DECISIONS

COMMISSION IMPLEMENTING DECISION (EU) 2018/351

of 8 March 2018

rejecting undertakings offered in connection with the anti-dumping proceeding concerning imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine

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] ('the basic Regulation'), and in particular Article 8 thereof,

Informing the Member States,

Whereas:

1. PROCEDURE

(1) By Implementing Regulation (EU) 2017/1795 [2] the European Commission ('the Commission') imposed a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel ('HRF') originating in Brazil, Iran, Russia and Ukraine and terminated the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia ('the definitive Regulation').

(2) During the investigation that led to the imposition of this duty, five exporting producers from Brazil, Iran, Russia and Ukraine offered price undertakings. As these offers were made after an additional final disclosure that came late in the investigation, the Commission was unable to analyse whether such price undertakings were acceptable, prior to the deadline for the adoption of the definitive Regulation. Therefore, considering this as an exceptional circumstance, the Commission undertook to complete the analysis of these five offers at a later stage. After the conclusion of the investigation and the publication of the definitive Regulation a sixth exporting producer offered a price undertaking.

(3) On 18 December 2017, the Commission informed all interested parties of the assessment of the undertaking offers underlying its intention to reject all undertaking offers ('Commission's assessment'). On the basis of this information, interested parties made written submissions providing comments on the assessment and, in some cases, further amendments to their offers. Interested parties who requested to be heard were also granted a hearing.

(4) On 3 January 2018, the Commission received a request from the Government of Ukraine for consultation pursuant to Article 50 *bis* EU-Ukraine Association Agreement [3]. The consultations were held on 26 January 2018. Written comments were submitted on 31 January 2018.

2. UNDERTAKINGS

(5) The adequacy and practicability of all offers were assessed in the light of the applicable legal framework, including the EU-Ukraine Association Agreement in the case of the Ukrainian exporting producer.

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[1] OJ L 176, 30.6.2016, p. 21.

[2] Commission Implementing Regulation (EU) 2017/1795 of 5 October 2017 imposing a definitive antidumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia (OJ L 258, 6.10.2017, p. 24).

[3] OJ L 161, 29.5.2014, p. 3.

2.1. **Undertaking offers and their assessment**

2.1.1. *Companhia Siderúrgica Nacional (Brazil)*

(6) The exporting producer offered one minimum import price ('MIP') per tonne for a certain volume of exports to the Union and another — higher — MIP for a volume above that. The exporting producer also offered a price adjustment mechanism.

(7) The offer based on one average MIP is inadequate as it will not remove the injurious effects of dumping for all product types, in particular the most expensive ones. As acknowledged in recitals 632 and 655 of the definitive Regulation, the Commission considered that a measure in the form of a company-specific fixed amount per tonne reflected the injury caused by the exporting producer found to be dumping more accurately than a MIP. It also ensures that, unlike a MIP, the duty removes injury entirely, giving immediate protection to the Union industry. Furthermore, the offer covers transactions between related entities. The very nature of such relations presents numerous possibilities for cross-compensation. Any other transaction, loan or grant between the two related entities could be used to offset the MIP. The Commission is unable to monitor these transactions and it lacks appropriate benchmarks that would enable it to verify whether they are genuine or compensatory.

(8) Furthermore, the acceptance of the offer would be impractical. The exporting producer has related companies in several Member States, some of which further process the product concerned. The exporting producer also sells other products to the Union customers and its related importer sells like products from other sources. It is thus impossible for the Commission to monitor these activities effectively, as well as the implementation of two different MIPs depending on the export volume.

(9) In response to the Commission's assessment, the exporting producer argued that the MIP proposed in its offer removes the injurious effect of dumping, as the same MIP was proposed by the Commission at a stage of the investigation. The exporting producer pointed out that the MIP is based on weighted average import prices of all product types. Consequently, the MIP would not be to the detriment of the Union producers since, lower-tier priced product types would be placed at a higher level prices than they should have been, thus compensating for the higher-tier priced product types. If this logic were to be applied to the product type composition of its exports during the investigation period, according to the exporting producer the MIP would be sufficient to remove the injurious effect of dumping. Furthermore, the exporting producer argued that the MIP should not be adjusted on the account of sales via a related company, due to, amongst others, the way its export price was established in the definitive Regulation. The exporting producer then argued that cross-compensation is impossible for a number of reasons, in particular because cross-compensation would show in the annual reports of the exporting producer and its related companies. The exporting producer also amended its undertaking offer. In the new offer the exporting producer undertook to cease resales of HRF via its related entity in the Union and to report on sales of other products to the Union.

