

Solar modules of non-European origin - what buyers should pay attention to

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The purchase of PV modules and cells of non-European origin is fraught with many pitfalls. Buyers and importers are often not aware that they may be held jointly responsible even for minor violations of the applicable anti-dumping measures and minimum price regulations for Chinese products. This may lead to heavy losses and in serious cases even to criminal prosecution.

Background: After the Commission found that Chinese companies were using anti-competitive practices, it imposed anti-dumping and anti-subsidy duties at an average of 50% on solar cells and modules made from crystalline silicon. The EU levies such duties in addition to the standard customs duty on products sold at dumped prices or benefiting from inadmissible subsidies. Their purpose is to offset an unjustified price advantage of products sold at below their normal price over products manufactured in the EU market.

To avoid payment of duties, the majority of exporting Chinese manufacturers made a commitment to the European Commission (so-called 'Undertaking') that they would not bring their products into the EU below a certain minimum import price. The EU accepted this undertaking and the duty measures (anti-dumping and anti-subsidy duties) for the imports concerned were suspended. Solar products by Chinese manufacturers who did not join the price undertaking continue to be subject to anti-dumping and anti-subsidy duties. The same applies to imports which do not comply with the terms of the undertaking as well as to imports from companies that are excluded from the Undertaking following a Commission finding of violations of the minimum import price

The levying of the whole anti-dumping duty is considered by the EU legislator as the base case. Any later levying of the anti-dumping duty due to violations of customs law by the importer is regarded as the usual business risk. All market participants are therefore obliged to exercise greater diligence and prudence. Anti-dumping duties on photovoltaic modules and cells are levied

- a) where products are dispatched directly from China. (The country of origin, even if different, does not matter here!)
- or
- b) where products originate from China. The country of origin of a PV module is the country where the majority of cells used in that module were produced.

Thus, the anti-dumping duty equally applies e.g. to PV modules produced in Taiwan with the majority of Chinese cells and to PV modules produced in China with Taiwanese cells.

1. Modules of Chinese origin (with Chinese cells) or dispatched from China

If you buy PV modules from a Chinese manufacturer it is important to check first whether the manufacturer has signed the undertaking. In such a case the manufacturer and its related parties (e.g. European distribution subsidiaries) are subject to certain obligations.

The undertaking obliges the manufacturer to comply with a certain minimum import price. The minimum price is not communicated to the public by the European Union. But there are enough reports published in the press according to which the initial minimum price for a module was € 0.56 /Watt and for cells € 0.28 /W. As of 1 April 2014, the prices were reduced to € 0.53/W (cells €0.27/W) and of October 1st at € 0.52/W (cells € 0.26/W). But since April 1st the minimum price has been re-established at 56 ct/W (and for cells, at 28 ct/W).

	Dec. 2013	1.April 2014	1.July 2014	1.Oct. 2014	1. Jan. 2015	1.April 2015
Module (ct/W)	56	53	53	52	52	56
Cell (ct/W)	28	27	27	26	26	28

The development of the MIP based on media releases.

This minimum import price is a net sale price including costs of transport and insurance valid throughout the EU incl. its external borders in case of immediate payment. Every service added to a pure supply made to the external borders of the EU must be included in the minimum price. These include e.g. payment deadlines, transport within the EU, sales support, warranties, credit notes of the manufacturer, or any kind of support in business transactions. Even in case of assistance from a sales employee or a branch office within the EU, the minimum price is to be increased by the monetary value of this service. This means that, depending on the terms and conditions of a given import, the actual minimum price of that purchase may be higher than the defined minimum import price. Therefore, as far as the purchase of PV modules from Chinese manufacturers who have signed the undertaking is concerned, the purchase price must not only equal at least the minimum import price but also it must cover the monetary value of all costs and services provided.

In case of imports, a commercial invoice and the so-called Export Undertaking Certificate are required. The invoice must contain the following data:

- Name of the enterprise which issues the commercial invoice;
- Invoice number and date;
- TARIC additional code under which the goods on the invoice are to be customs cleared at the EU frontier;
- exact description of goods, including: Product Code Number (PCN), the technical specification of the PCN, the goods code used by the enterprise, the CN code;
- quantity (in units, Watt);
- description of the terms of sale, including: price per unit (Watt), applicable payment terms, applicable delivery terms, total discounts and quantity rebates;
- Name and signature of the person responsible in the company who issued the commercial invoice.

