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

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II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2020/1216

of 24 August 2020

**invalidating invoices issued by Zhejiang Trunsun Solar Co Ltd. in breach of the undertaking repealed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,

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⁾,

⁽¹⁾ OJ L 176, 30.6.2016, p. 21 as amended by Regulation (EU) 2017/2321 of the European Parliament and of the Council (OJ L 338, 19.12.2017, p. 1) and Regulation (EU) 2018/825 of the European Parliament and of the Council (OJ L 143, 7.6.2018, p. 1).

⁽²⁾ OJ L 176, 30.6.2016, p. 55.

⁽³⁾ OJ L 325, 5.12.2013, p. 1.

⁽⁴⁾ OJ L 325, 5.12.2013, p. 66.

⁽⁵⁾ OJ L 56, 3.3.2017, p. 1.

⁽⁶⁾ OJ L 56, 3.3.2017, p. 131.

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 ⁽⁹⁾ the acceptance of the price undertaking as amended for the period of application of anti-dumping and countervailing definitive measures ('the undertaking'). The Commission accepted the undertaking, inter alia, for the exporting producer Zhejiang Trunsun Solar Co. Ltd, covered by the TARIC additional code B917 ('Trunsun Solar').
- (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 exporting 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 terminated 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').

⁽⁷⁾ OJ L 238, 16.9.2017, p. 22.

⁽⁸⁾ OJ L 209, 3.8.2013, p. 26.

⁽⁹⁾ OJ L 325, 5.12.2013, p. 214.

⁽¹⁰⁾ OJ L 270, 11.9.2014, p. 6.

⁽¹¹⁾ Commission Implementing Regulations (EU) 2015/866 (OJ L 139, 5.6.2015, p. 30), (EU) 2015/1403 (OJ L 218, 19.8.2015, p. 1), (EU) 2015/2018 (OJ L 295, 12.11.2015, p. 23), (EU) 2016/115 (OJ L 23, 29.1.2016, p. 47), (EU) 2016/1045 (OJ L 170, 29.6.2016, p. 5), (EU) 2016/1382 (OJ L 222, 17.8.2016, p. 10), (EU) 2016/1402 (OJ L 228, 23.8.2016, p. 16), (EU) 2016/1998 (OJ L 308, 16.11.2016, p. 8), (EU) 2016/2146 (OJ L 333, 8.12.2016, p. 4), (EU) 2017/454 (OJ L 71, 16.3.2017, p. 5), (EU) 2017/941 (OJ L 142, 2.6.2017, p. 43), (EU) 2017/1408 (OJ L 201, 2.8.2017, p. 3), (EU) 2017/1497 (OJ L 218, 24.8.2017, p. 10), (EU) 2017/1524 (OJ L 230, 6.9.2017, p. 11), (EU) 2017/1589 (OJ L 241, 20.9.2017, p. 21) withdrawing the acceptance of the undertaking for several exporting producers.

⁽¹²⁾ OJ L 37, 12.2.2016, p. 76.

⁽¹³⁾ OJ L 37, 12.2.2016, p. 56.

- (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 terminated 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 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 as reported by the Bloomberg database.
- (10) The undertaking also clarified, in a non-exhaustive list, what constituted a breach of the undertaking. That list included, in particular, the issuance of a commercial invoice by the exporting producer for which the underlying financial transaction was not in conformity with the face value of the invoice. Furthermore, issuing a commercial invoice for which the net sales price was not in conformity with the MIP also constituted a breach.
- (11) Under the terms of the undertaking, each exporting producer undertook not to issue a commercial invoice for any sales transaction of the product concerned that was not in conformity with any of the obligations stipulated in the undertaking. Therefore, the exporting producer could issue solely invoices corresponding to the requirements laid down in Annex III and Annex 2 to the expiry review anti-dumping and anti-subsidy Regulations respectively ('undertaking invoice') and sell the product under the undertaking terms while in force. In other words, exporters could not issue an 'ordinary' commercial invoice pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively while the undertaking was in force. The date to determine these requirements was the date of the issuance of the invoice.
- (12) The undertaking reporting obligations also stipulated that each exporting producer 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 ('resales'). 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.
- (13) Similarly, the exporting producers 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

- (14) 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.

⁽¹⁴⁾ OJ C 310, 3.9.2018, p. 4.

⁽¹⁵⁾ OJ C 310, 3.9.2018, p. 5.

