



Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 48

Consumer Pineapple exported from the
Republic of the Philippines and the
Kingdom of Thailand, Continuation Inquiry

January 2017

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Abbreviations

Term	Meaning
Act	<i>Customs Act 1901</i>
ADA	Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
AUD	Australian Dollar
Assistant Minister	Assistant Minister to the Minister for Industry, Innovation and Science
Appellate Body	Appellate Body of the World Trade Organisation
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
DPI	Dole Philippines Incorporated
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act, 1975</i>
FOB	Free on board
GAAP	Generally accepted accounting principles
Goods	[the goods described in the report]
IDD	Interim dumping duty
Manual	Dumping and Subsidy Manual November 2015

Minister	Minister for Industry, Innovation and Science
NIP	Non-injurious price
Parliamentary Secretary	The Parliamentary Secretary to the Minister for Industry, Innovation and Science
PPI	Prime Products Industrial Co., Ltd
CIO Regulation	<i>Customs (International Obligations) Regulation 2015</i>
SCM	Agreement on Subsidies and Countervailing Measures
WTO	The World Trade Organization

Introduction

1. Prime Products Industrial Co., Ltd (PPI) and Dole Philippines Incorporated (DPI) have applied pursuant to section 269ZZC of the *Customs Act 1901* (the Act) for a review of a decision of the Assistant Minister for Industry, Innovation and Science (the Parliamentary Secretary)¹ to secure the continuation of the Anti-Dumping measures applicable to Consumer Pineapple exported from the the Kingdom of Thailand (Thailand) and the Republic of the Philippines (the Philippines), respectively. The goods the subject of the measures are: *Pineapple prepared or preserved in containers not exceeding 1 litre* (Consumer Pineapple).
2. The application for review was accepted and notice of the proposed review, as required by section 269ZZI of the Act, was published on 18 November 2016. The Senior Member of the Review Panel has directed in writing, pursuant to s.269ZYA of the Act, that the Review Panel for the purpose of this review be constituted by me.

Background to the application

3. On 2 December 2015, in accordance with subsection 269ZHB(1) of the Act, a notice (ADN No. 2015/136) was published on the Anti-Dumping Commission's (ADC) website inviting certain persons to apply to the ADC for the continuation of Anti-Dumping measures regarding Consumer Pineapple exported to Australia from Thailand and the Philippines, respectively.

¹ The Minister for Industry, Innovation and Science has delegated responsibility with respect to anti-dumping matters to the Parliamentary Secretary, and accordingly, the Parliamentary Secretary is the relevant decision-maker. On 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science.

4. On 29 January 2016, Golden Circle Ltd (Golden Circle), the sole Australian manufacturer of Consumer Pineapple in Australia, lodged an application for the continuation of the measures, which was within the applicable legislative timeframes.
5. The application was accepted by the ADC and a continuation inquiry was initiated on 9 March 2016.² The inquiry period for the investigation was 1 January 2015 to 31 December 2015.
6. Pursuant to subsection 269ZHF(2), in order to recommend that the Parliamentary Secretary take steps to secure the continuation of the Anti-Dumping measures, the ADC must be satisfied that the expiration of the Anti-Dumping measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury that the Anti-Dumping measures are intended to prevent.
7. The ADC recommended that the Parliamentary Secretary take steps to secure the continuation of the Anti-Dumping measures applicable to Consumer Pineapple exported from the Philippines and Thailand. The Parliamentary Secretary accepted the recommendation and on 12 September 2016 declared, under s.269ZHG(1)(b) of the Act, that he had decided to secure the continuation of the Anti-Dumping measures currently applying to Consumer Pineapple from the Philippines and Thailand.³
8. PPI and DPI are affected by the decision of the Minister as they are manufacturers of Consumer Pineapple exported from Thailand and the Philippines, respectively.

