



EUROPEAN COMMISSION
Directorate-General for Trade

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Genel
B 27/2

NOTE VERBALE

The European Commission presents its compliments to the Mission of the Republic of Turkey to the European Union.

The European Commission would like to take the opportunity to express its highest considerations to the Republic of Turkey for revoking the measure subject to an investigation under the EU's trade Barriers Regulation on the monitoring and surveillance system applied by the Republic of Turkey to the importation of uncoated wood free paper products and the related effects of this measure.¹

The report of the investigation has been finalised and is hereby provided for information to the Republic of Turkey. In view of the fact that the Republic of Turkey revoked the measure, the European Commission recommends not pursuing the investigation further.

The European Commission regrets, however, the Republic of Turkey has not acted to resolve the problem with the surveillance system as a whole and would, therefore, continue to monitor the situation.

The European Commission takes this opportunity to renew to the Mission of the Republic of Turkey to the European Union the assurance of its highest consideration.

Brussels,

Republic of Turkey
Diplomatic chancellery
Avenue des Arts 36-38
1040 Bruxelles



¹ Official Journal of the European Union C 218/20 of 7.7.2017



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REPORT TO THE TRADE BARRIERS COMMITTEE

EXAMINATION PROCEDURE CONCERNING AN OBSTACLE TO TRADE WITHIN THE MEANING OF REGULATION (EU) 2015/1843 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 6 OCTOBER 2015 LAYING DOWN UNION PROCEDURES IN THE FIELD OF THE COMMON COMMERCIAL POLICY IN ORDER TO ENSURE THE EXERCISE OF THE UNION'S RIGHTS UNDER INTERNATIONAL TRADE RULES, IN PARTICULAR THOSE ESTABLISHED UNDER THE AUSPICES OF THE WORLD TRADE ORGANIZATION (CODIFICATION), CONSISTING OF MEASURES ADOPTED BY TURKEY AFFECTING TRADE IN UNCOATED WOOD FREE PAPER

COMPLAINT SUBMITTED BY THE CONFEDERATION OF EUROPEAN PAPER INDUSTRIES ("CEPI")

15 February 2018

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I. Executive Summary

On 2 May 2017 the Commission registered a complaint lodged by the Confederation of European Paper Industries ("CEPI") on behalf of the Union paper industry against the surveillance system applied by Turkey to the importation of uncoated wood free ("UWF") paper. That import surveillance system, would apply only to uncoated wood free paper imported into Turkey at a customs value of USD 1,200 per tonne or less. An importer has to apply for and obtain a surveillance certificate in order to import such paper for USD 1,200 per tonne or less into Turkey. In order to obtain a certificate an importer has to provide extensive information which would normally be considered business confidential, such as the cost of production of uncoated wood free paper. It is practically impossible for an importer to collect and provide such information. For this reason, importers would declare a customs value above USD 1,200 per tonne when the actual transaction value is less than USD 1,200 per tonne. There are no customs duties between the EU and Turkey. However, importers in Turkey have to pay the value added tax ("VAT") before the goods are customs cleared. The VAT is determined on the basis of the customs value. A customs value higher than the actual transaction value would render a higher amount of VAT. Turkey does not refund excess VAT and such VAT can also not be considered as cost for tax purposes.

The legal analysis concludes that it could be claimed that the surveillance system for UWF paper has introduced a *de facto* ban on the importation of UWF paper with an average unit price per tonne of below the threshold price of USD 1,200. The surveillance system applied to UWF paper could also be considered a quantitative restriction on trade prohibited by Article XI:1 of the GATT 1994 and a violation of Article 3.2 of the Agreement on Import Licensing Procedures. Furthermore, there are sufficient grounds to argue a violation of Article III:2, first sentence of GATT 1994. As Article 5 and Article 50 of Decision 1/95 on the Customs Union correspond to Article XI and Article III of the GATT, it could also be considered that the surveillance system would also be inconsistent with Turkey's obligations under its bilateral agreement with the EU.

The surveillance system could have the following adverse trade effects on the EU industry: (i) additional administrative burden and delays at customs; (ii) financial burden resulting from the excess VAT; (iii) loss of business opportunities; (iv) loss of competitiveness; and (v) loss of expertise. The claim of threat of adverse trade effects seems, therefore, imminent and real. The EU has a general and systemic interest in maintaining the observance of international trade rules among its trading partners. Furthermore, the Turkish export market is important for EU industry. It is in the EU's interest to support the EU industry.

On 7 December 2017 the Ministry of Economy revoked the measure with regard to UWF paper. In view of the fact that the surveillance system continues to exist and could be re-introduced for UWF paper products, it is proposed to suspend the examination procedure. The Commission will continue to monitor the situation.

II. Introduction

On 2 May 2017 the Commission registered a complaint lodged by the Confederation of European Paper Industries (“CEPI”) on behalf of the Union paper industry pursuant to Article 3 of Regulation 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (Trade Barrier Regulation).

The contested measure concerns an import monitoring and surveillance system applied by Turkey to the importation of uncoated wood free paper products and the related effects of this measure on the declared customs value and the possibility to obtain compensation for input VAT payable on importation.

The product affected by the contested system is uncoated wood free paper manufactured in the EU and classified under the following HS codes: 4802.55.15.10.00, 4802.55.25.10.00, 4802.55.30.10.00, 4802.55.90.10.00, 4802.56.20.20.00, 4802.56.80.10.00, and 4802.57.00.10.00.

