Commission Implementing Regulation (EU) 2020/611 of 30 April 2020 re-imposing the definitive anti-dumping duty imposed by Council Regulation (EC) No 91/2009 on imports of certain iron or steel fasteners originating in the People's Republic of China to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not

COMMISSION IMPLEMENTING REGULATION (EU) 2020/611

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union ('TFEU'),

Having regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (the 'basic Regulation')[(1)], and in particular Articles 13 and 14(1) thereof,

Whereas:

1. **PROCEDURE**

(1) By Regulation (EC) No 91/2009[(2)], the Council imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China ('the PRC' or 'China'). Those measures will hereinafter be referred to as 'the original measures' and the investigation that led to these measures will hereinafter be referred to as 'the original investigation'.

(2) Following the imposition of the definitive anti-dumping duty, the Commission received evidence that these measures were being circumvented through transhipping via Malaysia.

(3) For that reason, on 28 November 2010, the Commission, by way of Regulation (EU) No 966/2010[(3)], initiated an investigation concerning the possible circumvention of the anti-dumping measures imposed by Regulation (EC) No 91/2009 ('the anti-circumvention investigation').

(4) On 26 July 2011, the Council extended the anti-dumping duty imposed by Regulation (EC) No 91/2009 to certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, by Council Implementing Regulation (EU) No 723/2011[(4)] ('the anti-circumvention Regulation').

(5) On 27 February 2016, the Commission repealed the definitive anti-dumping duty imposed by Regulation (EC) No 91/2009, as extended by Implementing Regulation (EU) No 723/2011, by way of Commission Regulation (EU) 2016/278[(5)].

(6) By its judgment in Case C-644/17 *Eurobolt* of 3 July 2019[6], the Court of Justice declared Implementing Regulation (EU) No 723/2011 invalid inasmuch as it was adopted in breach of the consultation procedure contained in Article 15(2) of Council Regulation (EC) No 1225/2009[7].

2. IMPLEMENTATION OF THE JUDGMENT OF THE COURT OF JUSTICE IN CASE C-644/17 *EUROBOLT*

(7) The Court of Justice held that the requirement to provide the Advisory Committee with all relevant information no later than 10 working days before the meeting of that committee, as laid down in Article 15(2) of Regulation (EC) No 1225/2009, constitutes an essential procedural requirement governing the proper conduct of proceedings, the breach of which renders the act concerned invalid[8]. According to the Court, that provision had been infringed inasmuch as the observations of Eurobolt, a Dutch importer of fasteners from Malaysia, were not communicated to the Member States no later than 10 working days before the meeting of the Advisory Committee.

(8) In accordance with Article 266 TFEU, the Union's institutions must take the necessary steps to comply with the judgment of the Court of Justice of the European Union. On 27 August 2019, the Commission, therefore, re-opened the anti-circumvention investigation in order to correct the illegality identified by the Court of Justice[9].

(9) The reopening of the anti-circumvention investigation was limited in scope to the implementation of the judgment of the Court of Justice in Case C-644/17 *Eurobolt*, namely to ensure that all procedural requirements arising from the Advisory Committee procedure contained in Article 15(2) of Regulation (EC) No 1225/2009 were met[10]. That procedure has, in the meantime, been replaced by the examination committee procedure contained in Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council[11].

(10) In this respect, it should be pointed out that acts of the European Union are to be adopted in accordance with the procedural rules in force at the time of their adoption. Article 15(2) of Regulation (EC) No 1225/2009 in the form as it stood at the time of the underlying investigation was repealed. Therefore, a proceeding like the current re-opening of an anti-circumvention investigation initiated pursuant to Article 13(3) of Regulation (EC) No 1225/2009 can, as from the repeal of Article 15(2) of Regulation (EC) No 1225/2009 in the form as applicable at the time of adoption of Implementing Regulation (EU) No 723/2011, be completed only on the basis of the committee procedure currently in place for the imposition of anti-circumvention measures[12]. Pursuant to Article 15(3) of Regulation (EC) No 1225/2009, as amended and codified in Regulation (EU) 2016/1036, the procedure to be followed for the purposes of this re-opening is the one contained in Article 5 of Regulation (EU) No 182/2011.