(10) Concerning the comment that the proposed MIP removes the injurious effect of dumping because it is identical to the one proposed by the Commission at a stage of the investigation, the Commission noted that ultimately that solution was rejected. The reasons for this rejection were given in, among others, recitals 632 and 655 of the definitive Regulation, which are summarised in recital 7 above. The Comment regarding MIP being based on weighted average import prices, did not affect the conclusion that the MIP does not remove the injurious effect of dumping for the most expensive product types. The Commission was not able to retrieve data to support the claim that the injurious effect of dumping would have been removed by the MIP due to the product-type composition of the exports during the investigation period. Nor did the Applicant provide such data. Even if it had available to it the data supporting this claim, the Commission found that there is nothing preventing the product-type composition to shift towards the higher-tier priced product types. Indeed, the very application of the MIP could favour such shift. Concerning the comment that the MIP should not be adjusted on the account of sales via a related company, the Commission could agree that indeed, considering the circumstances of the case in the investigation period and, in particular, the way the export price for the exporting producer was established in the definitive Regulation, this adjustment would not be warranted. However, there is no guarantee that the circumstances will not change in particular since the companies are related. Finally, concerning the amendment of the offer and the risks of cross-compensation, the Commission noted that, whilst the commitment not to re-sell the product concerned would limit some of the cross-compensation risks the principal issue, namely the MIP being applied to transactions between related entities, remains. Such association between two entities offers

numerous possibilities for cross-compensation that cannot be effectively monitored by the Commission. Not all of these would be shown in the annual reports, and for those that would the Commission would lack the appropriate benchmarks capable of assessing whether they are of compensatory nature. An undertaking covering related sales may be accepted only if the product concerned is eventually re-sold to an independent customer and the MIP, appropriately adjusted, can be applied to those transactions. This is impossible if the product concerned is transformed into another product.

2.1.2. *Usinas Siderurgicas de Minas Gerais SA (Brazil)*

(11) The exporting producer offered one MIP per tonne for all of its exports.

(12) The offer based on one average MIP is inadequate as it will not remove the injurious effects of dumping for all product types, in particular the most expensive ones. As acknowledged in recitals 632 and 655 of the definitive Regulation, the Commission considered that a measure in the form of a company-specific fixed amount per tonne reflected the injury caused by the exporting producer found to be dumping more accurately than a single MIP. It also ensures that, unlike a single MIP, the duty removes injury entirely, giving immediate protection to the Union industry. The offer is also inadequate as the exporting producer did not propose an adjustment mechanism while the prices of HRF tend to vary significantly over time.

(13) Furthermore, the acceptance of the offer would be impractical. Due to the global structure and sales activities of the exporting producer, the price undertaking proposed could not be effectively monitored, offering several opportunities for price cross-compensation. The exporting producer has a number of related companies in several Member States and outside the Union. Furthermore, the exporting producer sells also other products to the Union. It is thus impossible for the Commission to monitor these activities effectively.

2.1.3. *Mobarakeh Steel Company (Iran)*

(14) The exporting producer offered one MIP per tonne for all of its exports, adjusted for sales via its trader in the Union.

(15) The offer based on one average MIP is inadequate as it will not remove the injurious effects of dumping for all product types, in particular the most expensive ones. As acknowledged in recitals 632 and 655 of the definitive Regulation, the Commission considered that a measure in the form of a company-specific fixed amount per tonne reflected the injurious dumping found for the exporting producer more accurately than a MIP. It also ensures that, unlike a MIP, the duty removes the injurious dumping entirely, giving immediate protection to the Union industry. The offer is also inadequate as the exporting producer did not propose an adjustment mechanism while the prices of HRF tend to vary significantly over time.