The Commission found that the complaint provides sufficient evidence to initiate an examination procedure and such procedure was initiated on 7 July 2017 by a Notice of Initiation (2017/C 218/11)¹.

The present report is based on the information collected by the Commission in the context of the procedure set out below.

III. Procedure

Following the initiation of the examination procedure, the Commission informed the European exporting producers who had raised the problem in the past and examined the evidence provided by the complainant and those exporting producers.

On 17 October 2017 the Commission held a hearing with the complainant CEPI, which provided additional information.

On the basis of all collected information, the Commission sent a questionnaire to Turkey on 24 October 2017. Turkey declined to respond to those questions but proposed to discuss with the Commission possible solutions.

Given the complexity of the examination the Commission extended the period identified in Article 9(8) of the Trade Barrier Regulation until 7 February 2018.

On 4 December 2017 the Commission sent questionnaires to the EU exporting producers that showed interest in the procedure. Those EU exporting producers who referred to their past submissions and evidence did not respond to those questionnaires within the deadline set by the Commission.

¹ OJ C 218 of 7.7.2017, p. 20

The Communiqué on uncoated wood free (UWF) paper was revoked by a Communiqué adopted by the Ministry of Economy and published in the Official Gazette of the Republic of Turkey No 30263 of 7 December 2017. As of 7 December 2017 the imports of UWF paper are no longer subject to surveillance.

IV. Factual Background

In 2004 the Turkish authorities established a framework for an import surveillance system.

1. The Decree

On 10 May 2004 the Council of Ministers² adopted Decree No 2004/7304 on import surveillance which was published in the Turkey's Official Gazette of 29 May 2004, No 25476. Article 1 of the decree lays down the procedures and principles for the surveillance of imports with the objective of closely following up the import trends related to a particular good. The decree does not provide any detail on the objectives and the functioning of the surveillance system.

The Directorate General for Imports can subject goods to surveillance either upon a request or *ex officio*. Pursuant to Article 4 the assessment should consider the import trends and conditions and the impact on domestic producers. Surveillance may be applied both *ex tunc* and *ex nunc*. Any good subject to surveillance should be imported with a surveillance certificate, a document which has to be provided to customs in addition to the normal customs documents. Pursuant to Article 5 the decree does not preclude the application of the obligations arising from international agreements. Pursuant to Article 6 the principles and procedures governing the implementation of this decree are laid down in a Regulation.

2. The Regulation

The Regulation on import surveillance was published in the Official Gazette of 8 June 2004, No 25486. Article 3 specifies that the Directorate General for Imports takes the decision to subject a good to surveillance based on an assessment which considers the import trends and conditions and the impact on domestic producers. Article 4 refers to the surveillance certificate which should be issued free of charge within 10 working days from the date of submission of a duly completed application. Article 3 also clarifies that the principles and procedures concerning the surveillance and the undertakings to be received from applicants are laid down in Communiqués.

3. The Communiqués and their operation

Since 2004 Turkey has adopted about 160 Communiqués covering about 900 tariff lines. Most of the communiqués list tariff lines and a unit price as follows:

² The decree is based on Article 1 of the Law of 20/2/1930 No 1567 (amended 15/2/1954, 6258/1), Article 2 of the Law of 14/5/1964 No 474 (amended 25/6/1992, 3824/15), Article 2 of Law of 6/5/1986 No 3283, Article 55 of Law of 27/10/1999 No 4458 (customs law) and the Law of 2/2/1984 on the Regulation of Foreign Trade No 2976. Those provisions empower the Council of Ministers to make decisions on the applicable customs duties, taxes and fees related to imports, customs-approved treatment or use of goods, including the restrictions on imports in specific cases and the levying and lifting of additional financial obligations other than tax on imports. None of those provisions explicitly allows the Council of Ministers to introduce the surveillance system.

Tariff line	Description	Unit customs value (USD/tonne)
XXX	YYYY	value

The imports subject to surveillance are those whose customs value is below the value indicated in the relevant Communiqué. Those importers have to request a surveillance certificate the validity of which is usually 6 months after which a new application has to be made. The threshold value determined by the Directorate General for Imports is usually the highest of the average import value for the past five years, which means that the majority of the importers should be requesting a surveillance certificate. To date, however, the EU has no knowledge of a surveillance certificate actually been requested and issued for any product.

This is due to the administrative burden related to such a request. The communiqués provide typically that the application for a surveillance certificate should contain a surveillance application form (information about the importer, including the total value of imports and the total value of tax paid for the last 2 years), certified signatures of authorised persons of the importers and copies of the invoices. In addition, the communiqués provide that following the submission of surveillance application form and the other documents, additional information and documents may be requested if deemed necessary by the Directorate General for Imports. If there are inconsistencies in the provided information then simply no surveillance certificate is issued. One company that cooperated with the Commission provided the additional information requested in order to obtain a surveillance certificate. The requested information includes not only the cost of production e.g. as regards raw materials and overheads but also information such as the number of workers and their average salary of the producer of the product concerned. In view of the confidential character of such information unrelated importers would in general not be in a position to provide such information. Furthermore, neither the decree, nor the regulation, nor the communiqués guarantee any confidential treatment of such information.