- (15) 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 variable duty MIP would not be subject to duties. In addition, the customs authorities would levy duties immediately if the product was imported at a price below the variable duty MIP. In order to benefit from the variable duty MIP, a commercial invoice pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively had to be presented at the time the goods entered into free circulation in the Union.
- (16) At the time of entry into force of the repeal Regulation on 1 October 2017 and in accordance with its recitals 54 and 57, 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.
- (17) The repeal Regulation entered into force on 1 October 2017, and hence is applicable *ratione temporis* only to imports that took place on or after that date. Invoices issued prior to 1 October 2017 are also to be invalidated. This applies irrespectively of when those invoices were presented to customs authorities, and includes cases where they were relied upon as commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively for imports on or after 1 October 2017.
- (18) By Implementing Regulation (EU) 2018/1551 ⁽¹⁶⁾, Implementing Regulation (EU) 2019/1329 ⁽¹⁷⁾ and Implementing Regulation (EU) 2020/444 ⁽¹⁸⁾, the Commission invalidated invoices issued by four exporting producers in breach of the undertaking while it was still in force.

D. MONITORING OF THE EXPORTING PRODUCERS

- (19) Based on Articles 8(7) and 14(7) of the basic anti-dumping Regulation and Articles 13(9) and 24(7) of the basic anti-subsidy Regulation, the Slovenian finance authorities submitted to the Commission evidence regarding Trunsun Solar's non-compliance with the undertaking. This evidence concerns transactions represented by commercial invoices issued by Trunsun Solar prior to 1 October 2017 to an importer. For each transaction, Trunsun Solar issued both an undertaking invoice and a commercial invoice pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively. Both the undertaking invoice and the commercial invoice pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively concern the same shipment, have the same invoice number, the same invoice date, the same invoice quantity and the same invoice price. Both invoices together were used by the importer on or after 1 October 2017 in order to benefit from the variable duty MIP. The Commission further analysed information submitted to it by Trunsun Solar under its reporting obligations, and compared in particular the prices shown on the invoices transmitted by the finance authorities and the prices reported for the same invoice numbers by Trunsun Solar.
- (20) The findings described in recitals 21 to 24 address the breaches uncovered for Trunsun Solar following receipt of evidence from the Slovenian finance authorities.

E. GROUNDS FOR THE INVALIDATION OF UNDERTAKING INVOICES

- (21) The information received from the Slovenian finance authorities compared with the information submitted by Trunsun Solar to the Commission in its quarterly reports gives the following picture. Trunsun Solar issued undertaking invoices and commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively for solar panels prior to 1 October 2017 at a price below the MIP, in breach of the provisions of the undertaking as described in recital 9. Those are the invoices transmitted by the Slovenian finance authorities. At the same time, Trunsun Solar reported those invoices as undertaking invoices to the Commission, but stating a higher price than that shown on the invoices presented to the Slovenian finance authorities, so that the Commission would be under the impression that the applicable MIP had been complied with.

⁽¹⁶⁾ OJ L 260, 17.10.2018, p. 8.

⁽¹⁷⁾ OJ L 207, 7.8.2019, p. 12.

⁽¹⁸⁾ OJ L 92, 26.3.2020, p. 10.

- (22) Based on the evidence received from the Slovenian finance authorities, it appears that an importer custom-cleared solar panels bought from Trunsun Solar after the repeal Regulation entered into force. The invoices presented at the customs clearance by that importer bear the same date and reference number as appear in the table of undertaking invoices reported by Trunsun Solar to the Commission. They did not comply with the content requirements for undertaking invoices set out in Annex III and Annex 2 to the expiry review anti-dumping and anti-subsidy Regulations respectively. Indeed, those invoices did not include the mandatory elements of an undertaking invoice listed under points 1 and 9 of Annex III and Annex 2 to the expiry review anti-dumping and anti-subsidy Regulations respectively (namely those invoices neither had a required heading nor the name of the company official and the required signed declaration). Moreover, those invoices were issued at a lower value than the value reported to the Commission.
- (23) Trunsun Solar issued those invoices while the undertaking was still in force. Furthermore, Trunsun Solar reported those invoices to the Commission as undertaking invoices. Based on the same invoices, the CCCME issued the related undertaking certificates. Later on, following the repeal of the undertaking, the unrelated importer used the invoices to clear through customs the solar panels for which an undertaking certificate had been issued.
- (24) As long as the undertaking was in force and the annual quota had not been reached, Trunsun Solar was prohibited from issuing commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively. By nevertheless issuing such invoices in parallel to the undertaking invoices and for the same transactions, Trunsun Solar breached that prohibition.
- (25) Consequently, Trunsun Solar breached its undertaking obligations, first, by issuing undertaking invoices for which the underlying financial transactions were not in conformity with the MIP (see recital 21); second by issuing undertaking invoices that did not comply with the content requirements stipulated in the Annex III and Annex 2 to the expiry review anti-dumping and anti-subsidy Regulations respectively, third, by reporting a sales price in conformity with the MIP applicable at the date of the invoice when in reality the sales price on the ordinary commercial invoice was lower than the one reported to the Commission (recital 21), and fourth by issuing in parallel commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively.