² ADN No. 2016/21

³ ADN No. 2016/81 and No. 2016/82

Conduct of the Review

9. In accordance with subsection 269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the decision under review or revoke it and substitute a new specified decision. In undertaking the Review, section 269ZZ requires the Review Panel to determine a matter as if it was having regard to the considerations to which the Parliamentary Secretary would be required to have regard to if determining the matter.
10. In carrying out its function, the Review Panel is not to have regard to any information other than to “*relevant information*” as that expression is defined in subsection 269ZZK(6) of the Act. For the Review, the relevant information is that to which the ADC had, or was required to have regard when making the findings set out in the report to the Parliamentary Secretary.⁴ In addition to relevant information, the Review Panel may have regard to conclusions based on relevant information that is contained in the application for review and any submissions received under section 269ZZJ of the Act.⁵
11. If a conference is held under section 269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information and to conclusions reached at the conference based on that relevant information. A conference was held with representatives of the ADC on 29 November 2016 for the purpose of clarifying information contained within the relevant ADC Report (Report No.333). A non-confidential summary of the conference was placed on the public record.
12. Unless otherwise indicated, in conducting this Review, I have had regard to the application (including documents submitted with the application or

⁴ subsection 269ZZK(6)(ca)

⁵ Subsection 269ZZK(4)

referenced in the application) and the submissions received pursuant to section 269ZZJ of the Act, insofar as they contained conclusions based on relevant information. I have had regard to the ADC Reports, and information relevant to the review which was referenced in the ADC Reports. This latter information included relevant submissions made to the ADC by interested parties. I have also had regard to information obtained at the conference held pursuant to section 269ZZHA of the Act.

13. The ADC also provided relevant documents containing confidential information. These documents and the correspondence with the ADC concerning them was not made publicly available.
14. Submissions were received within the 30 days required by section 269ZZJ of the Act from the ADC and Golden Circle.

Grounds for Review

Grounds for Review - PPI, Thailand

15. PPI is dissatisfied with the decision of the ADC to determine PPI's normal value based upon the normal value of a producer from the Philippines.⁶ In its application for review, PPI states that it *"has not been provided sufficient information by the Commission to properly understand the basis of the normal value ascertained for [the producer from the Philippines], in particular the like good domestic models and the Australian exported models. PPI considers this information was critical to its ability to properly respond to the Commission's findings and defend its interests in this matter ... PPI considers that the Commission ought to have properly taken into account PPI circumstances as a cooperating exporter and ascertained its export price at*

⁶ The producer from the Philippines is DPI

the same level as it ascertained normal value which reflects a non-dumped price by [the producer from the Philippines]".

16. PPI asserts that the ADC erred in the method it used to ascertain PPI's export price. PPI had not exported Consumer Pineapple to Australia during the inquiry period nor had it made any domestic sales of Consumer Pineapple during that period. Nevertheless, the ADC determined PPI's export price under subsection 269TAB(3) of the Act, on the basis of a weighted average export price for Thailand from the Australian Border Force's (ABF) import data-bases at Free on Board terms.

Consideration - PPI, Thailand

17. Although PPI disagrees with the method by which the ADC ascertained its normal value (by reference to the producer from the Philippines), its application for review is limited to the ADC's ascertainment of PPI's export price. The heading of that section of the review application outlining PPI's justification for the review is "*Ground 1: The Commission erred in ascertaining PPI's export price.*" Further, PPI's review application concludes by stating that the correct and preferable decision for the challenged findings are "*Finding 1: Consistent with its common approach to ascertaining export price in circumstances where no exports to Australia occurred during the review period, the correct and preferable decision was to ascertain PPI's export price at a level equal to the corresponding ascertained normal value during the review period.*"
18. Accordingly, I will limit my consideration to the method by which the ADC ascertained PPI's export price and I will not make any findings in relation to the manner in which the ADC ascertained PPI's normal value.
19. In the alternative, had I been required to have come to a finding as to the manner in which the ADC had determined PPI's normal value, I would have found that the ADC had considered and applied relevant policies and that the

applicant had failed to demonstrate that the manner in which the normal value was determined was not the correct and preferable one.