3. ASSESSMENT OF THE CLAIMS

3.1. Claims made in the anti-circumvention investigation

(11) Eurobolt, in its submission of 13 June 2011, questioned the legality of the Commission's interpretation of Article 13 of Regulation (EC) No 1225/2009 on two accounts. First, it argued that the extended measures should not apply to the product concerned if it was of genuine Malaysian origin. Second, Eurobolt questioned the Commission's power to, in an *ex officio* anti-circumvention investigation, allege injury on the basis of data of the original investigation without providing evidence of injury.

(12) The Commission observed that neither claim related to the implementation of the judgment. Eurobolt's comments thus related to issues falling outside the scope of the implementation exercise. In any case, the claims could also be dismissed on the merits.

(13) Regarding Eurobolt's first claim, and as noted in recital 46 of the anti-circumvention Regulation, Article 13(1) of the basic Regulation allows for the extension of measures to imports of the like product from 'third countries'. Article 13(4) of the basic Regulation allows for exceptions for genuine producers from that third country. As the anti-circumvention investigation revealed circumvention practises in line with the findings of investigations carried out by OLAF and the Malaysian authorities, Article 1 of the anti-circumvention Regulation extended the anti-dumping measures to imports consigned from Malaysia. However, any company that had demonstrated that it was a genuine Malaysian producer was granted an exemption from the extended measures. Moreover, requests for future exemptions were possible under Article 2 of the anti-circumvention Regulation. Accordingly, as the existence of transhipment of Chinese-origin products via Malaysia was confirmed (see recitals 34 and 45 of the anti-circumvention Regulation) and exports from genuine Malaysian producers were exempted from the extension of the measures, Eurobolt's first claim was rejected.

(14) Regarding Eurobolt's second claim, it should be pointed out that Article 13(1) of the basic Regulation requires, inter alia, 'evidence of injury *or* that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product ...' (emphasis added). These two requirements are not cumulative. Recitals 37 and 38 of the anti-circumvention Regulation show that the remedial effects of the anti-dumping duty imposed by the original Regulation were undermined by the circumvention, both in terms of prices and quantities. Therefore, the legal requirements of Article 13 of the basic Regulation were met. Accordingly, there was no need or legal obligation to re-assess or re-use injury data from the original investigation with regard to imports from China. Consequently, this claim was rejected as well.

(15) The Commission concluded from the above that Eurobolt's submission of 13 June 2011 had been duly considered and Eurobolt's claims were dealt with in the anti-circumvention Regulation, in particular in Sections 2.8 and 4 thereof. Moreover, it is important to note in this regard that Eurobolt questioned neither the evidence of transhipment of Chinese-origin products via Malaysia nor the finding that the companies from which Eurobolt sourced the product concerned had provided

misleading information to the Commission and had not been able to demonstrate that they were genuine Malaysian producers.

3.2. **Assessment of claims made after re-opening**

(16) Commission Implementing Regulation (EU) 2019/1374 re-opening the anti-circumvention investigation invited interested parties to make comments pertaining to the reopening of the anti-circumvention investigation. Two parties submitted comments.

(17) Eurobolt claimed that the violation of Article 15(2) of Regulation (EC) No 1225/2009 found to have occurred by the Court of Justice cannot be cured *ex post* because it is a violation of an essential procedural requirement and therefore it vitiates the entire conduct of the original anti-circumvention investigation.

