COMMISSION IMPLEMENTING REGULATION (EU) 2020/444

of 25 March 2020

invalidating invoices issued by Wuxi Suntech Power Co. Ltd in breach of the undertaking repealed by Implementing Regulation (EU) 2017/1570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 ([3]) 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, and in particular Article 3 thereof,

Having regard to Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013 ([4]) 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, and in particular Article 2 thereof,

Having regard to Commission Implementing Regulation (EU) 2017/366 of 1 March 2017 ([5]) 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,

Having regard to Commission Implementing Regulation (EU) 2017/367 of 1 March 2017 ([6]) 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,

Having regard to Commission Implementing Regulation (EU) 2017/1570 of 15 September 2017 ([7]) 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,

([1]) OJ L 176, 30.6.2016, p. 21.
([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.
([7]) OJ L 238, 16.9.2017, p. 22.

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, including their related parties, 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 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 Wuxi Suntech Power Co. Ltd covered by the TARIC additional code B796 ('Wuxi Suntech').

(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 and, where applicable, invalidating undertaking invoices ([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]) 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.

(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 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.

(11) The undertaking terms also detailed the exporter's reporting obligations to the Commission and that non-compliance with these obligations constituted a breach of the undertaking.

(12) 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, as recorded in the undertaking, in the Union and of the sales of its related parties, as recorded in the undertaking, 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, as recorded in the undertaking. 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) 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.

(14) 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**

(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 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 variable duty MIP. The repeal Regulation entered into force on 1 October 2017, and hence is applicable *ratione temporis* only to imports that take place on or after that date.

(17) 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 for undertaking invoices issued prior to that date, and considered appropriate to open new investigations for invoices issued 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 established, in respect of imports invoiced by companies subject to the undertaking, that one or more of the conditions of the undertaking were 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. Similarly, invoices issued prior to 1 October 2017 under the

([14]) OJ C 310, 3.9.2018, p. 4.
([15]) OJ C 310, 3.9.2018, p. 5.

old regime, which were relied upon as commercial invoices for imports on or after 1 October 2017, may be invalidated.

(18) By Implementing Regulation (EU) 2018/1551 ([16]) and Implementing Regulation (EU) 2019/1329 ([17]), the Commission invalidated invoices issued by three exporting producers in breach of the undertaking while it was still in force.

D. **MONITORING OF THE EXPORTING PRODUCERS**

(19) On the basis of Articles 8(7), 8(9) and 14(7) of the basic anti-dumping Regulation and Articles 13(7), 13(9) and 24 (7) of the basic anti-subsidy Regulation, the Commission became aware of evidence presented by Wuxi Suntech before the German customs authorities regarding its compliance with the undertaking. The Commission further analysed information submitted to it by Wuxi Suntech under its reporting obligations.

(20) The findings listed in recitals (21) to (23) below address the alleged breaches by Wuxi Suntech of the undertaking while it was still in force.

E. **GROUNDS FOR THE INVALIDATION OF UNDERTAKING INVOICES**

(21) While the undertaking was in force Wuxi Suntech had three related importers in the Union, namely Suntech Power Deutschland GmbH ('Suntech Deutschland') in Germany, Suntech Power Italy Co, Srl ('Suntech Italy') in Italy, and Suntech Europe France ('Suntech France') in France. Those companies are recorded in the undertaking as related parties to Wuxi Suntech. Wuxi Suntech never requested that the undertaking be withdrawn for those related parties.

(22) In 2018, in the context of court case C-226/18 ([18]), it became known to the Commission that several invoices from Wuxi Suntech to Suntech Deutschland dated from 2014 were presented for customs clearance in Germany without ever being reported to the Commission as re-sales in the framework of the undertaking, thus breaching the provisions of the undertaking as described in recitals (9) and (12) above.

(23) Further to a detailed examination performed in its undertaking monitoring system, the Commission has identified 28 transactions from Wuxi Suntech to Suntech Deutschland, two transactions from Wuxi Suntech to Suntech Italy, and eight transactions from Wuxi Suntech to Suntech France that were not reported at resales level ([19]) as required under the terms of the undertaking.