A study commissioned by the Central Bank of the Republic of Turkey confirmed in 2013 that the declared customs values exceed the prices actually paid for the imported products and as a result of the surveillance system the customs statistics of Turkey no longer reflect the real import price of the products.³

As it appears that importers are not requesting a surveillance certificate, in order to import into Turkey the importers have to increase the customs value, to avoid having to provide the detailed confidential information required for obtaining the surveillance certificate.

4. The Circular of 2012

The question is how to declare customs value that is higher than the actual transaction value to enable customs clearance if surveillance certificate is not submitted. The Directorate General for Customs issued a Circular (2012/3) on 7 February 2012 "Surveillance practices based on the criteria of value" to clarify this. Under point 3 it is explained that an additional declaration can be made via BİLGE program where the difference between the transaction value and the value based on the threshold value is declared as "Other Overseas Expenses". The final customs value is a value equal or exceeding the threshold value set out in the

³ Import Surveillance and Over Invoicing of Imports in Turkey, Working Paper No. 13/01 of January 2013 by Zelal Aktas and Altan Aldan

relevant Communiqué, thus enabling customs clearance with no surveillance certificate. The Circular also clarifies that importers that use this flexibility must submit a commitment declaring that they will not challenge in court or otherwise the value thus declared. Such a commitment reads as follows:

"In connection with the product under number dated ... as indicated in ... which we will import under the release for free circulation and which is registered by your Office in the name of our Company; the relevant item has reached the value specified in the Communiqué by adding additional value to the Part 'Other Overseas Expenses' according to the Surveillance Communiqué no XXX. Therefore, we hereby declare and commit that we will not make any reservations with regard to the product to be imported by us in accordance with the Circular No 2012/3, and kindly ask for your instructions and permissions."

Finally, the Circular (through modification of Point 3 on 29 November 2016) provides that if an importer challenges the customs value in any way, it will no longer be able to rely on the flexibility of declaring other overseas expenses and will have to apply for a surveillance certificate, if its imports are below the threshold value in the relevant Communiqué.

5. The Communiqué on uncoated wood free paper

On 28 August 2015 the Ministry of Economy published in the Official Gazette No 29459 a Communiqué on Implementation of Inspection in Importation No 2015/6 (UWF Paper Communiqué). The Communiqué subject imports of UWF paper of a unit price below 1,200 USD/tonne to surveillance.

C.T.C	Description	Unit customs value (USD/Tonne*)
4802 55 15 10 00	Printing paper (in rolls; weighing \geq [greater than or equal]40 m ² /gr < [less] 60 m ² /gr)	1200
4802 55 25 10 00	Printing paper (in rolls; weighing \geq 60 m ² /gr but <75m ² /gr)	
4802 55 30 10 00	Printing paper (in rolls; weighing \geq 75 m ² /gr) <80 m ² /gr)	
4802 55 90 10 00	Printing paper (in rolls; weighing > 80 m ² /gr)	
4802 56 20 20 00	Photocopy paper(A4 weighing \geq 40 m ² /gr) <150 m ² /gr)	
4802 56 80 10 00	Printing paper (with other dimensions; weighing \geq 40 m ² /gr) <=150 m ² /gr)	
4802 57 00 10 00	Printing paper (others in sheets ; weighing \geq 40 m ² /gr) <=150 m ² /gr)	

* Gross weight

Based on the import statistics provided in Annex G to CEPI complaint it can be established that the average price in USD per tonne for the UWF paper products covered by the Communiqué from all countries is as follows:

All countries	2010	2011	2012	2013	2014	2015	2016*
USD/tonne	[900 – 1100]	[1000 – 1300]	[950 – 1150]	[950 – 1150]	[1000 – 1200]	[1000 – 1200]	[1300 – 1500]

It seems that the average price set out in the Communiqué is the highest in the last 5 years. While in 2014 the biggest importers in Turkey in terms of quantities were Russia, the USA and Germany, in 2016 these were China, Indonesia and Russia. Imports from the USA, which were traditionally valued at about USD [700 – 900] per tonne, have decreased significantly. It seems that the price depends on the type of UWF paper being imported with Germany being in the high-end of the market (traditionally USD [1,500 – 3,500]/tonne) and Sweden in the lower end of the market (traditionally USD [700 – 900]/tonne).

Pursuant to Article 3 of the UWF Paper Communiqué in order for "*applications concerning requests for surveillance document to be evaluated, forms in Annex 1, Annex 3, Annex 4, Annex 5 and Annex 6 shall be duly filled in and submitted in complete form along with the documents listed in Annex 2, to the Directorate General for Imports*". Furthermore, pursuant to Article 4 of the UWF Paper Communiqué "*following submission of the documents listed in Article 3 to the Directorate General for Imports, additional information and documentation may be requested in cases where the DG Imports deems necessary*".

It follows that an importer must provide all the information in Annexes 1 to 6 in order for its application to be considered (not accepted). The importer can be requested further information and does not know whether it will be issued a certificate or not. The Communiqué does not oblige the Turkish administration to issue a certificate even if all the information is provided. The Regulation specifies only that an application will be denied, if there are inconsistencies in the provided information. The issuance or refusal of the surveillance certificate is therefore non-automatic and at the discretion of the Directorate General for Imports.

