Commission Implementing Decision of 4 February 2014 repealing Decision 2000/745/EC accepting undertakings offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of certain polyethylene terephthalate (PET) originating, inter alia, in India (2014/109/EU)

COMMISSION IMPLEMENTING DECISION

of 4 February 2014

repealing Decision 2000/745/EC accepting undertakings offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of certain polyethylene terephthalate (PET) originating, inter alia, in India

(2014/109/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community[(1)] (the 'basic anti-subsidy Regulation'), and in particular Articles 13 thereof,

After consulting the Advisory Committee,

Whereas:

A. EXISTING MEASURES

(1) Countervailing measures on imports of polyethylene terephthalate ('PET') originating in India have been in force since 2000[(2)]. These measures have been last maintained by Council Implementing Regulation (EU) No 461/2013[(3)], following an expiry review.

(2) Anti-dumping measures on imports of PET originating in India have been in force since 2000[(4)]. These measures have been last maintained by Council Regulation (EC) No 192/2007[(5)], following an expiry review. On 24 February 2012 the Commission initiated a subsequent expiry review. By Implementing Decision 2013/226/EU[(6)], the Council rejected the Commission's proposal for a Council implementing regulation maintaining the anti-dumping duty on imports of PET originating in, inter alia, India and, thus, the anti-dumping measures expired.

(3) In 2000, by Decision 2000/745/EC[(7)] the Commission accepted price undertakings ('the undertakings'), offered in connection with both the anti-dumping and anti-subsidy proceedings from, inter alia, the Indian companies: Pearl Engineering Polymers Limited ('Pearl') and Reliance Industries Limited ('Reliance'). In 2005, by Decision 2005/697/EC[(8)] amending Decision 2000/745/EC, the Commission accepted an undertaking from the Indian

company South ASEAN Petrochem Limited which as a result of a merger changed its name to Dhunseri Petrochem & Tea Limited ('Dhunseri')[9].

B. CHANGE IN CIRCUMSTANCES DURING THE IMPLEMENTATION OF THE UNDERTAKINGS

(4) A change in the circumstances during the implementation of the undertakings may justify a decision of the Commission to exercise its power to withdraw the acceptance of the undertakings, as set out in Article 13(9) of the basic anti-subsidy Regulation.

(5) The repeal of the anti-dumping measures and the maintenance of countervailing duties constitute a change in the circumstances under which the undertakings were accepted. The undertakings were accepted in the presence of both anti-dumping and anti-subsidy measures. The core element of the undertakings, the Minimum Import Price ('MIP'), reflects both the dumping and subsidy element. Currently, there is no dumping element. Therefore, the MIP is not at the appropriate level.

C. BREACHES OF THE UNDERTAKING

(6) In addition, one of the Indian companies, Pearl, did not respect its reporting obligation vis-à-vis the Commission. The company failed to submit quarterly sales reports. The Commission is thus unable to effectively monitor the undertaking.

(7) The provisions of the undertaking stipulate that failure to submit reports constitutes a breach of the undertaking. A recent ruling of the Court of Justice[10] also confirmed that reporting obligations must be regarded as primary obligations for the proper functioning of an undertaking.

(8) The acceptance of Pearl's undertaking has to be withdrawn also on this basis.

D. WRITTEN SUBMISSIONS

(9) The three companies were granted the opportunity to be heard and make written submissions. Two Indian companies and the Committee of PET Manufacturers in Europe (CPME), representing the Union industry, commented.

1. Changed circumstances as a ground for withdrawing the acceptance of an undertaking

(10) One company claimed that the proposal to withdraw the acceptance of the undertaking lacked a legal basis. That party claimed that Article 13(9) of the basic anti-subsidy Regulation did not explicitly mention 'changed circumstances' and linked any possibility to withdraw the acceptance of the undertaking with instances of breach. This argument had to be rejected. Article 13(9) of the basic anti-subsidy Regulation indeed does not explicitly mention 'change in circumstances'. However, it clearly does not limit the

instances in which the Commission may withdraw the acceptance of an undertaking to instances of breach. It states that '[i]n case of breach or withdrawal of undertakings by any party to the undertaking, or in case of withdrawal of acceptance of the undertaking by the Commission [emphasis added], the acceptance of the undertaking shall, after consultation, be withdrawn…'. It therefore singles out the withdrawal of acceptance of an undertaking as a stand-alone basis for withdrawal.