(16) Furthermore, the acceptance of the offer would be impractical. Due to the fact that the exporting producer sells to the Union other products, the price undertaking proposed would be impossible to be effectively monitored, offering opportunities for price cross-compensation. It is thus impossible for the Commission to monitor these activities effectively.

(17) In response to the Commission's assessment, the exporting producer argued that the Commission was silent on the fact that its offer mirrored Commission's proposal at a stage of the investigation. The exporting producer requested an explanation as to why an offer mirroring that proposal is not suitable. The exporting producer argued that the MIP it proposed is higher than that proposed by the Commission during the investigation and thus the MIP proposed in the undertaking, by definition, removes the injury to the Union industry. Furthermore, the exporting producer argued that there is no difference between a MIP and a specific duty per tonne as far as removal of injurious effect of dumping for the most expensive product is concerned, thus this argument is

irrelevant. The exporting producer argued the fact that it sells other products to the Union does not automatically create a risk of cross-compensation. Finally, it argued that the undertaking invoices would remove any risk of circumvention or cross-compensation just in the same way as the valid commercial invoice proposed in the final general disclosure document would.

(18) The Commission noted that its assessment is not only vocal on the similarities between the undertaking offer and an option being considered at a stage of the investigation, in recital 15 above it points to and summarises the part of the definitive Regulation explaining why that option was rejected. The same reasoning applies to the exporting producer's comment comparing undertaking invoices to one of the solutions being considered during the investigation and ultimately rejected by the Commission. The fact that the MIP proposed by the exporting producer is higher than the one considered by the Commission at one point during the investigation does not mean that it, by definition, removes the injurious effect of dumping. The difference is minor and it did not affect the reasoning that an average MIP is inadequate as it will not remove the injurious effects of dumping for all product types, in particular the most expensive ones. The comment that the MIP and a specific duty are equally ineffective in this respect is also misplaced. Unlike a MIP, a specific duty forces importers to pay more for more expensive product type, as the market price of a product type is a part of the price they pay, the other part being the duty. This is different in case of a MIP that is the same for all product types. Finally, indeed, sales of other products to the Union may be used for cross-compensation only if they are sold to the same customers as the HRF. However the Commission noted that cross-compensation and the risk of cross-compensation are two different concepts. For instance, the Commission knows that the exporting producer sells other products to the Union but does not have data concerning the exporting producer's customers for those products. Notably, the exporting producer did not deny selling other products to its HRF customers nor did it undertake not to do that in the future. This situation, whilst not proving cross-compensation, clearly presents a risk of cross-compensation that the Commission is unable to monitor.

2.1.4. *PJSC Magnitogorsk Iron and Steel Works (Russia)*

(19) The exporting producer offered two MIPs per tonne, one for sheets and one for coils. The exporting producer also offered a price adjustment mechanism and, in an amendment to its offer, undertook to sell the product concerned only directly to independent customers in the Union and not to sell other products to its HRF customers in the Union.

(20) The exporting producer's offer was submitted after the conclusion of the investigation and as such should be rejected. Whilst, according to Article 8(2) of the basic Regulation, in exceptional circumstances, undertakings may be offered after the period during which representations may be made pursuant to Article 20(5) of the basic Regulation, such offer should come at a reasonable time before the conclusion of the investigation.

(21) However, even if the offer was submitted in due time, the offer based on two average MIPs is inadequate as it will not remove the injurious effects of dumping for all product types, in particular the most expensive ones. As acknowledged in recitals 632 and 655 of the definitive Regulation, the Commission considered that a measure in the form of a company-specific fixed amount per tonne reflected the injurious dumping found for the exporting producer more accurately than a MIP. It also ensures that, unlike a MIP, the duty removes the injurious dumping entirely, giving immediate protection to the Union industry.

(22) Furthermore, the acceptance of the offer would be impractical. Due to the global structure and sales activities of the exporting producer, the price undertaking proposed would be impossible to be effectively monitored, offering several opportunities for price cross-compensation. The exporting producer has a number of related companies and sells also other steel products to the Union. It is thus impossible for the Commission to monitor these activities effectively.