F. RELEVANT UNDERTAKING INVOICES

- (26) The sales transactions made by Trunsun Solar in breach of the undertaking (recitals 21 to 23) were linked to the following undertaking invoices:

Reference of undertaking invoice accompanying goods subject to an undertaking	Date of issuance
TS-1708013-7	30.8.2017
TS-1708015-1	6.9.2017
TS-1708013-6	30.8.2017
TS-1708015-4	13.9.2017
TS-1708013-5	30.8.2017
TS-1708013-1	23.8.2017
TS-1708013-2	23.8.2017
TS-1708015-3	13.9.2017
TS-1708013-3	23.8.2017
TS-1708013-4	30.8.2017
TS-1708015-2	6.9.2017
TS-1708013-8	6.9.2017

G. WRITTEN SUBMISSIONS AND HEARINGS

- (27) Interested parties were informed of the findings, in particular the intention to invalidate the undertaking invoices. Interested parties were granted the opportunity to be heard and to comment pursuant to Article 8(9) of the basic anti-dumping Regulation and Article 13(9) of the basic anti-subsidy Regulation.
- (28) CCCME and Trunsun Solar made written submissions on 29 May and 1 June 2020 respectively. Trunsun Solar requested a hearing and was heard on 9 June 2020. Following the hearing Trunsun Solar made an additional submission on 12 June 2020. The Commission considered the comments submitted and addressed them below.
- (29) Both the CCCME and Trunsun Solar claimed that the sales transactions listed in recital 26 were governed by the repeal Regulation and not by the undertaking since, according to them, it was the date the solar panels were released for free circulation into the EU, in other words custom-cleared, that determined the legal framework applicable to the sales transactions. In support of their claim they referred to an email from the Commission services to the CCCME dated 28 September 2017 by which the Commission services answered that, in accordance with Article 172(2) of the Union Customs Code, the date of acceptance of the customs declaration determined the applicable MIP. Furthermore, the CCCME reinforced this claim by reference to Article 10(1) and Article 5 of the basic anti-dumping Regulation and Article 16(1) and Article 10 of the basic anti-subsidy Regulation that set the time of entry into free circulation of goods as the time limit for the applicability of the measure.
- (30) The Commission notes that the sales transactions listed in recital 26 were concluded between Trunsun Solar and the importer between 23 August and 13 September 2017, i.e. long before the Commission's email was sent. In addition, at that point in time, the only legal framework applicable was the undertaking. The repeal Regulation was adopted on 15 September 2017, published on 16 September 2017 and entered into force on 1 October 2017.
- (31) Furthermore, the Commission clarified in a letter to the CCCME dated 20 September 2017 that the duties and the variable duty MIP would apply automatically on goods declared for entry into free circulation into the EU as from 1 October 2017, even if the goods were accompanied by an undertaking invoice and an undertaking certificate issued prior to that date. Furthermore, the Commission clarified that the CCCME and the exporting producers were released from their reporting obligations according to Clause 5 of the undertaking as from that date, namely 1 October 2017. Therefore, even though the solar panels at issue were released for free circulation when the repeal Regulation was in force, Trunsun Solar could not possibly issue the corresponding invoices and conclude the sales transactions under another legal framework than the one applicable at that time, i.e. the undertaking. Therefore, this claim is rejected.
- (32) CCCME and Trunsun Solar further claimed that, since the date of release for free circulation determines the applicable legal framework, Trunsun Solar did not breach any undertaking obligations because the undertaking was no longer in force at the time of release into free circulation of the solar panels at issue. More specifically, according to Trunsun Solar the undertaking reporting obligations and compliance with the MIP were no longer applicable to these imports. Consequently, according to Trunsun Solar, the Commission cannot invalidate the undertaking invoices since the undertaking provisions and the legal consequences resulting from the breach thereof did not govern the imports at issue.
- (33) As explained in recital 31, Trunsun Solar was bound by the undertaking when the sales transactions were concluded and the undertaking invoices issued. The undertaking was in force until 1 October 2017. By the letter of 20 September 2017, the Commission explained that the CCCME and the exporting producers would be released from the undertaking obligations as from 1 October 2017 and requested that the sales until 30 September 2017 be reported to the Commission. The mere fact that the solar panels at issue were released for free circulation into the EU under the repeal Regulation did not entail that Trunsun Solar need not comply with the undertaking while this was still in force. These claims were thus rejected.
- (34) Moreover, CCCME and Trunsun Solar claimed that the Commission does not have the legal power to investigate any undertaking breaches for solar panels released for free circulation as from 1 October 2017. According to Trunsun Solar, under recitals 54 and 57 of the repeal Regulation the Commission can conduct investigations concerning the compliance with the price undertaking and may open new investigations only for goods that were released for free circulation while the price undertaking was still in place.