The Annexes require the provision of the following information:

Annex 1 – (i) information about the importer, including the total value of imports for the last two years and the taxes paid for the last two years; (ii) information about the declarant if different from the importer; and (iii) information about the product, including volume and value FOB and CIF.

Annex 2 – (i) original or notary-certified copy of authorised signatures and power of attorney, where relevant; and (ii) two copies of the invoice.

Annex 3 – (i) information about the producer, including total value of production, year of begin of production, produced products, number of workers and average monthly salary, etc; (ii) information on the product concerned for the last 5 years, including production capacity, total production, total domestic sales, total exports, end stock, number of workers employed, average monthly salary per worker, production date of the imported products; and (iii) cost of production, cost of raw materials per raw material, cost of industrial overheads per type of overhead, selling administrative and general expenses and any financial costs. This form has to be certified by the Turkish consulate in the country of supply after it has been certified with the local authorities.

Annex 4 – (i) information about the importer, its shareholders of the company and whether it possesses warehouses; (ii) information about the imported products and the reason for importation; (iii) detailed information of contacts with foreign producers/exporters, including e-mails of initial contacts, whether inspection visits were conducted, the payment and guarantee terms, etc.; (iv) information on the uses of the imported product, the distribution channels; (v) information about whether the goods are the subject of licensing, IPs, etc.; (vi)

information about the domestic and imported prices of the goods and the consumer preferences; (vii) other information such as the production process, the main sources for the purchase of the imported product and domestic market demands.

Annex 5 – Economic indicators' chart where the importer is the producer, including the volume and value of production, domestic and export sales, net turnover, cost of production, operational costs, net costs of financing, capacity and capacity utilisation, average remunerations, amortisation, total equity, turnover, non-operational income, profit and tax paid. This form is to be filled for each product produced separately.

Annex 6 – Economic indicators' chart of the importer, including domestic and export sales, net turnover, operational costs, net costs of financing, commercial cost, average remunerations, amortisation, total equity, turnover, non-operational income, profit and tax paid. This form is to be filled for each product separately.

If an importer produces all this information, its certificate will be valid for 6 months after which this importer will have to repeat the process and provide updated information.

6. The problem with regard to UWF paper

6.1. Impossibility to obtain a surveillance certificate

As the General Directorate of Imports requires the provision of extensive confidential information for obtaining a surveillance certificate, unrelated importers are in practice unable to apply for and receive such a certificate. Importers that are also producers are not willing to provide such information in view of the cost related to compiling it and the absence of any guarantee for confidential treatment.

Importers are, therefore, forced to declare a higher customs value.

6.2. The cost of declaring a higher customs value

The economic problem with this practice is that the customs value and not the transaction value is the basis on which both customs duties and value added tax (VAT) are determined and collected.

Due to the free movement of goods provided by the EU-Turkey Customs Union Agreement (EU-Turkey Association Council Decision No 1/95⁴), no customs duties are collected. In addition, Turkey applies zero customs duties to imports from any country for the tariff lines subject to the UWF Paper Communiqué.⁵ For this reason customs duties are not considered in this report.

Pursuant to the Turkish VAT Law⁶ the act of importation is a taxable event for VAT purposes. Pursuant to Article 21 of the same law the VAT to be paid by the importer is calculated on the basis of the "customs value" of the imported goods. The standard VAT rate

⁴ [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21996D0213\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21996D0213(01):EN:HTML)

⁵ See the Turkish Customs Tariff (2016) <http://english.gtb.gov.tr/trade/customs/import/duties-and-taxes/normal-customs-clearance/customs-tariff/turkish-customs-tariff-2016>

⁶ Turkish VAT Law No 3065, published in the Official Gazette No 18563 on 2 November 1984

is 18%. There are also two reduced VAT rates of 1% and 8%. The UWF Paper is subject to 8% VAT rate.⁷

So in order to avoid requesting a surveillance certificate an importer of UWF paper provides an additional declaration duly reflecting the "other overseas expenses" and declares that it will not challenge this customs value in any instance in Turkey or otherwise. As a consequence its customs value exceeds the transaction value in most of the cases.

The problem can be illustrated as follows:

	USD/tonne	USD/ 20 tonnes
Transaction value	900	18,000
Customs value	1,200	24,000
VAT 8 % of transaction value	72	1,440
VAT 8 % of customs value	96	1,920
VAT difference	24	480

For every imported tonne of UWF paper an importer has to pay USD 24 more than it would have paid, if it had declared the transaction value. In Turkey excess amount of VAT is not refunded but can be carried over for an undetermined time-period.

7. Turkish VAT system

Registered taxpayers, such as all Turkish importers, are entitled to a deduction of the input tax paid on importation of goods against the output tax computed within the scope of their business or professional activities (article 29(1)(b) of the VAT Act). Where the total amount of input VAT exceeds the total amount of output VAT, the excess amount is carried over to the following period(s).

Considering that the surveillance system impacts VAT on importation and follows regular Turkish VAT rules, import VAT is treated as a deductible VAT (input VAT) which can be offset against collected VAT (output). However, the economic value of the imported goods is significantly lower (for both import and for resale to Turkish end-customer) than the threshold price per tonne established by the UWF Paper Communiqué. As a direct consequence, input VAT will significantly increase and the importer will be in a constant VAT credit position, knowing that any excess input VAT cannot be cash refunded, except in limited situation zero rated transaction such as export for which importers are rarely concerned. The excess amount is allowed to be carried forward without any time limitation.