(18) This claim is unfounded for the following reasons. A breach of Article 15(2) does not vitiate the entire proceeding, as the illegality identified by the Court did not concern the substantive findings on circumvention. The breach can therefore be cured by reopening the anti-circumvention investigation at the point at which the illegality occurred. That entailed forwarding Eurobolt's original observations, together with the draft implementing act, to the committee in line with the procedure currently in place for the imposition of anti-circumvention measures. That is the procedure referred to in recital (10) above. The applicable legal deadline for the relevant information to reach the committee requires submission no later than 14 days before the meeting of that committee. This enables the committee, which consists of representatives of the Member States, to familiarise itself with all relevant information so that the Member States may formulate a position on the draft implementing act. As the Court of Justice has recently recognised, the resumption of the administrative procedure and the re-imposition of anti-dumping duties on imports that were made during the period of application of the regulation which was annulled can also not be considered as contrary to the rule of non-retroactivity[(13)].

(19) Where a judgment of the Court of Justice invalidates an anti-dumping regulation, the institution implementing that judgment (in this case the Commission) has the option of resuming the proceeding at the origin of that Regulation[(14)]. Furthermore, except where the irregularity found has vitiated the entire proceeding, the institution has the option, in order to adopt an act intended to replace the act that has been declared invalid, to resume that proceeding at the stage when the irregularity occurred[(15)].

(20) Eurobolt also claimed that it would be inappropriate for the Commission to re-impose the anti-circumvention measures, as they have both expired and been repealed since.

(21) In this respect, it should be pointed out that, by remedying a procedural irregularity and confirming the findings of the investigation which were not contested by the judgment at issue, the Commission complies with its obligation to impose measures on imports of the product concerned that took place during the period of

application of these measures, i.e. between 27 July 2011 and 27 February 2016. Therefore, the Commission rejected Eurobolt's claim.

(22) Another party, the European Fastener Distributor Association (EFDA), claimed '*persistent failures to take seriously the valid and carefully considered comments of European fastener distributors and their respective representative bodies*.' They also claimed that, in a case where an importer can demonstrate that they have carried out proper due diligence and taken all reasonable and appropriate measures to ensure that the imported product has been legitimately manufactured in Malaysia, they should not be responsible for paying the anti-dumping duty and any such duties paid should be reimbursed.

(23) The Commission rejected the first EFDA claim, as the Association did not show any specific violation of due process in the investigation re-opening proceedings and did not provide any evidence in this respect.

(24) As regards the EFDA's second claim, Article 13(4) of the basic Regulation stipulates that, where the circumventing practice, process or work takes place outside the Union, exemptions may be granted to producers of the product concerned that are found not to be engaged in the circumvention practices. Consequently, there is no scope for exemptions based on importer due diligence when the circumvention takes place outside the EU (as is the case here). Rather, it is up to the exporter to prove that they are a genuine Malaysian producer and to ask for an exemption. As mentioned in Section 4 of the anti-circumvention Regulation, a number of Malaysian exporters applied and were considered for exemptions, with a total of nine companies being granted such exemptions by the Commission. The Commission, therefore, rejected EFDA's second claim.

(25) Having taken account of the comments made and the analysis thereof, the Commission concluded that the original measures should be re-imposed on imports of the product concerned consigned from Malaysia, whether declared as originating in Malaysia or not.

4. DISCLOSURE

(26) All parties that came forward at the reopening of the anti-circumvention investigation were informed of the essential facts and considerations on the basis of which it was intended to re-impose the anti-dumping duty. They were granted a period within which to make representations subsequent to disclosure. Eurobolt and EFDA submitted comments.

(27) First, Eurobolt maintained that violations of essential procedural requirements vitiate the entire proceeding, and so cannot be cured *ex post*. Second, Eurobolt maintained that the re-imposition of measures whose legal basis is an act found to be illegal by the WTO violates the rule of law and the principle of good administration. Third, Eurobolt claimed that the Commission's proposal to re-impose measures results in the absence of effective judicial protection as it means that the Commission can simply cure any violation *ex post*, and that this outcome upsets the balance of power in