- (35) As mentioned in recital 33, the Commission notes that the fact that the solar panels at issue were released for free circulation into the EU under the repeal Regulation did not entail that Trunsun Solar need not comply with the undertaking while this was still in force. Furthermore, for the solar panels the sales transactions at issue were concluded with the importer and the undertaking invoices and corresponding undertaking certificates were issued during the undertaking. This claim is thus rejected.
- (36) Trunsun Solar explained in its submission the factual background for the transactions listed in recital 26: it issued the 12 undertaking invoices selling solar panels to an importer at the price level of the MIP applicable at the date of the undertaking invoices. Trunsun Solar issued the 12 undertaking invoices between 23 August and 13 September 2017 and obtained the corresponding undertaking certificates from the CCCME. Following publication of the repeal Regulation on 16 September 2017, the importer and Trunsun Solar re-negotiated downwards the selling price of these sales transactions at the level of the variable duty MIP about to be introduced by the repeal Regulation. As a consequence, Trunsun Solar and the importer signed a supplementary agreement on 20 September 2017 and Trunsun Solar re-issued 12 new commercial invoices in accordance with the stipulations of Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively ('variable duty MIP invoices'). Those invoices were back-dated to the same date as the undertaking invoices. Trunsun Solar claimed to have issued the 12 variable duty MIP invoices with the same date and reference number as the undertaking invoices to ensure consistency with other transaction documents and to replace the undertaking invoices and that, to its knowledge, the latter were not presented upon customs clearance by the importer. Furthermore, Trunsun Solar claimed that it issued the variable duty MIP invoices to conform with the repeal Regulation. It claimed that, should the importer submit only the undertaking invoices for customs clearance, the conditions for the application of the variable duty MIP would not have been fulfilled as those invoices did not comply with the requirements set in the Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively.
- (37) First, the Commission notes that Trunsun Solar could only issue undertaking invoices while the undertaking was in force. It was prohibited from issuing commercial invoices in accordance with the stipulations of Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively. It was precisely in that spirit that the Commission clarified on 20 September 2017 that imports of solar panels accompanied by an undertaking invoice and certificate and customs-cleared as from 1 October would be subject to and compliant with the repeal Regulation. Second, while Trunsun Solar claimed to have re-issued the variable duty MIP invoices after 20 September 2017 the Commission notes that the large majority of the solar panels in question had already been shipped to the EU before that date and therefore could have only been shipped with the corresponding undertaking invoice. Third, by re-issuing the variable duty MIP invoices at a lower price and value, to its commercial detriment, to replace the undertaking invoices for solar panels that had already been shipped to the importer, Trunsun Solar put into question the spirit and effectiveness of the undertaking. Fourth, Trunsun Solar re-issued the invoices because it anticipated that the solar panels in question would be released for free circulation under the repeal Regulation. No other commercial justification as regards the solar panels in question triggered the decrease in price. Finally, Trunsun Solar did not report to the Commission the sales in question at their real value, but at the value and price of the undertaking invoice even though the reporting was done long after the lower-value variable duty MIP invoices were issued. In light of the above, the Commission considers that the sales listed in recital 26 were concluded under the undertaking and that should have been accompanied by the corresponding undertaking invoice and certificate, and that the price had to comply with the undertaking price.
- (38) The Commission also notes that for each of the sales transactions listed in recital 26 two sets of invoices were presented upon customs clearance by the importer: one invoice in accordance with the stipulations laid in the Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively and another invoice that the Commission regarded as an undertaking invoice. The two invoices had the same specifications (date, reference number, customer, quantity and value) but different format and payment terms. The Commission also notes that the payment terms in the variable-duty MIP invoices allegedly issued by Trunsun Solar after the supplementary agreement of 20 September 2017 (see recital 37) are inconsistent with the payment terms agreed in the latter. This raises questions as to the reliability and accuracy of the variable-duty MIP invoices.
- (39) Trunsun Solar claimed that the Commission's proposal to invalidate the undertaking invoices and the variable duty MIP invoices violate the principle of legitimate expectations as Trunsun Solar expected that the variable duty MIP would apply to its imports into the EU on or after 1 October 2017. Furthermore, according to Trunsun Solar the Commission did not establish that Trunsun Solar failed to comply with any requirement of the repeal Regulation.