Turkish tax payers facing input VAT problem due from the application of the "surveillance" system have asked for tax rulings from the Ministry of Finance. The tax rulings could be summarised as follows:

Tax Ruling dated 14.08.2012 and numbered B.07.1.GİB.4.01.16.02-2011-4696-KDV-88:

⁷ The present Turkish rate of VAT on taxable transactions and importations is determined by Decree 2007/13033. Pursuant to List 2, point 13 of the Decree, the UWF paper products are subject to 8% VAT rate.

“.....Input VAT incurred by your Company due from the surveillance application for goods imported from China will be treated as “input VAT”. In case the input VAT cannot be recovered, then the non-recovered amount can be transferred to the following periods”.

Tax Ruling dated 28.12.2011 and numbered B.07.1.GİB.4.01.16.02-2011-2507-KDV-105:

” It has been understood that your Company is importing and selling porcelains in the domestic market where it has been asked whether input VAT due from surveillance application can be treated as input VAT. VAT calculated over the value determined by the customs for the imported goods under surveillance application can be treated as « input VAT » by your Company. In case the input VAT cannot be recovered, then the non-recovered amount can be transferred to the following periods.”

In addition, input VAT due from surveillance application cannot be treated as cost of goods imported.

In a tax ruling issued by Ministry of Finance dated 17/08/2012 and numbered B.07.1.GİB.4.35.17.01 35-02-789, it is stated that;

*“Input VAT incurred by your Company due from the surveillance application for goods imported should be treated as input VAT. In case input VAT cannot be recovered, **it cannot be treated as deductible expense during the calculation of corporate tax base**”.*

It follows that the excess input VAT is a cost for the importers but cannot be used as a cost of business and deducted from the taxable basis of the importers. In practice, it is an additional cost for the importers that cannot be absorbed.

The importers that are likely to be affected the most are those that are not able to generate sufficient output VAT to compensate for the higher input VAT. These would be importers specialised in UWF paper, importers importing only goods subject to surveillance and small and medium sized importers that cannot absorb the increased input VAT.

V. Legal Assessment

The assessment is based on the surveillance system as applied to the UWF Paper.

1. Inconsistency with Article XI of the GATT 1994

Article XI of the GATT 1994 provides that no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through ... other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member.

The surveillance system introduced by Turkey, including the decree, the regulation, the circular of 2012 and the UWF Paper Communiqué (the measure), aims at monitoring the trade flows but imposes burdens on importers which are not proportionate to the objective of the measure. The burdens are either (i) produce very detailed confidential information of the type required in a trade defence investigation; or (ii) declare a higher customs value.

The panel in Japan – Semi-conductors (1988) noted that the wording of Article XI:1 is comprehensive as it applied to all measures restricting the importation of products other than

measures that take the form of duties, taxes or other charges.⁸ The surveillance system as applied to UWF paper could, therefore, be covered by Article XI of the GATT 1994.

1.1. Import of a good with a value below a threshold value

The surveillance system establishes a requirement to obtain a surveillance certificate in order to import goods with unit value below a certain threshold value determined in a Communiqué. In practice, this appears to be a non-automatic licensing. The licensing is non-automatic as pursuant to Article 3 of the UWF Paper Communiqué the provision of the information in Annexes 1 to 6 is just the condition for the "consideration" of the application and pursuant to Article 4 of the same Communiqué additional documents and information may be requested. The issuance of a surveillance certificate seems to be discretion of the Directorate General for Imports. Article XI of the GATT 1994 applies to a discretionary and non-automatic licensing system.⁹

The application for a surveillance certificate for UWF Paper has to contain very detailed information not only with regard to the importer but also with regard to the exporting producer. This information is not likely to be provided to an unrelated importer and is too burdensome to collect for a related importer. According to the complainant CEPI no importer of UWF Paper has applied for a surveillance certificate.

It could, therefore, be claimed that the surveillance system for UWF paper has introduced a *de facto* ban on the importation of UWF paper with an average unit price per tonne of below the threshold price of USD 1,200.

Turkey could try to rely on any of the defences set out in Article XI and XX of the GATT 1994. However, it is likely that Turkey would fail to convince a WTO adjudication body.

None of the available defences, such as protection of public morals, health, environment, conservation of exhaustible natural resources, compliance with laws and regulations, etc., seems to be applicable.

Furthermore, the information requested from the importers, including confidential financial information of the producer, goes way beyond what is necessary to achieve the objective of the measure. Pursuant to Article 1 of the decree, its objective is to closely follow the import trends related to a particular good. According to Article 4 of the Decree and Article 3 of the Regulation the assessment whether to include a good in the list of goods for surveillance should take on board the import trends and their impact on domestic producers. According to the study commissioned by the Central Bank of the Republic of Turkey the main purpose of this mechanism is to monitor the import prices and see whether imports bring unfair competition in the domestic market.¹⁰ So objective of the measure is limited to monitoring of import and domestic prices. The information requested from UWF paper importers goes way beyond import quantities and prices.

The measure could, therefore, be considered a restriction prohibited under Article XI of the GATT 1994 which does not seem to be justified.

⁸ Panel Report, *Japan – Semi-conductors* (1988), para 104.