The minimum import price applies naturally also where duty for the modules is paid and modules are bought e.g. by an EU or Swiss subsidiary of the Chinese manufacturer. In this case the purchase price must be significantly higher than the minimum import price, because according to the undertaking a flat rate margin of at least 5% for the resale price within the EU is charged. Furthermore, other cost elements must be taken into account, such as intra-Community transport costs and costs associated with customs treatment. Thus, the purchase price charged to European subsidiaries should exceed the minimum import price by c. 10%. This assessment is based on many factors, such as current legislation applicable to any given transaction, corporate structure (as far as cost intensity on the seller's part is concerned) etc. For this reason, the actual rate might differ from that approved during a corresponding check. If the purchase price is below the minimum price, this may lead to subsequent customs claims and the removal of the undertaking benefits for the supplier involved going forward.

Even if modules of Chinese manufacturers who have signed the undertaking are bought in Europe from an independent European dealer, the purchase price should be higher than the minimum import

price. If the dealer sells at a price below or exactly at the minimum import price, it is a strong indication of an actual breach of the minimum price regulation under the undertaking, because the dealer also incurs expenditures and costs and it should be assumed that he will have a margin on the transaction, even if it is low. All these factors are to be considered in relation to the minimum import price.

The same applies to purchases from independent third parties, where the manufacturer has a subsidiary in the EU. Whenever the goods are not purchased directly from the manufacturer and the import is made by the buyer itself, the purchase price should be above the minimum import price – this is the only way to avoid a higher risk.

Apart from the minimum import price, the undertaking stipulates also an anti-circumvention provision pursuant to which the parties are not allowed to e.g. make compensating transactions. Compensating transactions are presumed to exist in particular where transactions are composed of –besides the underlying purchase– other legal transactions that must be carried out with a certain cash flow necessary for the minimum import price to be reached at least on paper. E.g. the target purchase of modules of different origins and for different prices might be deemed a compensating transaction, if it is effectively bound to the condition that the 'more expensive' Chinese modules must be purchased along with the 'more affordable' modules with origin in a different country, so as to comply with the minimum import price. The mix of origins of the modules by the same manufacturer, e.g. modules of Chinese and Turkish origin, should be absolutely avoided as this entails a great risk.

Apart from classic sales contracts, additional agreements are often signed, e.g. advertising and marketing contracts, where money goes back to the seller and which, therefore, constitute a breach of the minimum import price. Fictitious indemnity claims or warranty payments have the same effect. Further possible breaches may be reserve supplies (e.g. 10 ordered, 11 supplied in case of failure), commission rules, misstatements on performance declarations (e.g. the 260th module supplied as module 250+), coupling with other products (e.g. less expensive inverters or frames). This list of examples is far from complete. There is a great number of possible and actually offered methods of circumvention which are forbidden under the price undertaking and may give rise to retrospective custom claims.

2. Modules of non-Chinese origin

Modules of non-Chinese origin, even if not dispatched from China to the EU, may also involve higher business risks. The undertaking forbids also changing marketing strategies and the pattern of trade of Chinese manufacturers, if this leads to a circumvention of the anti-dumping regulations. When a Chinese manufacturer suddenly offers modules of Taiwanese or Japanese origin, the seller should take into account the possibility of a retrospective customs claim. Moving of production is equally critical such as the establishment of new production facilities in neighbouring countries like Malaysia etc. This also refers to products of so called OEM-producers (Original Equipment Manufacturers), i.e. producers that are producing for Chinese companies.

As a general rule, as far as PV modules of non-Chinese origin are concerned, the purchase price may be lower than the minimum import price, but the purchaser must exercise particular care to ensure the modules in question are in fact not of Chinese origin. The purchase of such modules requires agreeing with the seller on contractual provisions concerning the origin of the modules, so that if problems

occur after the delivery of the goods, the buyer's right to claim damages is expressly reserved. In addition to the contractual provisions concerning the origin of the PV modules, a sample testing of the purchased products should also be carried out. The imposition of anti-dumping duties increases the risk that the origin of the PV modules will be misstated in order to circumvent the payable custom duties. Cases have been reported where the customs authorities seized modules, although the European importer had already paid for them or paid an advance. For this reason the buyer should check the supplier with due care prior to the purchase of the modules and demand proof of origin of the PV modules. It should be noted again at this juncture that both the delivery from China and the use of cells mainly from China give rise to the charging of the anti-dumping duty. False information on the origin may lead to retrospective customs claims and further fines, if a party participates in the transaction at least through negligence.