- (40) As mentioned in recital 31, Trunsun Solar was bound by the undertaking when the sales transactions at issue were concluded with the importer. The repeal Regulation was neither published nor into force when the sales transactions and the corresponding commercial invoices were concluded. This is why Trunsun Solar requested and obtained the corresponding undertaking certificates and reported these sales to the Commission as undertaking sales. The Commission established that by not observing the undertaking requirements in force Trunsun Solar should not have benefitted from the variable duty MIP introduced by the repeal Regulation. The claims are therefore rejected. The Commission further notes that the variable duty MIP invoices were issued prior to the email of the Commission services of 28 September 2017. As a result, that email could not possibly have created legitimate expectations at a date prior to its sending. In any event, the content of that email does not provide any indication that compliance with the undertaking could possibly cease prior to 1 October 2017.
- (41) Trunsun Solar claimed that the Commission's present proposal is disproportionate given that the solar panels were released for free circulation in the EU in full respect of the variable duty MIP and thus they caused no injurious effect to the Union industry. Consequently, Trunsun Solar should not be subject to the same punitive measures as other undertaking companies that committed deliberate breaches of the undertaking.
- (42) The Commission examines whether a company respects' the undertaking in light of the terms of the undertaking.. The terms of the undertaking were accepted by the exporting producer. In return, it is entitled to the form of trade defence measures that is most favourable to it, because it enables it, provided it complies with the undertaking, to avoid paying duties. ⁽¹⁹⁾ Therefore, applying the normal form of duties in a situation where the exporting producer breached the undertaking is not disproportionate, but simply the application of the normal rules, because a breach of the undertaking does not justify the most favourable treatment. The only argument invoked by Trunsun Solar to justify why invalidation would be disproportionate is because it alleges that it complied, in substance, with the variable duty MIP when importing the goods. This argument already fails for the simple reason that the question of actual dumping of a concrete export transaction is relevant only for a possible refund pursuant to Article 11(8) of the basic anti-dumping Regulation. ⁽²⁰⁾ If indeed, as a result of the respect of the MIP, the dumping margin of the concrete export has been reduced or even annihilated, the importer can ask for a refund. In addition, the Commission notes that when the breach occurred, there was no guarantee that customs clearance would indeed take place after 30 September 2017. In this case, the Commission takes the view that Trunsun Solar breached its undertaking obligations as detailed in recital 25. Thus the claim that the Commission's proposal is disproportionate is rejected.
- (43) Both the CCCME and Trunsun Solar submitted that the Commission cannot invalidate undertaking invoices since the enabling provisions of Article 3(2)(b) of Implementing Regulation (EU) No 1238/2013, Article 2(2)(b) of Implementing Regulation (EU) 2017/367, Article 2(2)(b) of Implementing Regulation (EU) No 1239/2013 and Article 2(2)(b) of Implementing Regulation (EU) 2017/366 expired and were revoked by Implementing Regulation (EU) 2017/1570, meaning that there is no legal provision permitting today the invalidation of undertaking invoices. Furthermore, Trunsun Solar submitted that the Commission lacks the legal basis to invalidate the variable duty MIP invoices as Article 2(2)(b) of the expiry review anti-dumping Regulation and Article 2(2)(b) of the expiry review anti-subsidy Regulation, only refer to the power of the Commission to invalidate undertaking invoice issued in breach of undertaking.
- (44) Trunsun Solar further claimed that the Commission cannot order an alleged retroactive collection of duties on past imports already released to free circulation. According to Trunsun Solar, retroactive collection of anti-dumping and countervailing duties without having registered and re-imposed a provisional duty on those imports beforehand would be a violation of Article 8(1), (9) and (10) and Article 10(5) of the basic anti-dumping Regulation and of Article 13(1), (9) and (10) and Article 16(5) of the basic anti-subsidy Regulation.