⁹ Panel Report, *India – Quantitative Restrictions* (1999) and Panel Report, *China – Raw Materials* (2012).

¹⁰ See footnote 3

1.2. Import of a good with a customs value equal or higher than a threshold value and a transaction value lower than the same threshold value

As UWF paper importers are unable to obtain surveillance certificate, they have to declare a higher customs value. In this sense, the measure works similarly to a minimum import price. In *EEC — Programmes of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* a minimum import price system has been considered to be a restriction within the meaning of Article XI:1.¹¹ In *China — Raw Materials*, the Panel found that a minimum export price requirement is a quantitative restriction on trade prohibited by Article XI:1 of the GATT 1994.¹²

The measure, however, does not require that the transaction value is above a certain level but that the declared customs value is equal to or higher than the threshold value of USD 1,200 per tonne. As a consequence the importers pay excess VAT than they would have normally paid. This amount can neither be refunded, nor deducted from the taxable base of the importers. Importers are thus dissuaded from importing UWF paper in Turkey. The surveillance system applied to UWF paper could, therefore, be considered a quantitative restriction on trade prohibited by Article XI:1 of the GATT 1994. As explained above, there does not seem to be a justification for that measure under the GATT.

2. Inconsistency with Article III:2 of the GATT 1994

The threshold price set out in the UWF Paper Communiqué, the declaration of a customs value in excess of the transaction value and the resulting payment of the excess VAT (collectively called the measure at issue) could be considered not only a quantitative restriction on the importation, but also a discriminatory tax. The panel in *India — Autos* (2002) did not exclude the application of both Article III and Article XI of the GATT 1994 in certain circumstances.¹³

Article III:2 of the GATT 1994 reads in the context of the surveillance system with regard to UWF paper as follows: *the products of the territory of any WTO Member imported into Turkey shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.*

In *EC — Asbestos* (2001) the Appellate Body stated that "*the purpose of Article III is "to prevent members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, between the domestic and imported, products involved, 'so as to afford protection to domestic production'".*¹⁴

¹¹ Panel Report on *EEC — Programmes of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, adopted on 18 October 1978, para. 4.9.

¹² In *China — Raw Materials* the panel found that the minimum export price requirement on exporters of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc was a quantitative restriction on exports inconsistent with Article XI:1 of the GATT 1994, para 8.20. The Appellate Body concluded that Section III of the complainants' panel requests did not satisfy the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" and on this basis declared moot and of no legal effect the Panel's findings regarding these claims.

¹³ Panel Report, *India — Autos* (2002), para. 7.224

¹⁴ Appellate Body Report, *EC — Asbestos* (2001), para 98

The actual trade effects of the measure at issue are not dispositive of the consistency with Article III. A measure can be found to be inconsistent with Article III even when the effect of the measure on the volume of imports is insignificant or even non-existent.¹⁵

Article III:2 involves a three-tier test of consistency of internal taxation:

- 1) Is the measure at issue an internal tax or other internal charge on products?

VAT is a typical example of an internal tax, as confirmed by case law.

The "measure at issue" is more properly defined as the pertinent aspects of the VAT system together with the pertinent parts of the surveillance system. The main obligation to pay the VAT is an internal event. The border element (the declaration of the customs value for the purpose of importation) would trigger the circumstances which lead to tax discrimination. Consequently, this element does not change the conclusion that the measure at issue could be described as an internal tax.

In particular, as a result of the application of the UWF Paper Communiqué the taxable base for imported UWF paper with a unit value less than USD 1,200 is different from the taxable base for domestic UWF paper. The taxable base for UWF paper with an import value less than the threshold value of USD 1,200 is equal or above that threshold value of USD 1,200. The same would not be true for domestic UWF paper which is taxed at the actual transaction value.

- 2) Are imported and domestic products like products?

The products at issue are the same types of UWF paper. This is confirmed by the fact that the surveillance system is triggered for goods, the import of which impacts the domestic products. The design of the surveillance system thus presupposes that the imported and the domestic products are like.

- 3) Are imported products taxed in excess of the domestic products?

The VAT rate as imposed in terms of percentage seems to be identical – it is nominally 8%, for both domestic and imported products. However, the taxable base is different. Under the general Turkish VAT rules, the VAT base for imports is the customs value where the customs value reflects the actual transaction price and the VAT base for domestic sales is the transaction price. Given the fact that, as a consequence of the application of the UWF Paper Communiqué, the customs value for imported goods with unit value of less than USD 1,200 is at least USD 1,200, the customs value is obviously higher than the actual transaction value. Thus the percentage VAT applied to this higher tax basis would render a higher VAT amount.

Important is that the importers of UWF paper face a "practical impossibility" of applying for a surveillance certificate. Importers would have to provide data on cost of production which they do not have themselves. In addition, there are no guarantees for confidential treatment by Turkey of this data. For this reason and other reasons EU exporters do not provide such data to importers. The fact that there is no evidence of an importer that applied and obtained a surveillance certificate is additional evidence that the system as set up by Turkey has created a practical impossibility. Furthermore, this "practical impossibility" is attributable to the Turkish government. Turkey has (i) set the requirements for obtaining a surveillance

¹⁵ Appellate Body Report, *Japan – Alcoholic Beverages II* (1996), para 109

certificate; (ii) requested the provision of highly sensitive information; (iii) not provided any guarantees of confidentiality; and (iv) determined a threshold value of USD 1,200 which is higher than the real average import value for UWF paper. Therefore, the practical impossibility could be attributable to the Turkish government.