(11) In fact, the Commission's discretionary powers to accept or reject an undertaking offer have to be mirrored by the power to withdraw the acceptance of an undertaking, should the circumstances on the basis of which the undertaking offers were accepted change. According to the case-law of the Court, 'it is for the institutions, in the exercise of their discretionary power, to determine whether […] undertakings are acceptable.'**(11)**. That discretionary power is in general wide in the sphere of measures to protect trade, because the Union Courts recognize that in that sphere, the Institutions have to examine complex economic, political and legal situations. More specifically, the Court held that the Commission, 'when exercising the powers assigned to it in [the basic Regulation], has a very wide discretion to decide, in terms of the interests of the Community, any measures needed to deal with the situation which it has established.'**(12)**. Hence, the Commission, when accepting, rejecting or withdrawing an undertaking, enjoys the discretion necessary in order to be able to implement trade measures in the Union interest.

(12) The Commission therefore rejects the argument that a change in circumstances, as compared to those which prevailed at the time of the acceptance of the undertaking, cannot serve as a ground for withdrawal of that acceptance.

2. **Consistency of the withdrawal with previous legal acts concerning the same proceeding**

(13) One company claimed that Commission Decision 2013/223/EU**(13)** reconfirmed the acceptance of its undertaking. A related argument was that Article 2(2) of the Implementing Regulation (EU) No 461/2013 imposing a definitive countervailing duty constituted another recognition that the undertaking could remain in force after the expiry of the anti-dumping duties. Both arguments are misguided. By Decision 2013/223/EU, the Commission withdrew the acceptance of the undertakings of one Indonesian and one Indian company that violated their reporting obligations. A withdrawal for one company does not in any way preclude a subsequent decision of the Commission to withdraw acceptance of other undertakings should such action be warranted in light of circumstances of a particular case.

(14) Consequently, Implementing Regulation (EU) No 461/2013, published on 23 May 2013 reflected the amendment of Decision 2000/745/EC due to the adoption of Decision 2013/223/EU (withdrawal for one Indonesian and one

Indian company). Implementing Regulation (EU) No 461/2013 imposing a definitive countervailing duty was published on the same day as Implementing Decision 2013/226/EU by which the Council repealed the anti-dumping duty. The consequences of the latter decision could only be assessed by the Commission after its adoption.

(15) The arguments of the party had to be thus rejected.

3. **Mathematical adaptation of the MIP**

(16) One company requested that the Commission should deduct from the MIP an amount corresponding to the fixed anti-dumping duty and thereby bring the MIP in compliance with the underlying measure — countervailing duty. Such an operation could not be performed. First and foremost, under the terms of the undertaking any revision of the scope and the minimum prices is only possible through an interim review in accordance with Article 19 of the basic anti-subsidy Regulation. Secondly, the company requested a mere deduction from the current MIP of amounts corresponding to the amount of the fixed anti-dumping duty. In the current undertaking the MIP and the indexation mechanism are based either on the non-injurious price established for the Union market (target price) or on the normal value (depending on the company in question) as determined in 1999. In the latter case, since the anti-dumping duty expired the whole basis for the MIP is non-existent. Had the undertaking been assessed only with regard to the countervailing duty, the export price (increased by the amount of the fixed countervailing duty) could have become a benchmark for the MIP. In order to establish an appropriate MIP, the Commission would have to first identify export price that would serve as a benchmark. No such benchmark can be easily identified in the present case, not least because measures have been in force for a long time. Further, the indexation mechanism currently in place that relates to the non-injurious price (target price) or the normal value cannot be simply transposed to the export price. Any simple mathematical adaptation would have required that all elements necessary to calculate the MIP are easily identifiable and undisputable. Only then the Commission can guarantee the equivalence of the undertaking to the measure in force. This condition is not fulfilled in the present case. A simple mathematical operation as suggested by the applicant is therefore impossible.

(17) The Commission has to act timely with regard to the undertaking in force in order to follow the decision of the Council to repeal the anti-dumping duties in force. Therefore, any further delay has to be avoided. The withdrawal of the acceptance of the undertaking does not prejudice any possible future decision, should a company wish to submit an undertaking offer.

(18) Following the second disclosure of the Commission's findings, one party reiterated that the minimum import price should be decreased by a simple mathematical operation. It contested the Commission's reasoning in that

regard as 'misplaced and lacking any basis'. However, that position has not been substantiated any further and thus has to be rejected. In any case, the claim has been address in recital 16 above.

(19) Consequently, the claim to mathematically adjust the MIP had to be rejected.

4. **Pending case T-422/13**

(20) One company claimed that undertakings should remain in force pending the decision of the General Court in case T-422/13 *CPME and Others* v *Council*. According to that company, should the Union industry be successful in their challenge of Council Implementing Decision 2013/226/EU repealing the anti-dumping duties, the Commission would be under obligation to reinstate the undertaking. This argument is misguided. The Commission has to assess the current situation and act timely in order to follow the decision of the Council to repeal the anti-dumping measures. An anticipation of a possible outcome of a court case cannot guide Commission's decisions in that regard. In view of this fact, the decision concerning the undertakings in force has to be taken in a timely manner.