⁽¹⁹⁾ Judgment in *Neotype v Commission*, C-305/86 and C-160/87, EU:C:1990:295, para. 60; and in *International Potash v Council*, T-87/98, EU:T:2000:221, para. 41 and case-law quoted.

⁽²⁰⁾ Judgment in *International Potash v Council*, T-87/98, EU:T:2000:221, para. 35: 'It must be emphasised that the basic regulation does not permit any factors other than those in respect of which findings are made during the period of investigation, such as, for example, the "actual" dumping margin for future export transactions, to be taken into account for the purposes of fixing the dumping margin. A Council regulation imposing anti-dumping duties must be based on facts established following a procedure in which interested parties make known their views (see Case 240/84 *NTN Toyo v Council* [1987] ECR 1809, paragraph 26). Thus, under the basic regulation, the concept of an "actual" dumping margin is relevant only in the context of procedures for the review of existing duties or the refund of duty collected, which are referred to in paragraphs (3) and (8) respectively of Article 11 of the regulation'.

- (45) As regards the claim of alleged retroactivity of the imposition of measures the Commission noted that, according to Article 8(10) of the basic anti-dumping Regulation and Article 13(10) of the basic anti-subsidy Regulation, a provisional duty may only be imposed where the investigation that led to the undertaking has not been completed. These provisions however do not apply to the current case.
- (46) This case concerns ending the temporary non-payment of anti-dumping and countervailing duties because the conditions for the continuation of that non-payment were no longer fulfilled.
- (47) The Commission recalls that, pursuant to its Decision 2013/423/EU, breaches of the undertaking can refer to particular transactions ⁽²¹⁾. The Commission identified transactions in breach of the undertaking as materialised by the corresponding invalidated invoices. This allows the customs authorities of the Member States to collect the full customs debt. This is without prejudice of the possibility for customs authorities to collect those duties independently from the formal finding of a breach of the undertaking by the Commission, based on the general rules of Implementing Regulation (EU) No 1238/2013 and Implementing Regulation (EU) No 1239/2013.
- (48) Through the invalidation regulations, the Commission notifies the customs authorities of the Member States that the temporary non-collection of the applicable anti-dumping and countervailing duties is lifted, and that the individual duties have to be collected for the imports concerned. In those circumstances, the definitive duties imposed by Article 9(4) of the basic anti-dumping Regulation and 14(4) of the basic anti-subsidy Regulation apply.
- (49) The collection of duties that should have been due all along is not a violation of the principle of non-retroactivity, or, for that matter, a violation of the principle of legitimate expectations: Trunsun Solar was subject to the terms of the undertaking, and, in return, benefitted from the temporary non-collection of the anti-dumping and countervailing duties. Since it did not respect those terms, it cannot claim to have acquired legitimate expectations. The claim of alleged retroactivity was thus rejected.
- (50) Lastly, the Commission addressed the claim according to which Article 3(2)(b) of Implementing Regulation (EU) No 1238/2013, Article 2(2)(b) of Implementing Regulation (EU) 2017/367, Article 2(2)(b) of Implementing Regulation (EU) No 1239/2013 and Article 2(2)(b) of Implementing Regulation (EU) 2017/366 expired and were revoked by Implementing Regulation (EU) 2017/1570.
- (51) The Commission explained that the breach of the undertaking occurred during the period of application of the undertaking.
- (52) As mentioned in recital 16 above, recital 54 of Implementing Regulation (EU) 2017/1570 states: 'The Commission continues to conduct investigations concerning the compliance with the price undertaking and may open new investigations for goods that were released for free circulation while the price undertaking was still in place. For those investigations, Articles 2 and 3 of Implementing Regulations (EU) 2017/366 and (EU) 2017/367 remain the applicable law. In particular, 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. The Commission further considered that an exporting producer which is found to have breached the undertaking should not benefit from the variable duty MIP, even if these findings are made after the termination of the price undertaking. In those kind of cases, the variable duty MIP should no longer be applicable. The Commission should then remove the names of the respective company(ies) from the new Annex VI and the new Annex 5 by the same legal act in which the non-compliance is established.'
- (53) In that regard, the Commission observed that it has the right to invalidate undertaking invoices from Article 14 of the basic anti-dumping Regulation and Article 24 of the basic anti-subsidy Regulation. Furthermore, the Commission implementing regulation that invalidates invoices only states the legal consequence of the breach of the undertaking, which follows directly from Article 8 of the basic anti-dumping Regulation and Article 13 of the basic anti-subsidy Regulation. Those powers are stated again in Article 2 of Implementing Regulation (EU) 2017/366, Article 2 of Implementing Regulation (EU) 2017/367, as well as Article 3 of Implementing Regulation (EU) No 1238/2013 and Article 2 of Implementing Regulation (EU) No 1239/2013.