20. PPI asserts that the approach adopted by the ADC in ascertaining its export price, by reference to the ABF import statistics reflecting a weighted average export price for Thailand, was inconsistent with *“the Commission’s current and long-standing policy and practice of ascertaining export price in the absence of export sales”*. PPI claims that the preferred approach, and one consistent with past practice and policy, ought to have been to ascertain its export price by reference to the normal value of like goods produced by an exporter from Thailand, thereby *“providing a floor price measure which ensured that future exportations were exported at or above the non-dumped normal value”*.
21. In support of this claim, PPI noted that the ADC applies this approach in the context of New Exported Accelerated Reviews (Accelerated Reviews) as outlined in the Manual. PPI went on to reference ten recently completed Accelerated Reviews in which the ADC had adopted this approach. PPI noted that such an approach was consistent with the provisions of Article 9.5 of the World Trade Organization’s (WTO) Anti-Dumping Agreement (the Agreement).
22. I note that Article 9.5 of the Agreement, in part, concerns the conduct of Accelerated Reviews. There is nothing in the language of Article 9.5 or in the broader context of Article 9 which suggests that Article 9.5 influences the manner in which export prices are ascertained. In terms of the Act, export prices are ascertained under Division 1 of the Act, whilst Division 5 contains provisions for the conduct of Accelerated Reviews. I disagree with PPI that the Accelerated Review provisions under Division 5 are equally relevant in the context of the ascertainment of normal value.
23. The ADC drew attention to that part of the Manual referring to Accelerated Reviews. It noted that the practice of determining export price by reference to

normal value was subject to a caveat. Namely, in determining an export price for any entities that had not exported to Australia, the ADC will first assess the normal value of the goods. The ADC will only set the export price equal to the normal value if it has confidence that the normal value is a reasonable approximation of the export price. I accept that such confidence is unlikely to be present in circumstances where normal value has been set by reference to 'facts available' pursuant to subsection 269TAC(6).

24. In all of the recently completed Accelerated Reviews cited by PPI (referred to above), the normal value for the relevant exporters were calculated under subsection 269TAC(1) or subsection 269TAC(2) of the Act. That is, for each of the exporters there was reliable information to calculate the normal value of the exporter based on verified information.
25. At pages 45 and 46 of Report No.333 the ADC detailed why it was not able to determine PPI's normal value by reference to un-dumped exports from Thailand or third country sales. It also detailed why it was not able to set the normal value of an exporter from the Philippines as being equal to PPI's export price.
26. The ADC noted that REP333 had been the second occasion on which it assessed the normal value in relation to PPI. The earlier occurrence being contained within *Anti-Dumping Commission Report No.296*.⁷ On both occasions, the ADC was unable to determine a normal value for PPI based upon PPI's own information.
27. As there were no other cooperating exporters from Thailand, the ADC had no option but to have recourse to subsection 269TAC(6) of the Act to determine a normal value for PPI by reference to the weighted average normal value

⁷ ADN 2015/111

determined for the Philippines producer. This approach is consistent with that adopted in Chapter 13.3 of the Manual, which provides that in establishing normal values under subsection 269TAC(6), regard will be had to information including that gathered from other countries, the subject of the same investigation. The ADC considered the information gathered in respect of the producer from the Philippines to be relevant to PPI because both countries are large producers of canned pineapple products and are predominantly export focused. Both countries are subject to similar weather events and are in the same geographic region.

28. The ADC noted in circumstances where the normal value is calculated under subsection 269TAC(6) of the Act, the ADC is unlikely to set the export price equal to the normal value, where the ADC has access to more reliable or relevant sources of information.
29. The ADC distinguishes its practice of determining export price in the context of an Accelerated Review with the method it applied to the determination of PPI's export price on the basis of:
 - Accelerated Reviews must be completed in a shortened time frame of 100 days, as compared with 155 days (which can be extended) for a continuation inquiry or investigation;
 - Accelerated Reviews have a limited number of exporters and exporting countries (usually one) as compared to multiple parties and countries involved in continuation inquiries or investigations; and
 - Applicants for Accelerated Reviews are motivated to cooperate with the verification process, whereas some parties in a continuation inquiry or investigation are not subject to verification.
30. The ADC considered that in the absence of export sales to Australia, sufficient information was not available to enable PPI's export price to be ascertained under the subsections proceeding subsection 269TAB(3). The ADC notes that in such circumstances, subsection 269TAB(3) states "*the*