(23) In response to the Commission's assessment, the exporting producer expressed its disagreement with the above assessment whilst emphasising the importance of its additional commitments to use only one sales channel and not to sell other products to its HRF customers.

(24) In relation to the additional commitments the Commission noted that, considering the exporting producer's global structure and the global structure of its customers, it is impossible to monitor all the available cross-compensation possibilities. For instance if the companies covered by the undertaking do not sell other products to an HRF customer in the Union, there is nothing preventing their related companies be it in the Union or outside entering into potentially cross-compensatory transactions with these customers or their related entities. Whilst the exporting producer disagreed with the assessment of the adequacy of its offer it did not put forward any additional arguments against the conclusion reached by the Commission.

2.1.5. *Novolipetsk Steel OJSC (Russia)*

(25) The exporting producer first offered several MIPs per tonne depending on a product type. Then it amended its offer, proposing one MIP per tonne for all product types with an adjustment mechanism based on the average HRF prices. In addition, the exporting producer proposed a quantitative annual ceiling and undertook to sell only to its related company in the Union and only for further processing.

(26) The offer based on one average MIP is inadequate as it will not remove the injurious effects of dumping for all product types, in particular the most expensive ones. As acknowledged in recitals 632 and 655 of the definitive Regulation, the Commission considered that a measure in the form of a company-specific fixed amount per tonne reflected the injurious dumping found for the exporting producer more accurately than a MIP. It also ensures that, unlike a MIP, the duty removes the injurious dumping entirely, giving immediate protection to the Union industry. Furthermore, the offer covers transactions between related entities. The very nature of such relations presents numerous possibilities for cross-compensation. Any other transaction, loan or grant between the two related entities could be used to offset the MIP. The Commission is unable to monitor these transactions and it lacks appropriate benchmarks that would enable it to verify whether they are genuine or compensatory.

(27) The acceptance of the offer would also be impractical. Due to the global structure and sales activities of the exporting producer, the price undertaking proposed would be impossible to be effectively monitored, offering several opportunities for price cross-compensation. Furthermore, related companies in the Union also produce and sell the like product. It is thus impossible for the Commission to monitor these activities effectively.

(28) In response to the Commission's assessment the exporting producer argued that the Commission overlooked the two key elements of its offer namely the quantitative ceiling and the end-use commitment (i.e. further processing only). According to the exporting producer these two commitments ensure that exports at dumped prices would cease as the product concerned would not be exported to the Union free market. The exporting producer then argued that in the definitive Regulation the Commission did not find injury on the captive market. Despite these arguments, in the spirit of full cooperation, the exporting producer amended its offer, offering 22 MIPs based on product types. With regard to the risk of cross-compensation the exporting producer argued that, as there will be no sales to the free market, it is in fact irrelevant at which minimum price the product concerned is sold within the group. Since such minimum price is irrelevant, the risk of cross-compensation is equally irrelevant. The exporting producer further argued that intra-group transactions are subject to group's transfer price policy and thus cannot be used for cross-compensation.

(29) The exporting producer did not sell HRF to its related entities in the Union during the investigation period. In addition, contrary to what the exporting producer suggested, intra-group sales of HRF for further processing were not excluded from the finding of injurious dumping in the definitive Regulation. These sales are currently covered by the applicable duty and this finding cannot be reversed through an undertaking. Considering that the exporting producer's argument for impossibility of cross-compensation within the group hinges on an incorrect assumption that intra-group sales for processing do not cause injurious dumping, that argument was therefore rejected. Furthermore, the group's internal transfer policy is the group's own internal decision and as such it is not a sufficient guarantee against cross-compensation. Even if it were, cross-compensation within the group could be done via other means than a sale of goods. An undertaking covering related sales may be accepted only

if the product concerned is eventually re-sold to an independent customer and the MIP, appropriately adjusted, can be applied to those transactions. This is impossible if the product concerned is transformed into another product. The offer of 22 MIPs based on groups of product types could not be accepted as its effective monitoring by customs would be impossible.