F. **RELEVANT UNDERTAKING INVOICES**

(24) The sales transactions made by Wuxi Suntech in breach of the undertaking (recitals (21)-(23)) are linked to the following undertaking invoices:

Number of Commercial invoice accompanying goods subject to an undertaking	Date
SFDE20140601~0640	30.6.2014
SFDE20140245~0284	30.6.2014
SFDE20140165~0204	30.6.2014
SFDE20140001~0002	13.6.2014
SFDE20140005~0044	30.6.2014
SFDE20140481~0520	30.6.2014

([16]) OJ L 260, 17.10.2018, p. 8.
([17]) OJ L 207, 7.8.2019, p. 12.
([18]) EU:C:2019:440.
([19]) The undertaking defines a 're-sale invoice' as a sales invoice issued to the first independent customer in the Union by a related party in the Union for the product covered or the product concerned (part 1, Definitions).

Number of Commercial invoice accompanying goods subject to an undertaking	Date
SFDE20140045~0084	30.6.2014
SFDE20140365~0404	30.6.2014
SFDE20140285~0324	30.6.2014
SFDE20140561~0600	30.6.2014
SFDE20140325~0364	30.6.2014
SFDE20140721~0760	30.6.2014
SFDE20140125~0164	30.6.2014
SFDE20140761~0800	30.6.2014
SFDE20140445~0480	30.6.2014
SFDE20140641~0680	30.6.2014
SFDE20140521~0560	30.6.2014
SFDE20140205~0244	30.6.2014
SFDE20140681~0720	30.6.2014
SFDE20140405~0444	30.6.2014
SFDE20140085~0124	30.6.2014
SFDE20140003~0004	11.7.2014
REF0001~0040	19.9.2014
REF_EXWX0023~0027	19.9.2014
REF_EXWX0001~0022	19.9.2014
0308001312-009	21.5.2014
0308001312-015	17.7.2014
Lavansol201400001	13.3.2014

G. **WRITTEN SUBMISSIONS AND HEARINGS**

(25) 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.

(26) Wuxi Suntech made written submissions on 29 July 2019, 4 September 2019, 26 September 2019, 20 January 2020 and 3 March 2020.

(27) On 28 August 2019 and 7 February 2020, hearings took place with the Commission services following a request of Wuxi Suntech.

(28) Wuxi Suntech claimed its ownership changed on 11 March 2014 when, following a restructuring plan approved by a Chinese Intermediate People's Court, Jiangsu Shunfeng Photovoltaic Technology Co., Ltd, a subsidiary of Shunfeng Photovoltaic International Limited ([20]), acquired all Wuxi Suntech's shares.

([20]) Currently being referred to as Shunfeng International Clean Energy Limited ('SFCE').

(29) According to Wuxi Suntech, this shareholding restructuring removed Suntech Power Holdings Co., Ltd ('Suntech Holdings') ([21]) as Wuxi Suntech's ultimate holding company. Since Suntech Holdings was also the ultimate owner of Suntech France, Suntech Deutschland and Suntech Italy, Wuxi Suntech submits that, as from 11 March 2014, these European companies ceased to be related to Wuxi Suntech. Consequently, from that moment on, Wuxi Suntech was under no obligation to report the transactions at stake as re-sales in the framework of the undertaking. Wuxi Suntech submits it did not breach its reporting obligations under the undertaking.

(30) Wuxi Suntech further claimed that it informed the Commission about this ownership change. According to it, Wuxi Suntech, already in December 2013, through its counsel, informed the Commission about an *impending* change in the company structure. It derived this understanding from an email of 6 January 2014, which mentioned a December 2013 communication without providing further details on this point. Wuxi Suntech continued that, on 22 May 2014, via a reply to a name change questionnaire sent to it by the Commission, Wuxi Suntech informed the Commission that it was no longer related to the three companies in Europe.