*export price of those goods shall be such amount as is determined by the Minister having regard to **all relevant information***” [emphasis added]. That is, the subsection does not mandate that the export price be determined only by reference to the normal value. The ADC therefore had regard to the ABF import database as constituting “*relevant information.*”

31. The ADC made reference to the ABF import statistics as it is able to filter the producer from the Philippines import statistics to capture only goods to which anti-dumping measures have been taken, which increases the likelihood that the import statistics relate only to the goods under consideration.
32. In its submission regarding PPI, Golden Circle states “*it is also appropriate that in the context of a continuation and review inquiry for all exporters that where a cooperative exporter has not previously exported the goods to Australia, then the ‘best available information’ on export prices for the goods exported to Australia from Thailand is that derived from the ABF database*”.
33. Accordingly, I find that the ADC was not obligated to determine PPIs export price in a manner consistent with the approach adopted in Accelerated Reviews, as such an approach would be inconsistent with ADC practice and policy.
34. PPI argues that in ascertaining the export price, the ADC did not undertake an objective examination of the various sources of information available. Further, PPI makes reference to Article 6.8 and Annex II of the Agreement, which enables an investigating authority to rely upon “*facts available*” where a respondent has failed to provide some or all of the necessary information requested by the investigating authority. PPI notes that the Act reflects these provisions in subsection 269TAB(3) and subsection 269TAC(6).

35. PPI refers to a WTO Dispute Panel⁸ finding which confirms Article 6.8 of the Agreement imposes obligations on the investigating authority with which it must comply in order for it to have recourse to the “*facts available*”. The Panel found “*determining that something is ‘best’ inevitably requires, in our view, an evaluative, comparative assessment*” and that the investigating authority must make an inherently comparative evaluation of the evidence available in deciding upon which “*facts available*” to rely.
36. My analysis of the methodology the ADC applied in ascertaining PPI’s export price reveals an objective examination and consideration of the various sources of information available. This is reflected at pages 45 and 46 of REP No.333. There is evidence that, at various stages of its analysis, the ADC considered the application of its policies and practices and applied them to the issue before it. The stated reason for the preference for ABF statistics over other sources of information is also indicative of an objective examination and an evaluative and comparative assessment.
37. Of course, had other choices been made, different outcomes would have arisen, some may have been more favourable to PPI in the sense of either removing or reducing its dumping liability. Both the ADC and Golden Circle note that had PPI adopted a different course of action, it may have achieved such an outcome. That the adoption of other options or methods would have generated different outcomes is not determinative as to which option or method is the correct and preferable one.
38. Accordingly, I do not consider the grounds relied upon by PPI established that the decision of the Parliamentary Secretary was not the correct and preferable one.

⁸ Panel Report, Mexico – Definitive Anti-Dumping Measures on Beef and Rice, WT/DS295/R, para 7.16, page 144.

Grounds for Review – DPI, Philippines

39. DPI challenges the ADC's refusal to make any adjustment to normal value because of differences in selling, marketing and trade promotion expenses applying to domestic and export sales. DPI asserts that if adjustments were made to normal value because of one or more of those expense categories, the resulting dumping margin attributed to DPI would be less than zero.

Consideration - DPI, Philippines

40. DPI notes that in the 2011 continuation inquiry, the ADC made adjustments for selling expenses, domestic administration expenses and domestic merchandising expenses. However, despite no change in the material circumstances, DPI alleges the ADC has ignored the earlier findings and reasons, without providing any "cogent" explanation.
41. In its submission, the ADC noted that whilst past verification visit findings may be relevant to the current continuation inquiry, its role was to make recommendations in relation to the continuation inquiry under review based upon sufficient evidence of differences between the domestic and export markets, which affect price comparability.
42. In its submission, Golden Circle, makes the point that *"it cannot be concluded that simply because certain adjustments were granted in an earlier investigation that automatically DPI is entitled to receive those same adjustments in 2016. There can be a host of reasons as to why the anticipated adjustments sought by DPI were not accepted in the current investigation, including a better understanding as to the level of information required to support the adjustments"*.
43. The ADC provided me with a confidential version of DPI's 2011 Verification Visit Report, and I was able to identify the nature and basis of the

adjustments made in that inquiry.⁹ The 2011 adjustments were made on the basis that *“DPI incurs merchandising expenses on the domestic market that are not incurred in respect of exports to Australia. As with administration expenses, this is a reflection that the majority of domestic sales are under the DPI brand while exports to Australia are primarily private-label”*.