⁽²¹⁾ Commission Decision 2013/423/EU of 2 August 2013 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China, recitals 14 and 15.

- (54) Since the breaches of the undertaking by Trunsun Solar occurred prior to the entry into force of the repeal Regulation, the Commission is entitled to invalidate the undertaking invoices pursuant to Article 3 of Implementing Regulation (EU) No 1238/2013, Article 2 of Implementing Regulation (EU) 2017/367, Article 2 of Implementing Regulation (EU) No 1239/2013, and Article 2 of Implementing Regulation (EU) 2017/366. The fact that the Commission was unaware of that breach until after those provisions were repealed by the repeal Regulation does not undermine the need for the effective application of those rules and the requirement to invalidate the invoices as of the point in time at which the breach occurred. This claim was, therefore, rejected.
- (55) Following the hearing on 9 June 2020, Trunsun Solar reiterated the arguments addressed above. In addition, it submitted that it disagreed with the Commission's view that it was not allowed to conclude sales transactions under the repeal Regulation while the undertaking was still in force. Trunsun Solar claimed that the Commission's view was not compatible with the legal requirements of the repeal Regulation as the variable duty MIP was meant to increase the legal certainty of the economic operators by setting the appropriate MIP at a non-injurious level. Furthermore, Trunsun Solar claimed that the two-week transition period before the variable duty MIP taking effect was meant to allow business operators to adapt to the substantially changed market circumstances, both in terms of procedural requirements of future imports and of the requisite price level to be complied with. Trunsun Solar further argued that without the two-week transition period the exporters could not have sold at the variable duty MIP on 1 October 2017 (i.e. date of entry into force of the repeal Regulation) but only six weeks later due to ocean shipment time between the Chinese port and the Union border.
- (56) In reply to those comments, the Commission notes that, as mentioned in recitals 37 above, Trunsun Solar was bound by the undertaking until 30 September 2017. Under the terms of the undertaking Trunsun Solar could not issue commercial invoices. The Commission also notes that the repeal Regulation was not in force and not even published at the time when the sales transactions were first concluded. Moreover, as stated in recital 37 the Commission clarified in a letter to the CCCME that exports with an undertaking invoice would be accepted and customs-cleared under the repeal Regulation as from 1 October 2017. While indeed the two-week transition period was provided so that the economic operators could adapt to the new regime, the commercial terms for the solar panels at issue were concluded before the publication of the repeal Regulation and revised while these solar panels had already been shipped. The Commission also notes that no procedural and price level requirements would have been breached had the imports been customs-cleared with an undertaking invoice after the entry into force of the repeal Regulation. These claims are thus rejected.

H. BREACH OF THE UNDERTAKING AND IMPOSITION OF DEFINITIVE DUTIES

- (57) In accordance with Articles 8(7) and 8(9) of the basic anti-dumping Regulation, Articles 13(7) and 13(9) of the basic anti-subsidy Regulation and in accordance with the terms of the undertaking, the Commission concluded that Trunsun Solar breached the undertaking while it was still in force.
- (58) Therefore, in accordance with Article 3(2)(b) of Implementing Regulation (EU) No 1238/2013, Article 2(2)(b) of Implementing Regulation (EU) 2017/367, Article 2(2)(b) of Implementing Regulation (EU) No 1239/2013 and Article 2(2)(b) of Implementing Regulation (EU) 2017/366 in force at the time of issuance of the undertaking invoices, Trunsun Solar's invoices listed in recital 25 should be declared invalid. This applies both to undertaking invoices and commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively.
- (59) It falls to the national customs authorities to assess whether the applicable limitation periods have expired in accordance with Article 103 of Regulation (EU) No 952/2013 of the European Parliament and of the Council ⁽²²⁾. Those rules being substantive rules, their application *ratione temporis* depends on the date of entry into free circulation of the goods ⁽²³⁾.
- (60) In the present case, Slovenian customs authorities relied upon the undertaking invoices and commercial invoices pursuant to Annex V and annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively to customs-clear goods on or after 1 October 2017. The customs authorities granted the variable duty MIP, and did not levy duties, having considered that the undertaking invoices and the commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively that are invalidated by this Regulation can be qualified as commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively.

⁽²²⁾ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).