So by having set up the system in a way that no importer has been able to apply for a license, Turkey has left the importers with only one realistic possibility: to declare import values of at least USD 1,200, for those UWF paper products the real transaction value of which is lower. The domestic producers pay VAT on the basis of their transaction value which for a number of UWF paper types is lower than USD 1,200.

The situation resembles *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*. Imported cigarettes were subject to excess VAT taxation through a higher government-fixed tax base than the tax base applied to like domestic cigarettes.¹⁶ The Panel found that "in fixing the VAT base for imported cigarettes, Thai Excise failed to follow its general methodology, which resulted in marketing costs for the imported cigarettes being higher than they would have been if the general methodology had been followed," while "no similar departure from the methodology was found with respect to the determination of the marketing costs for like domestic cigarettes." On this basis, the Panel found that imported cigarettes were taxed in excess of like domestic cigarettes, in violation of Article III:2, first sentence.¹⁷ This finding was not appealed.

On the basis of the preceding paragraphs, we consider that there are sufficient grounds to argue a violation of Article III:2, first sentence of GATT 1994.

It does not seem that any of the relevant provisions of the GATT 1994 would be applicable as a potential justification for this discrimination. We consider that Turkey would not be in a position to provide any credible defence for this measure.

3. Inconsistency with Article 3.2 of the WTO Agreement on Import Licensing Procedures

Pursuant to Article 1 of the Agreement on Import Licensing Procedures "*import licensing is defined as administrative procedures ... requiring the submission of an application ... as a prior condition for importation...*"

As import of UWF paper with a unit value of less than the threshold value is not possible without a surveillance certificate, which is issued upon submission of an application, the surveillance system for UWF paper could be considered import licensing and the Agreement would apply to it (the measure).

As discussed under point IV.5 the Communiqué does not oblige the Turkish administration to issue a certificate if all the information is provided. The issuance or refusal of the surveillance certificate is therefore non-automatic and at the discretion of the Directorate General for Imports.

Article 3.2 of the Agreement on Import Licensing Procedures provides:

¹⁶ Panel Report, *Thailand – Cigarettes (Philippines)*, paras 7.489, 7.493

¹⁷ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.567

"Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure."

(i) trade-restrictive effects additional to those caused by monitoring of trade flows

The measure (concerning imports of goods with import value less than USD 1,200) could have trade restrictive aspects as established under point V.1 and the restriction seems to go beyond what is necessary in order to ensure proper monitoring of trade flows.

(ii) scope and duration of monitoring

In general, surveillance, or monitoring of trade flows under the safeguards regime is time-limited. The Turkish surveillance system is not time-limited. The measure is applied for an indeterminate period of time. The scope of the measure is also extremely large covering more than 900 tariff lines.

(iii) no more administratively burdensome than absolutely necessary to administer the measure

In order to monitor trade flows, all the administration needs is information such as the identity of the importer, a description of the goods with values and quantities and eventually a contract.¹⁸ The UWF Paper Communiqué requires in addition confidential business information, including on cost of production. The measure is so burdensome that no applications for surveillance certificates are made.

It could therefore be considered that Turkey would also violate Article 3.2 of the Agreement on Import Licensing Procedures.

4. Inconsistency with Article 5 of Decision 1/95 of the EC – Turkey Association Council on the EU – Turkey Customs Union

Article 5 of Decision 1/95 provides the following:

"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Parties."

With respect to the circumstances at issue Article 5 raises considerations similar to those discussed with respect to Article XI of the GATT 1994. The general lines and conclusions of the assessment under Decision 1/95 are the same and therefore, we refer to the discussion above.

5. Inconsistency with Article 50 of Decision 1/95 of the EC – Turkey Association Council on the EU – Turkey Customs Union

Article 50 of Decision 1/95 provides the following:

¹⁸ See for example Article 2 of the Commission Implementing Regulation (EU) 2016/670 introducing prior Union surveillance of imports of certain iron and steel products originating in certain third countries <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0670&rid=1>

“Neither Party shall, directly or indirectly, impose on the products of the other Party any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Neither Party shall impose on the products of the other Party any internal taxation of such a nature as to afford indirect protection to other products.”

With respect to the circumstances at issue, the test established by the first paragraph of Article 50 raised considerations which are similar to the discussed with respect to Article III:2 of the GATT 1994. The general lines and conclusions of the assessment under Decision 1/95 are the same and therefore, we refer to the discussion above.

VI. Adverse trade effects

The complainant CEPI stressed that the surveillance system poses a serious and credible threat of significant adverse effects to the European UWF paper industry.

An extract from the EU export statistics (comext) does not show impact of the surveillance system on EU exports during the first year of operation of the system (2016). The statistics 2017 are not yet available. It should be noted that the surveillance is imposed on 10 digit level and the public EU statistics are available only at 8 digit level. Therefore, some effects of the system may not be visible. An exporting producer reported in Annex H to the complaint that the import statistics show decrease of imports as a consequence of the surveillance system.