(31) Furthermore, according to Wuxi Suntech, its notification obligation set out in clause 5.16 of the undertaking as regards the changes to its corporate structure was duly complied with at the very latest by its disclosure of information of 22 May 2014.

(32) As an alternative argument, Wuxi Suntech submitted that the Commission could not invalidate undertaking invoices and order an alleged retroactive collection of duties on past imports already released to free circulation. According to Wuxi Suntech, 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.

(33) Lastly, Wuxi Suntech submitted that even if the Commission could impose duties retroactively, 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.

(34) The Commission considered the comments submitted by the exporting producer and addressed them below.

(35) The Commission first addressed the claim according to which Suntech France, Suntech Deutschland and Suntech Italy were not related parties of Wuxi Suntech since 11 March 2014, and that therefore the company was under no obligation to report resales. In support of its claim, Wuxi Suntech attached a circular of 21 March 2014 ([22]) by which the Hong Kong Exchange and Clearing Limited and the Stock Exchange of Hong Kong Limited ('HK stock exchange') made known to the shareholders of Shunfeng Photovoltaic International Limited a proposed 'acquisition of equity interests in Wuxi Suntech' ('the acquisition').

(36) According to that circular, the acquisition was subject to two conditions: a) that it was approved by the Chinese court, which indeed happened on 15 November 2013, and b) that it was approved by the shareholders in a general meeting that took place on 7 April 2014. As described in the circular, only after the shareholders' vote would the acquisition become effective.

(37) The circular of 21 March 2014 was first brought to the attention of the Commission on 29 July 2019, as Annex 5 of Wuxi Suntech's submissions of the same date. The confirmation that the general meeting indeed took place on 7 April 2014 was brought later to the attention of the Commission following the Commission's request at the hearing that took place on 28 August 2019. Wuxi Suntech submitted evidence of the date when that shareholders meeting took place only on 4 September 2019, by way of annex 4 to an email sent by the counsel of Wuxi Suntech of the same date.

([21]) Together with its 100 % subsidiary Power Solar System Co.Ltd.

([22]) Document attached as Annex 5 of Wuxi Suntech's submissions of 29 July 2019.

(38) However, the Commission is under no obligation to monitor on its own motion changes in corporate structure of companies having provided an undertaking. Rather, it clearly follows from clauses 5.16 and 9.6 of the undertaking that it is the duty of the relevant company to inform the Commission of such changes and to comply with the undertaking until the actual undertaking has been modified so as to incorporate the change, i.e. until the names of the formerly-related companies have been removed from the undertaking.

(39) Therefore, regardless of the actual date in which the acquisition took place, it remains essential to assess whether Wuxi Suntech fulfilled the obligations undertaken under clauses 5.16 and 9.6 of the undertaking.

(40) The Commission first observed that it was only informed of the fact that Wuxi Suntech was no longer related to Suntech France, Suntech Deutschland and Suntech Italy on 22 May 2014. Hence, at the very least for the invoices of 13 March 2014 and 21 May 2014, there can be no doubt that there has been a violation of the reporting obligations.

(41) The Commission considers that Wuxi Suntech remained also bound by its reporting obligations for the time after 22 May 2014. As a matter of fact, the three related companies have never formally been removed from the undertaking. Hence, Wuxi Suntech remained bound to report on them until 1 October 2017.

(42) Clause 5.16 of the undertaking sets out that the CCCME and the company undertake to notify immediately the Commission of any changes to its corporate structure, which occur during the period of application of the undertaking. It further states that the company understands that such changes may give raise to the need to modify certain aspects of the undertaking.

(43) According to clause 9.6 of the undertaking, annexes are an integral part of the undertaking. Annex IX to the undertaking, in particular, exhaustively listed all the exporters' related parties in the Union.

(44) A combined reading of these two provisions leads to the conclusion that Wuxi Suntech's legal obligations vis-à-vis the undertaking remained in place until its previously related companies in the Union were removed from it, and a new, updated annex IX entered into force. Only then would the legal situation change in terms of allowing Wuxi Suntech to stop reporting resales. Such change never occurred.