However, in the current case the adjustment with which DPI takes issue relate to costs incurred in relation to its sales to Australia.

44. DPI also referred to what it described as an ‘*anomaly*’ in the parallel dumping inquiry just conducted into Food Service and Industry (FSI) Pineapple exported from Thailand. In that case the ADC made an adjustment to normal value because of differences in selling costs applying to domestic and export sales undertaken by an exporter from Thailand.
45. In relation to the adjustment granted to the FSI exporter from Thailand and reflected in REP No.333 the ADC provided me with confidential correspondence which explained the nature and justification for the adjustment in that case. It is apparent that the adjustment granted to the FSI exporter from Thailand¹⁰ and those sought by DPI in the current Consumer Pineapple continuation are not related. Accordingly, I do not view as significant the fact that an adjustment was granted to the FSI exporter from Thailand in relation to differences it incurred in relation to its domestic selling costs.
46. Accordingly, I place no significance on the fact that adjustments were declined in the inquiry under review, whilst other adjustments were granted in the 2011 inquiry. Nor do I view as significant the fact that an adjustment

⁹ In its application for review DPI quoted details as to the nature of the adjustments from paragraphs 7.3.3, 7.3.4, and 7.3.5 of the 2011 Visit Verification Report.

¹⁰ In that case a subsidiary of the exporter from Thailand incurred selling and marketing costs in relation to domestic sales during the inquiry period.

was granted to the FSI exporter from Thailand in relation to differences in selling costs.

47. There are diverging views between DPI, the ADC and Golden Circle as to whether sufficient or adequate information was made available by DPI to substantiate its claims for adjustments.
48. In its submission, the ADC states that *“the only submission made by DPI regarding adjustments is at page 2 of document no.20 on electronic public record no.333”*.¹¹ This submission was made by DPI in response to the publication of the Statement of Essential Facts (SEF). On the evidence before me, the statement of the ADC, to the effect that DPI’s first mention of the adjustments was in response to the SEF, is incorrect for the reasons outlined below.
49. In its submission, the ADC has provided me with a copy of DPI’s Exporter Questionnaire Response. The ADC states that the claimed adjustments *“are not mentioned or explained”* in that response. However, when I refer to the answers provided under *Section E, Fair Comparison*, I am able to identify responses relevant to each of the six adjustment items identified in DPI’s letter of 2 May 2016.¹²
50. In its application for review, DPI notes the ADC verification team’s conclusions that *“Dole Philippines CTMS data is complete, relevant and accurate.”* Later in its review application, DPI states *“the selling expenses in the present matter set out in the accepted and verified domestic and export cost to make and sell (CTMS) worksheets are the expenses found by the Commission to be properly attributable to sales by DPI of consumer*

¹¹ Email dated 17 July 2016 to ADC from DPI’s legal representative.

¹² In its submission, the ADC stated that this letter was provided to ADC officers at the commencement of the verification visit.

pineapple". In relation to marketing costs, DPI's review submission stated, "these are clearly identified in the CTMS worksheets, and accepted by the Commission, as expenses directly linked to relevant sales."

51. Further, the ADC also provided copies of emails, passing between the ADC and DPI's Australian legal representative over the period from 3 June to 15 June 2016, in which the following adjustments were discussed: selling expenses; administration and other marketing expenses; trade promotions and merchandising; and warehousing. In this email exchange, DPI's legal representative stated "*domestic and export CTMS worksheets and the domestic sales worksheets provided all information requested in the EQ [Exporter Questionnaire] including detailed quantitative information relevant to the claimed adjustment categories.*"
52. I infer from the above references that DPI's position is that sufficient information to substantiate the adjustments claimed formed part of the response to the Exporter Questionnaire which, in its view, was subsequently verified.
53. The ADC also provided a copy of the verification team's Work Plan. At page 53 of that document the following statement appears: "*the verification team discussed the objective of adjustments and informed the company that unless marketing and related promotional costs could specifically be related back to invoices on a direct basis, that these costs could not be claimed as adjustments.*"
54. Nevertheless, the ADC maintains that the documents provided show that DPI were informed of the ADC's view that sufficient evidence had not been provided to justify the claimed adjustments. The ADC went on to note that DPI's application for review does not provide further information to address that view.