2.1.6. *Metinvest Group (Ukraine)*

(30) The exporting producer proposed two scenarios in its original offer. The first scenario is based on one MIP per tonne (its average price during the investigation period, increased by the duty and adjusted for the increase of the price of the raw materials after the investigation period) and with possibility of selling below that MIP, under the duty. The second scenario is based on a lower MIP per tonne (without the adjustment for the increase of the price of the raw materials after the investigation period) and without possibility of selling below that MIP. Subsequently, the exporting producer amended its offer by adding an annual quantitative ceiling for sales under the undertaking.

(31) The Commission does not accept the so called pick-and-choose clauses whereby the exporting producer is allowed to sell within an undertaking and in parallel below the MIP under the duty, thus the only scenario open for consideration is the second one. Acceptance of such clause would allow for a cross-compensation mechanism where transactions at the MIP level could be offset by transactions at prices below MIP.

(32) Article 50 of the EU-Ukraine Association Agreement expresses a preference for undertakings, provided that the Commission receives a workable offer that is adequate and the acceptance of which is not considered impractical. In this case, for the reasons explained below, the Commission did not receive a workable undertaking offer and therefore the preference cannot be accommodated.

(33) In the Commission's assessment there are several reasons for which the offer is inadequate. It is based on one average MIP thus it will not remove the injurious effects of dumping for all product types, in particular the most expensive ones. As acknowledged in recitals 632 and 655 of the definitive Regulation, the Commission considered that a measure in the form of a company-specific fixed amount per tonne reflected the injurious dumping found for the exporting producer more accurately than a MIP. It also ensures that, unlike a MIP, the duty removes the injurious dumping entirely, giving immediate protection to the Union industry. The exporting producer did not propose an adjustment on the account of sales via its related companies. While the prices of HRF tend to vary significantly over time, the exporting producer did not propose an adjustment mechanism. Furthermore, only two out of the three production sites that exported the product concerned to the Union during the investigation period are covered by the undertaking. Finally, the exporting producer proposed that its sales to related entities in the Union would be covered by the terms of the undertaking. The very nature of such relations presents numerous possibilities for cross-compensation. Any other transaction, loan or grant between the two related entities could be used to offset the MIP. The Commission is unable to monitor these transactions and it lacks appropriate benchmarks that would enable it to verify whether they are genuine or compensatory.

(34) The acceptance of the offer would also be impractical. Due to the global structure and sales activities of the exporting producer, the price undertaking proposed would be impossible to be effectively monitored, offering several opportunities for price cross-compensation. The exporting producer has several related companies in various Member States and outside the Union, some of which produce and sell the like product. The exporting producer sells to the Union via one or more of these companies. It is thus impossible for the Commission to monitor these activities effectively.

(35) In response to the Commission's assessment, the exporting producer submitted a third version of its undertaking offer. In the new version of the offer the exporting producer proposed four different MIPs and undertook not to sell below them. According to the exporting producer this change was made despite the Commission considering a single MIP for all product types acceptable at a stage of the investigation that lead to the imposition of the duty. Furthermore, the exporting producer undertook to include the third production site in the undertaking offer; not to sell the product concerned via its related entities in the Union; to provide details of its sales in the Union of

other products to its Union HRF customers; and not to sell outside of the Union the product concerned and other products to its Union HRF customers. Finally, the exporting producer proposed a lower annual quantitative ceiling. Beyond that ceiling, the exporting producer offered to sell under the applicable anti-dumping duty.

(36) In addition to these commitments, during the consultations the Government of Ukraine proposed to provide the Commission with export statistics for the product concerned and to establish an expert group that would facilitate the exchange of statistics and other information.

(37) On 5 February 2018, the exporting producer made another amendment to its undertaking offer. The exporting producer argued that all of its sales are subject to strict price-making policy of the group and prevent cross-compensation. Furthermore, the exporting producer argued that the regular tax authorities' audits, both in the Union and in Switzerland, rigorously verify the pricing policies of the group. Despite these, the exporting producer undertook not to sell HRF produced in the Union and other products produced by its group to its HRF customers which buy the product concerned. This would apply to all of its customers except for one, who would be buying HRF from Ukraine, the Union and other products produced by the group.