PERIOD	2014	2015	2016	2014	2015	2016	2014	2015	2016
Tariff codes	EUR	EUR	EUR	Tonnes	Tonnes	Tonnes	EUR/t	EUR/t	EUR/t
48025515	1,330,562	1,564,972	2,390,494	1,968	1,676	2,686	676	934	890
48025525	44,562,494	44,003,360	45,263,817	77,648	68,956	73,480	574	638	616
48025530	539,348	5,995,678	2,047,636	940	9,413	1,814	574	637	1,129
48025590	71,137,365	68,773,323	63,488,910	91,096	80,400	76,047	781	855	835
48025620	16,816,587	19,033,495	17,473,547	26,221	25,464	25,035	641	747	698
48025680	4,318,465	5,636,694	3,019,881	6,392	6,924	3,313	676	814	911
48025700	41,590,192	34,153,866	33,841,784	43,190	39,327	38,067	963	868	889
Total	180,295,013	179,161,388	167,526,069	247,455	232,159	220,442	729	772	760

The EU exporting producers reported, however, that they started feeling the impact of the surveillance system by means of (i) additional administrative burden and delays at customs and (ii) financial burden resulting from the excess VAT.

The Complainant CEPI lists the following additional adverse trade effects: (iii) loss of business opportunities; (iv) loss of competitiveness; and (v) loss of expertise.

With regard to (i) the additional administrative burden we understand that some operators experience increased controls at the Turkish border which incurs costs and delays.

With regard to (ii) a number of operators report that the excess VAT has an impact on their profit margins. The profit margins for some paper types are small¹⁹ that therefore, the excess VAT affects the profitability. The Commission has also obtained from an EU producer of another product subject to the Turkish surveillance system evidence that the non-refunded excess VAT could reach a significant value of millions of EUR. There is, therefore, evidence that the surveillance system affects the profitability of certain importers, and mainly those specialised in the importation of a good subject to surveillance.

With regard to (iii) the loss of business opportunities, it stems from the design and application of the measure that if a trading partner in Turkey has to choose where to buy UWF paper without much hustle, it will choose a domestic producer, whenever possible, simply to avoid the problems related to the importation of the UWF paper and any excess VAT. Therefore, the claim that the EU industry will lose business opportunities is plausible.

With regard to (iv) the loss of competitiveness, it is likely that importers that are affected by the excess VAT paid may have to increase their resale prices in Turkey in order to ensure some profitability. The higher prices will reduce the competitiveness of the EU UWF paper in comparison to the domestic UWF paper. Therefore, the claim of loss of competitiveness is plausible.

With regard to (v) loss of expertise, importers specialised in the importation of UWF paper that do not have sufficient output VAT from other sources, are likely to be forced to exit the market or accept profit loss. If this happens, the EU producers will lose valuable trading partners. This could also potentially lead to loss of business opportunities as the EU producers may have to import through non-specialised importers that cannot secure new contracts for the EU producers.

In conclusion, there are sufficient arguments demonstrating that the claim of threat of adverse trade effects is imminent and real.

VII. EU Interest

The EU has a general and systemic interest in maintaining the observance of international trade rules among its trading partners. This is particularly true of the obligations contained in the WTO Agreement, given the amount of trade governed by and the number of countries subject to these rules. This interest applies especially in relation to a WTO Member such as Turkey, which is a large economy, has a customs union with the EU and accounts for a significant amount of trade with the EU. Lastly, the WTO obligations at issue in this case are among the core principles of the WTO and the Turkish measures appear to violate these rules.

Likewise, the EU has an interest in ensuring the compliance of Turkey with its obligations under the EU – Turkey Customs Union, including its core principles of prohibition of quantitative restrictions or measures having an equivalent effect and tax discrimination.

In addition, the surveillance system applied to UWF paper would have a considerable impact on the EU producers of uncoated wood free paper who export to Turkey. The Turkish export market was very important for EU industry and would have a considerable growth potential in

¹⁹ See Annex H to the Complaint.

the absence of this obstacle to trade. It therefore appears essential to safeguard the equal treatment of uncoated wood free paper from the EU on the Turkish market by addressing the alleged obstacles to trade.

VIII. Measures taken by Turkey

Following the initiation of the examination procedure, the Commission and Turkish authorities held discussions with a view to finding a solution to this trade barrier. On 7 December the Ministry of Economy revoked the UWF Paper Communiqué with a Communiqué published in the Official Gazette of the Republic of Turkey No 30263 of 7 December 2017. As of 7 December 2017 the imports of UWF paper are no longer subject to surveillance.

IX. Conclusions and recommendations

Turkey's surveillance system as applied to UWF Paper appears to be inconsistent with Article XI and Article III:2 of the GATT 1995, Article 3.2 of the Agreement on Import Licensing Procedures and Article 5 and Article 50 of Decision 1/95 of the EC – Turkey Association Council. It seems that none of the available justifications would apply to the restrictions Turkey appears to have introduced.

The surveillance system appears to have adverse trade effects on the EU UWF paper industry and it is in the EU interest to intervene.

By repealing the UWP paper Communiqué, on 7 December 2017 Turkey removed UWF Paper from the scope of its import surveillance system.

In view of the fact that the surveillance system continues to exist and could be re-introduced for UWF paper products, it is proposed to suspend the examination procedure pursuant to Article 12(2) of Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification). The Commission will continue to monitor the situation.