(45) According to the documents submitted by Wuxi Suntech, the preparations for the acquisition started in October 2013 before the Commission accepted the undertaking offer at definitive stage in December 2013. Previously, in July 2013, Wuxi Suntech – through the CCCME – had already submitted its signed undertaking offer. It did not change that undertaking offer before the Commission accepted the offer at definitive stage. The three companies were listed therein as related companies and there was no indication of a possible impending change in the company structure.

(46) The acceptance of the undertaking created a direct, clear, and dedicated communication channel between exporters and the Commission services for the purposes of the specific obligations arising from the undertaking. This communication channel was a functional mailbox included in the undertaking text ([23]) although a direct contact with the official in charge of the undertaking was also set up as an option in the undertaking text. Wuxi Suntech was, consequently aware that its communication as regards the undertaking would have to occur through the functional mailbox or direct contact with the official in charge of the undertaking. However, Wuxi Suntech never used those channels of communication to mention, or inform the Commission of, any change in its company structure.

(47) Instead, Wuxi Suntech opened up a new channel of communication: it argued that, already in December 2013, it contacted the Commission's team in charge of the original anti-dumping and anti-subsidy investigations to preliminarily indicate impending changes in the structure of Wuxi Suntech. Wuxi Suntech provided no evidence to support this communication or to evidence which information was exchanged but merely relied on an email of 6 January 2014, which referred to that December 2013 communication.

([23]) That mailbox being 'TRADE-UT-HELPDESK@ec.europa.eu'.

(48) On 6 January 2014, Wuxi Suntech sent to the dedicated functional mailbox for the original anti-dumping and anti-subsidy investigations ([24]) an email to request a 'particular questionnaire/name change questionnaire'. The Commission services replied by sending an adapted 'name change' questionnaire to Wuxi Suntech, as is usually done when a name change is requested. On 14 January 2014, by email, Wuxi Suntech then provided further explanation regarding the change to its company structure. That email was subsequently followed, on 22 May 2014, by a reply containing the completed 'name change' questionnaire. That questionnaire for the first time mentioned the complete new corporate structure and clarified that Wuxi Suntech's former three related companies in the Union were no longer related to it.

(49) In March 2014, Wuxi Suntech unilaterally decided to stop reporting the resales of Suntech France, Suntech Deutschland and Suntech Italy to the Commission. However, Wuxi Suntech never asked for the companies in Europe to be removed from the undertaking text, via neither of the two communication channels.

(50) That unilateral decision without the three European companies ever being removed from the undertaking was contrary to the agreed terms of the undertaking. The legal obligation set out in clause 5.16 of the undertaking was only complied with when the previously related companies in the European Union were removed from the undertaking text. Until then, Wuxi Suntech's reporting obligations were maintained. It was for companies undergoing corporate structure changes to handle the contractual risks and consequences of those changes. The burden of handling those was not on the Commission's side.

(51) The completion of the acquisition, the date in which it allegedly took place and the consequences for the functioning of the undertaking were issues that needed to be brought to the attention of the Commission in order to justify such a change in the undertaking. Until the Commission had taken a decision on accepting a change of the terms of the undertaking, Wuxi Suntech needed to abide by its terms, including reporting for companies recorded as related in the undertaking. Furthermore, insofar as the acquisition gave rise to the need to modify the undertaking it was up to Wuxi Suntech to initiate such a change.

(52) The Commission therefore took the view that the transactions from Wuxi Suntech to Suntech Deutschland, Suntech Italy, and Suntech France mentioned in recital (23) should have been reported at resales level. This non reporting constituted a breach of the undertaking.

(53) In any case, and only for the sake of the argument, regardless of the exact date in which the acquisition took place, at least the resales regarding the invoices issued prior to 22 May 2014 should have been reported. This is because they precede the date in which the company informed the team in charge of the original investigation that it was no longer related to the three companies in the Union. The first claim was thus rejected.

(54) 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 in a scenario such as the present.

