Commission Implementing Regulation (EU) 2018/1551 of 16 October 2018 invalidating invoices issued by two exporting producers in breach of the undertaking repealed by Implementing Regulation (EU) 2017/1570

COMMISSION IMPLEMENTING REGULATION (EU) 2018/1551

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invalidating invoices issued by two exporting producers in breach of the undertaking repealed by Implementing Regulation (EU) 2017/1570

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union ('the Treaty'),

Having regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union[(1)] ('the basic anti-dumping Regulation'), and in particular Article 8 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)] ('the basic anti-subsidy Regulation'), and in particular Article 13 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 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[(4)] ('the expiry review anti-dumping Regulation'),

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[(5)], 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[6] ('the expiry review anti-subsidy Regulation'),

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] ('the repeal Regulation'),

Having regard to Notices 2018/C 310/06 and 2018/C 310/07[8] ('the expiry Notices'),

Informing the Member States,

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 originating in or consigned from the People's Republic of China ('the PRC') ('the product concerned'). 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[9], 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[10] 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 for the following exporting producers, *inter alia*:

(a) Jiangsu Sinski PV, Co. Ltd covered by the TARIC additional code: B838 ('Sinski PV');

(b) Zheijang Koly Energy Co. Ltd covered by the TARIC additional code: B908 ('Koly Energy').

(3) The Commission also adopted a Decision clarifying the implementation of the undertaking[11] and 15 regulations withdrawing the acceptance of the undertaking for several exporting producers[12].

(4) By Implementing Regulations (EU) 2016/185[13] and 2016/184[14], 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 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 the basic anti-dumping Regulation.

(6) By 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 the basic anti- subsidy Regulation (the expiry review anti-dumping Regulation and the expiry review anti-subsidy Regulation are hereinafter collectively referred as 'the expiry review Regulations').

(7) By the repeal Regulation the Commission repealed the undertaking.

(8) By the expiry Notices 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 expired 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 including Chinese prices 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, issuing undertaking invoices for solar panels produced by a non-undertaking company in order to benefit from the exemption of anti-dumping and countervailing duties ('the company channelling').

(12) The undertaking also obliged the exporting producers to provide the Commission on a quarterly basis with detailed information on all their export sales to

and re-sales in the Union ('the quarterly reports'). 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.

(13) The exporting producers were liable for the breach of any of their related parties, whether or not listed in the undertaking.

(14) The exporting producers also undertook to consult the Commission regarding any difficulties or questions, technical or otherwise, which might arise during the implementation of the undertaking.

C. REPEAL OF THE UNDERTAKING

(15) 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. Seventeen 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.

(16) By the repeal Regulation, the Commission repealed the undertaking and introduced a variable duty under the form of a minimum import price ('the variable duty MIP') that replaced the undertaking. The variable duty MIP means that eligible imports with a declared value at, or above, the MIP would not be subject to duties and customs authorities will levy duties immediately if the product is imported at a price below the MIP.

(17) Given that the variable duty MIP replaced the undertaking, the Commission found it appropriate, as per the findings listed in recitals (50) to (53) of the repeal Regulation, that the variable duty MIP would only apply to those companies that had not breached the undertaking in the past, irrespective of whether such a breach had already been found to have occurred, or whether such a breach would be found to have occurred in future investigations by the Commission. Accordingly, for all exporting producers which breached the undertaking while it was still in place the uncapped *ad valorem* duties should apply.

(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 place. For those investigations, a customs debt will 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.

D. MONITORING OF THE EXPORTING PRODUCERS

(19) The Commission received evidence from customs authorities of two Member States 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 regarding compliance of Sinski PV and Koly Energy with the undertaking. The Commission also assessed publicly available information regarding the corporate structure of Koly Energy.

(20) The findings listed in recitals (21) to (24) below address the allegations received from the customs authorities for Sinski PV and Koly Energy regarding an alleged breach of the undertaking while it was still in force.

E. GROUNDS TO INVALIDATE UNDERTAKING INVOICES

(a) Sinski PV

(21) The evidence received from customs authorities suggests that Sinski PV sold solar panels to at least one customer in the Union systematically below the MIP, thus breaching the provisions of the undertaking as described in recital (9) above.

(22) Further evidence also shows that Sinski PV engaged with three other companies to issue undertaking invoices for solar products manufactured by non-undertaking companies as per purchase orders placed by a customer of Sinski PV in the Union. This practice (company channelling) constitutes a breach specifically listed in the undertaking as described in recital (11) above.

(b) Koly Energy

(23) Based on the evidence received from customs authorities and corroborated by publicly available sources, Koly Energy sold solar panels to an allegedly unrelated importer in the Union for which it issued undertaking invoices. The transactions to this importer amounted in value to more than 50 % of Koly Energy's total sales to the Union. Based on the information available to the Commission, the importer involved in these transactions was related to Koly Energy in the sense of Article 127(1) of Commission Implementing Regulation (EU) 2015/2447[(15)] ('Union Customs Code Implementing Act'). Koly Energy has never reported a related importer in the Union. As this importer is not listed as a related party in the undertaking, Koly Energy breached the terms of the undertaking as described in recital (10) above.

(24) Related importers have reporting obligations similar to their Chinese mother companies in order to enable the Commission to assess whether the net sales price to the first unrelated customer in the Union is at, or above, the MIP. None of the re-sales by the related importer was reported to the Commission. Consequently, Koly Energy also breached the terms of the undertaking as described in recitals (12) and (13) above.

F. RELEVANT UNDERTAKING INVOICES