⁽²³⁾ Judgment of 23 February 2006, *Molenbergnatie NV*, C-201/04, ECLI: EU:C:2006:136, paragraph 41.

- (61) The Commission considers that the reliance on the undertaking invoices and commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively for that purpose is excluded, for three separate reasons. First, the exporting producer, Trunsun Solar, did not have the right to issue commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively as long as the undertaking was in force and the annual quota was not exhausted. Second, the undertaking invoices and commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively were a breach of the undertaking, as found in this Regulation, and therefore cannot be validly relied upon in any event. Third, as set out in recital 54 of the repeal Regulation, 'The Commission further considered that an exporting producer which is found to have breached the undertaking should not benefit from the variable duty MIP, even if these findings are made after the termination of the price undertaking. In those kind of cases, the variable duty MIP should no longer be applicable. The Commission should then remove the names of the respective company (ies) from the new Annex VI and the new Annex 5 by the same legal act in which the non-compliance is established.' The Commission also observes that in any event, the undertaking invoices did not comply with the requirements of Annex III and Annex 2 to the expiry review anti-dumping and anti-subsidy Regulations respectively' (see above recital 22).
- (62) Consequently, the Commission considers that Trunsun Solar is to be deemed removed from the new Annex VI and the new Annex 5 to the expiry review anti-dumping and anti-subsidy Regulations as modified by the repeal Regulation. The imports subject to the undertaking invoices listed in recital 25 should not have benefitted from the variable duty MIP introduced by the repeal Regulation but should have rather paid the applicable anti-dumping and countervailing duty. The situation is different for other importers that bought solar panels from Trunsun Solar with valid commercial invoices pursuant to Annex V and Annex 4 to the expiry review anti-dumping and anti-subsidy Regulations respectively issued after the entry into force of the repeal Regulation. Those importers had legitimate expectations to benefit from the variable duty MIP as they were unaware and should not have been aware of the breach established hereby. Therefore, those importers continued to benefit from the variable duty MIP. This is without prejudice of further investigations into this matter, which may reveal that also for other importers, legitimate expectations did not prevail, because they were able to or should have been aware of a breach of the undertaking by Trunsun Solar,

HAS ADOPTED THIS REGULATION:

Article 1

1. The undertaking invoices listed in the Annex are declared invalid.
2. Those undertaking invoices shall not be accepted by customs authorities as commercial invoices pursuant to Annex V to Implementing Regulation (EU) 2017/367 and Annex 4 to Implementing Regulation (EU) 2017/366.

Article 2

1. Zhejiang Trunsun Solar Co. Ltd shall be removed as of 1 October 2017 from the new Annex VI to Implementing Regulation (EU) 2017/367 and from the new Annex 5 to Implementing Regulation (EU) 2017/366, as amended by Implementing Regulation (EU) 2017/1570.
2. The anti-dumping and countervailing duties due at the time of acceptance of the customs declaration for release into free circulation under Article 3(2)(b) of Implementing Regulation (EU) No 1238/2013, Article 2(2)(b) of Implementing Regulation (EU) 2017/367, Article 2(2)(b) of Implementing Regulation (EU) No 1239/2013, and Article 2(2)(b) of Implementing Regulation (EU) 2017/366 shall be collected for the imports customs-cleared with the invoices invalidated under Article 1, except where the applicable limitation periods have expired pursuant to the rules contained in Article 103 of Regulation (EU) No 952/2013.
3. All other imports from 1 October 2017 from Zhejiang Trunsun Solar Co. Ltd accompanied by a valid commercial invoice issued on or after 1 October 2017 pursuant to Annex V to Implementing Regulation (EU) 2017/367 and Annex 4 to Implementing Regulation (EU) 2017/366 shall remain unaffected.

Article 3

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*. It shall apply to the transactions carried out using the undertaking invoices referred to in Article 1.

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

Done at Brussels, 24 August 2020.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX

List of undertaking invoices issued by Zhejiang Trunsun Solar Co Ltd. which are declared invalid:

Reference of undertaking invoice accompanying goods subject to an undertaking	Date of issuance
TS-1708013-7	30.8.2017
TS-1708015-1	6.9.2017
TS-1708013-6	30.8.2017
TS-1708015-4	13.9.2017
TS-1708013-5	30.8.2017
TS-1708013-1	23.8.2017
TS-1708013-2	23.8.2017
TS-1708015-3	13.9.2017
TS-1708013-3	23.8.2017
TS-1708013-4	30.8.2017
TS-1708015-2	6.9.2017
TS-1708013-8	6.9.2017

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