(55) This case concerns a lifting of the temporary non-payment of anti-dumping and countervailing duties because the conditions for the continuation of that non-payment were no longer found to hold true.

(56) The Commission recalls that, pursuant to its Decision 2013/423/EU, breaches of the undertaking could refer to particular transactions ([25]). Those transactions in breach of the undertaking materialised themselves in invoices that need to be invalided by the Commission. 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 (EC) No 1238/2013 and Implementing Regulation (EC) No 1239/2013.

([24]) Those mailboxes being 'TRADE-SOLAR-DUMPING@ec.europa.eu' and 'TRADE-SOLAR-SUBSIDY@ec.europa.eu', which was communicated to all parties in the notices of initiation concerning those investigations.

([25]) 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, (OJ L 209, 3.8.2013, p. 26), recitals 14 and 15.

(57) Through the invalidation, 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 put in place by Article 9(4) of the basic anti-dumping Regulation and 14(4) of the basic anti-subsidy Regulation kick in and apply.

(58) 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: Wuxi Suntech was subject to the situation of not breaching the conditions undertaken, and, in return, benefit from the temporary non-collection of the anti-dumping and countervailing duties. Since it did not respect those conditions, it cannot claim to have acquired legitimate expectations from a situation that was capable of being altered under certain circumstances. The claim of alleged retroactivity was rejected.

(59) 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. Consequently, Wuxi Suntech submitted that there was no legal basis anymore to allow for the invalidation of undertaking invoices.

(60) The Commission explained that the breach of the undertaking occurred during the period of application of the undertaking.

(61) As mentioned in recital (17) 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) No 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.'

(62) In that regard, the Commission observed that it derives the power 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 recorded 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.

(63) Since the breach at stake manifested itself at a point in time prior to the entry into force of the repeal Regulation, the Commission is in a position to invalidate the undertaking invoices by virtue of the application of Articles 8 and 14 of the basic anti-dumping Regulation, Articles 13 and 24 of the basic anti-subsidy Regulation, 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 did not become aware of that breach until after the repeal of those provisions by Implementing Regulation (EU) 2017/1570 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. The argument was, therefore, rejected.

H. **BREACH OF THE UNDERTAKING AND IMPOSITION OF DEFINITIVE DUTIES**

(64) In accordance with Article 8(7) and 8(9) of the basic anti-dumping Regulation, Article 13(7) and 13(9) of the basic anti-subsidy Regulation and in accordance with the terms of the undertaking, the Commission concluded that Wuxi Suntech breached the undertaking while it was still in force.

(65) Therefore, in accordance with Articles 8(7), 8(9) and 14 of the basic anti-dumping Regulation, Articles 13(7), 13(9) and 24 of the basic anti-subsidy Regulation, 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 acceptance of the customs declaration for release into free circulation, Wuxi Suntech' invoices listed in recital (24) are declared invalid.

(66) It falls to the national customs authorities to assess whether the applicable limitation periods have expired in line with the rules contained in Articles 221 of Regulation (EEC) No 2913/92 ([26]) and 103 of Regulation (EU) No 952/2013 ([27]). Those rules being substantive rules, their application *ratione temporis* depends on the date of entry into free circulation of the goods ([28]).

(67) The customs debt incurred at the time of acceptance of the declaration for release for free circulation should be recovered and entered in the accounts by the national customs authorities in accordance with Articles 218 et seq of Regulation (EEC) No 2913/92 and Article 105 of Regulation (EU) No 952/2013.

(68) The Commission also recalls that where the customs authorities of the Member States have indications that the price presented on an undertaking invoice does not correspond to the price actually paid, they should investigate whether the requirement to include any rebates in the undertaking invoices has been violated or the MIP has not been respected.

(69) Where the customs authorities of the Member States conclude that there has been such a violation or that the MIP has not been respected, they should collect the duties as a consequence thereof.