(38) Concerning the comment that the Commission considered a single MIP for all product types acceptable at a stage of the investigation, the Commission noted that ultimately that solution was rejected. The reasons for this rejection were given in, among others, recitals 632 and 655 of the definitive Regulation, which are summarised in recital 33 above.

(39) The offer remains inadequate for several reasons. Out of the four MIP groups proposed there were barely any sales in one of them, there is a price variant in another and significant price variants in the remaining two groups. The MIPs, being based on the average prices in each group will therefore not remove the injurious effects of dumping for all product types, in particular the most expensive ones in each group. Furthermore, the levels of four MIPs were set in a completely arbitrary fashion. The Commission was presented with no data justifying the difference between the MIPs. Finally, whilst HRF prices tend to vary significantly over time, the exporting producer still did not propose an adjustment mechanism.

(40) The acceptance of the undertaking offer remains impractical. The exporting producer undertook not to sell any products to its Union customers' entities based outside of the Union. However, this undertaking covers only the three producing companies and omits dozens of its related companies including the Swiss trader. Even if all these companies were covered by the undertaking, considering the size of the exporting producer's group and that of their customer base, such commitment would be impossible to monitor. Furthermore, the exporting producer proposed to report on sales of other products to its HRF customers in the Union. However the Commission would not have the appropriate benchmarks in order to verify whether these transactions are of a compensatory nature. Whilst the exporting producer undertook not to sell via its related entities in the Union, these entities sell the like product on the Union market. Whilst these transactions may concern the same customers and thus can be used for compensation, they are completely outside of the scope of the undertaking.

(41) The amendment to the undertaking offer proposed on 5 February 2018 (i.e. to sell only the product concerned to all of its HRF customers in the Union, except for one), does not remove the abovementioned concern for the excluded customer. For the other customers, considering the size of the exporting producer's group, it would be impossible to monitor whether any of the companies related to the exporting producer sell other products to the Union HRF customers or their related entities. The internal pricing policies of the exporting producer and the customer it intends to sell to are not a sufficient guaranty against cross-compensation. Furthermore, the exporting producer failed to explain how tax authorities' audits in the Union and in Switzerland would detect cross-compensatory prices. Agreeing to sell a product at a price lower than otherwise would be demanded is not necessary an offence against a tax law. It is part of day-to-day price negotiations.

(42) Finally, the sales beyond the annual ceiling under the applicable anti-dumping duty cannot be accepted as they could be used for compensation. This is basically a variation of the pick-and-choose clauses described in recital 31 above, postponed in time. Therefore, by lowering the ceiling well below the historical annual export quantities, this new offer increases the risk of cross-compensation.

(43) Despite the preference for undertakings expressed in Article 50 of the EU-Ukraine Association Agreement, the offer cannot be accepted as it is inadequate. Had it been adequate, for the reasons outlined above, its acceptance would still be impractical. None of the concerns listed above would have been sufficiently addressed by the exchange of statistics and the creation of the expert group proposed by the Government of Ukraine during the consultation.

2.2. **Conclusion**

(44) For the reasons set out above the Commission cannot accept any of these undertaking offers.

2.3. **Comments of parties and rejection of the undertaking offers**

(45) The interested parties have been informed of the reasons underlying this decision and were given an opportunity to comment and to be heard. The Government of Ukraine was also offered consultation in accordance with Article 50 *bis* of the EU-Ukraine Association Agreement. Consultations took place with the Ukrainian authorities on 26 January 2018, with the Government of Ukraine providing written comments on 31 January 2018. In addition, a number of hearings with the exporting producers concerned and Eurofer, representing the Union industry, took place. All comments received throughout this process were addressed above. Neither the comments provided by interested parties, nor the consultations with the Government of Ukraine, led to a different conclusion than the rejection of the undertaking offers,

HAS ADOPTED THIS DECISION:

Article 1

The undertakings offered by the exporting producers in connection with the anti-dumping proceeding concerning imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine, are hereby rejected.

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, 8 March 2018.

For the Commission
The President
Jean-Claude JUNCKER