55. In its submission, Golden Circle notes *"DPI is challenging the Commission's assessment that the selling expenses it has detailed in its worksheets have been separated between domestic and export selling expenses ... However, it cannot be readily accepted that simply because DPI has categorized (sic) selling expenses between domestic and export sales, that the separately identified expenses are anything more than 'general' selling expenses incurred in the normal cost of conducting business. It is evident that the Commission was not satisfied that the separated selling costs related to 'differences in conditions and terms of sale'"*.
56. I am therefore satisfied, that in response to the Exporter Questionnaire, DPI identified and quantified the adjustments sought and, in the course of the verification visit, adjustments were also discussed. Although, I note there is apparent disagreement between the ADC and DPI as to whether an outcome was reached by the conclusion of the verification regarding the adjustments.
57. However, it is apparent that the ADC, like Golden Circle, considers that it is not enough to identify adjustments for selling expenses, administration and other market expenses, or even attempt to quantify the amount of such adjustments. The ADC considers that such expenses related to the general costs of doing business. For such items to warrant adjustment they must be *"exclusive to the goods in question"*.¹³ I take this to mean that the exporter must be able to identify a difference between domestic selling prices and the export prices of particular transactions.
58. In Appendix B to the ADC submission, Attachments 12 and 13 are said to be *"source documents"* relating to DPI's selling and promotional expenses. My review of those documents confirms that they relate indirectly to some

¹³ ADC Manual.

export sales to Australia. For example, some documents reflect costs incurred in relation to promotion costs for two major supermarket chains operating within Australia. However, the documents within those attachments do not relate back to particular export transactions to Australia.

59. I note the onus is upon the exporter to provide evidence demonstrating a difference which affects price comparative for which an allowance or adjustment must be made. Those matters for which an allowance is sought must give rise to a difference between the normal value and export price being compared such that those prices are not fairly comparable unless an allowance is made. This legal standard can be satisfied by evidence that the feature, characteristic or identifiable component of the prices in question is linked exclusively to either the domestic sales, or to **relevant export sales subject to comparison**, or to both sides of the comparison but in different amounts.¹⁴ I note WTO precedent suggests that such allowances or adjustments include a case specific analysis of the particular evidence available.
60. I accept that in the present case, DPI did identify a number of items for which it sought adjustment. It went on to quantify the amount of the adjustments. However, it did not provide sufficient evidence to be able to link the claimed quantum to the relevant export sales to Australia, which were to be compared to the normal value to establish whether a dumping margin existed. In the absence of such evidence, the ADC was able to regard the claimed adjustments as general costs of doing business which could not be directly linked to the transactions for which the company was seeking an adjustment.

¹⁴ Refer WTO Panel decision, *European Union – Anti-Dumping Measures on Imports of Fatty Alcohols from Indonesia*, WT/DS442/R, December 16, 2016

61. Accordingly, I conclude DPI has not demonstrated that the ADC's decision in relation to the adjustments claimed was not the correct and preferable one.
62. DPI argued that if its claims in relation to the adjustments sought were to be upheld, this would necessitate a review of the ADCs recommendations concerning the likelihood of the continuation of dumping, a recurrence of dumping and the likelihood of a continuation or recurrence of the material injury caused by such dumping. In light of the conclusions I have reached in relation to the adjustments issue, it is unnecessary for me to proceed to consider DPI's argument relating to this aspect of the continuation of the measures.

Recommendations/Conclusion

63. I do not consider that the grounds relied upon by PPI and DPI establish that the decisions of the Parliamentary Secretary in relation to them were not the correct or the preferable decisions.
64. Pursuant to section 269ZZK of the Act, I recommend that the Parliamentary Secretary affirm the reviewable decisions in relation to both PPI and DPI.



Paul O'Connor
Panel Member
Anti-Dumping Review Panel
12 January 2017