(4) By Implementing Regulations (EU) 2016/185[12] and (EU) 2016/184[13], the Commission extended the definitive anti-dumping and countervailing duties on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the PRC to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan with the exception of a number of genuine producers.

(5) By Implementing Regulation (EU) 2017/367 (the 'expiry review anti-dumping Regulation'), the Commission extended the definitive anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the PRC following an expiry review and terminating

the partial interim review investigation pursuant to respectively, Article 11(2) and Article 11(3) of Regulation (EU) 2016/1036 (the 'basic anti-dumping Regulation').

(6) By Implementing Regulation (EU) 2017/366 (the 'expiry review anti-subsidy Regulation'), the Commission extended a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the PRC following an expiry review and terminating the partial interim review investigation pursuant to respectively, Article 18(2) and Article 19(3) of Regulation (EU) 2016/1037 (the 'basic anti-subsidy Regulation').

(7) By Implementing Regulation (EU) 2017/1570 (the 'repeal Regulation'), the Commission repealed the undertaking.

(8) By Notices 2018/C 310/06[(14)] and 2018/C 310/07[(15)], the Commission gave notice that the anti-dumping duty and the anti-subsidy duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the PRC would expire on 3 September 2018.

B. TERMS OF THE UNDERTAKING

(9) Under the terms of the undertaking, the exporting producers agreed, inter alia, not to sell the product concerned to the first independent customer in the Union below a certain minimum import price ('the MIP'). The MIP was subject to a quarterly adjustment mechanism by reference to international spot prices of modules as reported by the Bloomberg database.

(10) The exporting producers also agreed to sell the product concerned only by means of direct sales. For the purpose of the undertaking, a direct sale was defined as a sale either to the first independent customer in the Union or via a related party in the Union listed in the undertaking. Indirect sales to the Union by companies other than those listed in the undertaking constituted a breach of the undertaking.

(11) The undertaking also clarified, in a non-exhaustive list, what constituted a breach of the undertaking. That list included, in particular, making compensatory arrangements with customers and taking part in a trading system leading to a risk of circumvention. The sale of solar panels for the construction of solar parks by companies related to the exporting producer also constituted a breach of the undertaking.

(12) By letter of 30 September 2014, the Commission services explicitly clarified to CCCME that, under the terms of the undertaking, sales for the construction of solar parks by related parties constituted a breach to the undertaking. After the entry into force of the undertaking the Commission services noted a substantial increase in the exports as captive sales to build solar parks, which constituted a change in the pattern of trade. Hence, the undertaking could no longer be effectively monitored. The Commission services requested the CCCME to disseminate this information to all Chinese exporting producers participating in the undertaking. Furthermore, this information was repeatedly disseminated by the Commission services during seminars held in the PRC. During these seminars the Commission services provided the exporting

producers extensive information and explanations concerning the implementation of the undertaking, inter alia, information contained in the letter above mentioned.

(13) The undertaking reporting obligations stipulated that each exporter submitted to the Commission, inter alia, quarterly reports of its direct sales to independent customers in the Union, of its sales to related parties in the Union and of the sales of its related parties to the first independent customer in the Union. This implied that the data submitted in these quarterly reports must be complete and correct and that the reported transactions fully complied with the terms of the undertaking. Reporting of re-sales in the Union was a particular obligation when the product concerned was sold to the first independent customer through a related importer. Only these reports enabled the Commission to monitor whether the re-sale price of the related importer to the first independent customer was in accordance with the MIP.

(14) According to the undertaking, each exporting producer would also be liable for the breach of any of its related parties, whether or not listed in the undertaking.

(15) Similarly, the exporting producers undertook to consult the Commission regarding any difficulties or questions, technical or otherwise, which may arise during the implementation of the undertaking. No such request has been received by the Commission services from Zhejiang Sunflower.

C. REPEAL OF THE UNDERTAKING

(16) The undertaking was initially accepted from more than 120 companies/company groups. In the meantime, the Commission withdrew its acceptance of the undertaking for 19 companies. 17 of these were found to have breached the undertaking while the remaining two companies had business models that made it impracticable to monitor their compliance with the undertaking. In addition, 16 other Chinese companies voluntarily withdrew from the undertaking.

(17) By the repeal Regulation, the Commission repealed the undertaking and introduced a variable duty in the form of a minimum import price ('the variable duty MIP'). The variable duty MIP had the effect that eligible imports with a declared value at, or above, the MIP would not be subject to duties. In addition, the customs authorities would levy duties immediately if the product is imported at a price below the MIP. The repeal Regulation applies to all imports that are customs cleared after its date of entry into force.

(18) At the time of entry into force of the repeal Regulation on 1 October 2017, the Commission continued to conduct investigations concerning the compliance with the undertaking, and considered appropriate to open new investigations for goods that were released for free circulation while the undertaking was still in force. For those investigations, a customs debt would be incurred at the time of acceptance of the declaration for release into free circulation: (a) whenever it is established, in respect of imports invoiced by companies subject to the undertaking, that one or more of the conditions of the undertaking was not fulfilled; or (b) when the Commission finds that

the undertaking was breached, in a regulation or decision which refers to particular transactions and declares the relevant undertaking invoices as invalid.

(19) By Implementing Regulation (EU) 2018/1551[16], the Commission invalidated invoices issued by two exporting producers in breach of the undertaking while it was still in force.

D. MONITORING OF THE EXPORTING PRODUCERS

(20) On the basis of Articles 8(9) and 14(7) of the basic anti-dumping Regulation and Articles 13(9) and 24(7) of the basic anti-subsidy Regulation, the customs authorities of one Member State submitted to the Commission evidence regarding noncompliance of Zhejiang Sunflower with the undertaking.

(21) The findings listed in recitals 22 to 27 below address the allegations received from the customs authorities of the Member State referred to in recital 20 for Zhejiang Sunflower regarding alleged breaches of the undertaking while it was still in force.

E. GROUNDS FOR THE INVALIDATION OF UNDERTAKING INVOICES

(22) The evidence received from customs authorities of the Member State mentioned in recital 20 indicates that Zhejiang Sunflower and its related importer sold solar panels in the Union systematically below the MIP, thus breaching the provisions of the undertaking as described in recital 9 above.

(23) Based on the evidence received from customs authorities of the Member State mentioned in recital 20, Zhejiang Sunflower set up a trading system (e.g. kickback payments, fraudulent undervaluation of services in particular related to solar parks) with its related importer in the Union to sell solar panels below the MIP since the entry into force of the undertaking.

(24) Zhejiang Sunflower sold solar panels to its related importer in the Union, which further sold them to independent customers. Based on the evidence received from customs authorities, those independent customers had received kickback payments via a Hong Kong-based company related to Zhejiang Sunflower. Thus, the final sales prices of the solar panels stated on the Resale Invoice were in reality lowered to levels in breach of the applicable MIPs.

(25) The related importer also sold solar panels for the construction of solar parks by final unrelated customers. The related importer negotiated with these final customers the price for the full package consisting of solar panels, inverters and engineering, procurement and construction services. On the invoice, the price of the solar panels was increased to respect the applicable MIP whereas the price of the engineering, procurement and construction services was decreased accordingly to compensate for the artificial increase in the solar panels' price. Thus, the final sales prices of the solar panels stated on the Resale Invoice were in reality lowered to levels in breach of the applicable MIPs.

(26) One final customer that had bought solar panels for the construction of solar park projects was found to be, in reality, related to Zhejiang Sunflower, as it belonged to