(70) In order to facilitate the work of the customs authorities of the Member States, the Commission should share in such situations the confidential text and other information of the undertaking for the sole purpose of national proceedings on the basis of Article 4(3) of the Treaty on the Functioning of the European Union,

HAS ADOPTED THIS REGULATION:

Article 1

1. The undertaking invoices listed in the Annex are declared invalid.

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, except where the applicable limitation periods have expired in line with the rules contained in Articles 221 of Regulation (EEC) No 2913/92 ([29]) and 103 of Regulation (EU) No 952/2013 ([30]).

Article 2

1. Where the customs authorities of the Member States have indications that the price presented on an undertaking invoice pursuant to Article 3(1)(b) of the Implementing Regulation (EU) No 1238/2013, Article 2(1)(b) of Implementing Regulation (EU) 2017/367, Article 2(1)(b) of Implementing Regulation (EU) No 1239/2013 and Article 2(1)(b) of Implementing Regulation (EU) 2017/366 issued by Wuxi Suntech Power Co. Ltd prior to the entry into force of this regulation does not correspond to the price paid and that therefore the company may have violated the undertaking, the customs authorities may, if necessary for the purpose of conducting national proceedings, request the Commission to disclose to them a copy of the undertaking and other information in order to verify the applicable minimum import price on the day when the undertaking invoice was issued.

([26]) Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 302, 19.10.1992, p. 1.
([27]) 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.
([28]) Judgement of 23 February 2006, *Molenbergnatie NV*, C-201/04, ECLI: EU:C:2006:136, paragraph 41.
([29]) Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 302, 19.10.1992, p. 1.
([30]) 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.

2. Where the verification referred to in paragraph 1 reveals that discounts and rebates have not been included in the commercial invoice, the duties due as a consequence under Article 3(2)(a) of the Implementing Regulation (EU) No 1238/2013, Article 2(2)(a) of Implementing Regulation (EU) 2017/367, Article 2(2)(a) of Implementing Regulation (EU) No 1239/2013 and Article 2(2)(a) of Implementing Regulation (EU) 2017/366 shall be collected.

3. The information in accordance with paragraph 1 may only be used for the purpose of enforcement of duties due under Article 3(2)(a) of the Implementing Regulation (EU) No 1238/2013, Article 2(2)(a) of Implementing Regulation (EU) 2017/367, Article 2(2)(a) of Implementing Regulation (EU) No 1239/2013 and Article 2(2)(a) of Implementing Regulation (EU) 2017/366. In this context, customs authorities of the Member States may provide the debtor of those duties with this information for the sole purpose of safeguarding their rights of defence. Such information may under no circumstances be disclosed to third parties.

Article 3

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

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

Done at Brussels, 25 March 2020.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX

List of undertaking invoices issued by Wuxi Suntech Power Co. Ltd which are declared invalid:

Number of Commercial invoice accompanying goods subject to an undertaking	Date
SFDE20140601~0640	30.6.2014
SFDE20140245~0284	30.6.2014
SFDE20140165~0204	30.6.2014
SFDE20140001~0002	13.6.2014
SFDE20140005~0044	30.6.2014
SFDE20140481~0520	30.6.2014
SFDE20140045~0084	30.6.2014
SFDE20140365~0404	30.6.2014
SFDE20140285~0324	30.6.2014
SFDE20140561~0600	30.6.2014
SFDE20140325~0364	30.6.2014
SFDE20140721~0760	30.6.2014
SFDE20140125~0164	30.6.2014
SFDE20140761~0800	30.6.2014
SFDE20140445~0480	30.6.2014
SFDE20140641~0680	30.6.2014
SFDE20140521~0560	30.6.2014
SFDE20140205~0244	30.6.2014
SFDE20140681~0720	30.6.2014
SFDE20140405~0444	30.6.2014
SFDE20140085~0124	30.6.2014
SFDE20140003~0004	11.7.2014
REF0001~0040	19.9.2014
REF_EXWX0023~0027	19.9.2014
REF_EXWX0001~0022	19.9.2014
0308001312-009	21.5.2014
0308001312-015	17.7.2014
Lavansol201400001	13.3.2014