5. **Breaches of the undertaking**

(21) One company claimed that breach of reporting obligations by one company should not have any consequences upon other companies. It is hereby confirmed that only the company Pearl was found in breach of its reporting obligations.

6. **Possible review and undertakings**

(22) Two Indian companies claimed that undertakings should remain in force pending the results of a possible interim review of the MIP. The Commission notes that because the anti-dumping duty expired the basis for the MIP has become non-existent (see recital 16 above). A decision to address the effects of this change has to be taken in a timely manner. In parallel, a company can request a review of the measure in place and in that context offer a new undertaking concerning only the anti-subsidy measures in force.

(23) Following the second disclosure of the Commission's findings, one party reiterated that the Commission should have initiated an ex-officio interim review while the undertaking should remain in force pending the outcome of such review.

(24) The Commission notes first and foremost that the initiation of an anti-subsidy review investigation lies within its discretionary powers. However, in this particular case a review investigation is linked to the wish of an exporter to offer a new undertaking. Thus, the Commission has no reason to initiate a review without a new undertaking offer from the exporter concerned, in line with Article 13 of the basic Regulation.

(25) Further, as an equivalent form of measures, an undertaking has to correspond to the underlying measure imposed by the Council. This is no longer the case and thus has led the Commission to propose to withdraw the undertaking in force.

(26) Parties can indeed request an interim review based on the provisions of the basic anti-subsidy regulation and any possible new undertaking offer would be considered in the framework of any such review.

7. **Anti-subsidy duty as a barrier to imports**

(27) Following the second disclosure of the Commission's findings, one party claimed that the withdrawal of the acceptance of the undertaking 'rather than reducing the level of protection in line with the expiry of the anti-dumping measures, (…) [would] make it impossible for users of PET to import'. The Commission notes in that regard that in the absence of an undertaking, the minimum import price ceases to be a benchmark for an exporter. The party did not substantiate why the countervailing duty would prevent Indian exporters from importing. In any case, the purpose of imposing measures and accepting an undertaking, if appropriate, is not about the possibility of users to import. The purpose is establishing a level of protection, as the party notes. The interests of users have been assessed under the Union interest for imposing measures together with the interests of all other parties concerned. It has been concluded that the imposition of measures is not against the Union interest. The argument had to be therefore rejected.

8. **Conclusion on submissions by parties**

(28) None of the arguments raised by interested parties was such as to alter the Commission's proposal to withdraw the acceptance of the undertaking.

E. **REPEAL OF DECISION 2000/745/EC**

(29) In view of the above, the acceptance of the undertakings should be withdrawn and Decision 2000/745/EC should be repealed. Accordingly, the definitive countervailing duties imposed by Article 1(2) of Implementing Regulation (EU) No 461/2013 should apply to imports of PET produced by the companies Dhunseri, Reliance and Pearl (TARIC additional code A585 for Dhunseri, TARIC additional code A181 for Reliance and TARIC additional code A182 for Pearl.),

HAS ADOPTED THIS DECISION:

Article 1

Decision 2000/745/EC is repealed.

Article 2

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

Done at Brussels, 4 February 2014.

For the Commission

The President

José Manuel BARROSO

(**1**) OJ L 188, 18.7.2009, p. 93.

(**2**) OJ L 301, 30.11.2000, p. 1.

(**3**) OJ L 137, 23.5.2013, p. 1.

(**4**) OJ L 301, 30.11.2000, p. 21.

(**5**) OJ L 59, 27.2.2007, p. 1.

(**6**) OJ L 136, 23.5.2013, p. 12.

(**7**) OJ L 301, 30.11.2000, p. 88.

(**8**) OJ L 266, 11.10.2005, p. 62.

(**9**) OJ C 335, 11.12.2010, p. 7.

(**10**) Judgment of the Court of 22 November 2012 in case C-522/10 P *Usha Martin Ltd* v *Council of the European Union and European Commission*, not yet reported.

(**11**) Case 256/84 *Koyo Seiko* v *Council* [1987] ECR 1912, paragraph 26; Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1884, paragraph 42; Case 240/84 *Toyo* v *Council* [1987] ECR 1849, paragraph 34.

(**12**) Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, paragraph 26; see also Case T-162/94 *NMB France and Others* v *Commission* [1996] ECR II-427, paragraph 72; Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 51; and Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraph 32.

(**13**) OJ L 135, 22.5.2013, p. 19.

Changes to legislation:
There are currently no known outstanding effects for the Commission Implementing Decision of 4 February 2014 repealing Decision 2000/745/EC accepting undertakings offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of certain polyethylene terephthalate (PET) originating, inter alia, in India (2014/109/EU).