3. Consequences of violations

Pursuant to customs law, customs and anti-dumping duties may be collected retrospectively for three years. The first step is the retrospective collection of duties from the importer of the PV modules, the so called declarant. However this risk also weighs upon the other companies in the supply chain, like wholesalers and installers.

Transactions which lead to an effective circumvention of anti-dumping regulations, like the circumvention of minimum import prices, entail the possibility of a customs claim in future. Tax law and tax criminal law provide for a number of instruments that allow access to the goods, even after the duty is paid. Thus, modules may be seized alone to serve as security for subsequent customs claims. For example, if an importer becomes insolvent and cannot meet the subsequent customs claims, the customs authorities can seize the imported modules, irrespectively of the fact who the owner of those modules is and where the modules are installed and used. The seizure can, thus, weigh upon any of the supply chain partners. In addition, criminal tax investigation may be instituted against the buyers. In principle, even a price below the minimum import price or a minor difference between the minimum import price and the purchase price can give rise to a suspicion concerning the participation in such an attempted circumvention. It takes a great deal of effort to be declared free from the accusation. According to European customs law, the customs authorities are authorised to conduct a very broad examination which allows exposing any circumvention easily. Every person indirectly involved in cross-border movement of goods, i.e. also the purchaser of modules being customs cleared, is liable to disclose information to the customs authorities and is required to present at their requests relevant documents such as purchase agreements, invoices and proofs of payment.

4. Risk reduction measures

Therefore, the buyer should always carry out a detailed assessment of the seller and the purchase agreement, especially as far as pricing is concerned. For example, a contract stipulating that products of non-Chinese origin may be bought for a certain price below the minimum price only if they are bought along with Chinese products leads to a circumvention of the legal regulations.

Buyers can protect themselves against it by drafting civil law contracts in a certain way. But this relates only to a claim under civil law, e.g. for damages, and can never completely rule out the risk of legal liability concerning retrospective customs claims and the possibility of seizure.

Thus, when buying PV modules of Chinese origin the following questions should be taken into account:

- Has the manufacturer signed the price undertaking?
- Is the manufacturer associated with a Chinese manufacturer who has signed the price undertaking?
- Are the PV modules of Chinese origin (cells from China) or are they sent from China?
- Can the seller be trusted and is he reliable?
- Who is responsible for the clearance of the PV modules?
- Is the purchase price higher than the minimum import price?
- Has the seller changed his pattern of trade since the imposition of anti-dumping duties? Have the statements and information provided by the seller, in particular concerning the origin of the modules, been sufficiently evidenced and documented?
- Are there any contractual terms which effectively circumvent the minimum import price?
- Are there any cash flows, bundle transactions or other agreements which effectively circumvent the minimum import price?
- Has the origin of the PV modules been contractually secured?
- Does the country of origin correspond with the supporting documents and the products and is it plausible?
- Do I have a civil-law claim for damages in case of potential retrospective customs claims?

Note:

Because of the complex factual and legal situation this text is not to be regarded as complete or as a legal opinion. It also does not replace any case-by-case appraisal in terms of tax law.

Negative-Checklist

If one of the following circumstances occurs you'd better refrain from this transaction:

- I am not sure about the origin of the modules.
- The origin (as far as other than China) has not been warranted to me in the contract.
- The manufacturer claims that the country of origin is not China, but I do not know whether he is engaged in the manufacture there.
- The manufacturer has changed his pattern of trade since the imposition of anti-dumping measures and the minimal purchase price. The manufacturer claims that he neither uses Chinese cells nor delivers the module from China, but I know that he is a Chinese company or is engaged in the manufacture there.
- The price is lower than the minimum price I know.
- The price equals the minimum price or is only a bit higher, but it is composed of more services than only the delivery of goods to the port of entry with cash payments.
- The price is higher than the minimum price by less than 5%, although the manufacturer has offices and representatives in Europe.
- The manufacturer offers benefits apart from the delivery of modules.
- The modules' peak power exceeds the values stipulated on the invoice.
- I am offered a part of the delivery on a commission basis.
- I am asked to sign a marketing agreement before I am offered a specific price.
- The manufacturer is not able to show me any export licence issued by the Chinese Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME).
- The manufacturer offers transfers of payments via offshore accounts.
- The manufacturer offers besides delivery of modules also delivery of inverters, frames and other materials.
- The supplier owns no business premises or storage facilities in the EU („flying trader“) and even has an overseas address and account.
- The manufacturer/supplier fails to answer all my questions satisfactorily and in writing.
- The supplier does not secure me any civil claim for damages in case of potential customs claims.