Commission Implementing Regulation (EU) 2019/1374 of 26 August 2019 reopening of the investigation following the judgment of 3 July 2019, in case C-644/17 Eurobolt, with regard to Council Implementing Regulation (EU) No 723/2011 of 18 July 2011 extending the definitive anti-dumping duty imposed by 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

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 266 thereof,

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

Whereas:

1. PROCEDURE

(1) On 9 November 2007, the Commission initiated an anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China[(2)] pursuant to Article 5 of Council Regulation (EC) 384/96[(3)] (the ‘basic Regulation’).

(2) On 31 January 2009, by way of Regulation (EC) 91/2009[(4)], 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’).

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

(4) For that reason, on 28 November 2010, the Commission, by way of Regulation (EU) 966/2010[(5)], initiated an investigation concerning the possible circumvention of the anti-dumping measures imposed by Regulation (EC) 91/2009.

Changes to legislation: *There are currently no known outstanding effects for the Commission Implementing Regulation (EU) 2019/1374. (See end of Document for details)*

(5) On 26 July 2011, the Council extended the anti-dumping duty imposed by Regulation (EC) 91/2009 to certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, by Regulation (EU) 723/2011 of 18 July 2011 (the anti-circumvention Regulation)[(6)].

(6) On 27 February 2016, the Commission repealed the definitive anti-dumping duty imposed by Regulation (EC) 91/2009, as extended by Regulation (EU) 723/2011[(7)].

(7) On 17 November 2017, the Supreme Court of the Netherlands requested a preliminary ruling in the context of domestic litigation brought by a Dutch importer of fasteners from Malaysia, Eurobolt BV ('Eurobolt'). Eurobolt challenged the validity of the anti-circumvention measures on the ground that the Commission had failed to send the Committee all relevant information at least 10 working days prior to the meeting of the committee as prescribed by the then-applicable Article 15(2) of Regulation (EC) 1225/2009[(8)].

(8) In this context, the refering court asked the Court of Justice whether Regulation (EU) 723/2011 is invalid in the light of Article 15(2) of Regulation (EC) 1225/2009, inasmuch as the observations submitted by Eurobolt in response to the Commission's findings were not, as relevant information for the purposes of that provision, made available to the Advisory Committee referred to therein at least 10 working days prior to the meeting of that committee[(9)].

(9) In its judgment, the Court of Justice noted that the observations at issue were submitted by Eurobolt in its capacity as an interested party in connection with an investigation initiated by the Commission under Article 13(3) of Regulation (EC) 1225/2009. Those observations were intended to respond to the provisional findings that had been made by the Commission[(10)]. Accordingly, they should have been considered to constitute relevant information for the purposes of Article 15(2) of Regulation (EC) 1225/2009[(11)], with the effect that that provision had been infringed inasmuch as those observations were not communicated to the Member States no later than 10 working days before the meeting of the Advisory Committee[(12)].

(10) To the Court of Justice, the requirement to provide the Advisory Committee with all relevant information no later than 10 working days before the meeting of that committee laid down in Article 15(2) of Regulation (EC) 1225/2009 constitutes an essential procedural requirement governing the proper conduct of proceedings, breach of which renders the act concerned void.[(13)].

(11) 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.

(12) It follows from the case-law that where a judgment of the Court annuls a regulation imposing anti-dumping duties or declares such a regulation to be invalid, the institution called upon to take such measures for the purpose of implementing that judgment does have the option of resuming the proceeding at the origin of that regulation, even if that option is not expressly set out in the applicable legislation[(14)].

(13) Furthermore, except where the irregularity found has vitiated the entire proceeding with illegality, the institution concerned has the option, in order to adopt an act intended to replace the act that has been annulled or declared invalid, to resume that proceeding only at the stage when the irregularity was committed[(15)]. That implies in particular that in a situation where an act concluding an administrative procedure is annulled, that annulment does not necessarily affect the preparatory acts, such as the initiation of the anti-circumvention procedure by Regulation (EU) 966/2010.

(14) In the present case, the Court of Justice declared Regulation (EU) 723/2011 invalid inasmuch as it was adopted in breach of the consultation procedure contained in Article 15(2) of Regulation (EC) 1225/2009. Thus, the Commission has the possibility to remedy the aspects of Regulation (EU) 723/2011 which led to its annulment, leaving those parts which were not affected by the judgment of the Court unaffected[(16)].

(15) The Commission has therefore decided to reopen the anti-circumvention investigation in order to correct the illegality identified by the Court of Justice.

2. REOPENING PROCEDURE

2.1. Reopening

(16) In view of the above, the Commission reopens the anti-circumvention investigation concerning imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, that led to the adoption of Council Implementing Regulation (EU) No 723/2011 of 18 July 2011 extending the definitive anti-dumping duty imposed by Regulation (EC) No 91/2009.

(17) The reopening is limited in scope to the implementation of the judgment of the Court of Justice of Case C-644/17 *Eurobolt*. In that judgment, the illegality identified by the Court of Justice pertains to the obligations arising from the Advisory Committee procedure contained in Article 15(2) of Regulation (EC) 1225/2009 as it stood at the time. That procedure has, in the meantime, been replaced by the examination committee procedure contained in Article 5 of Regulation (EU) 182/2011[(17)(18)].

(18) In this regard, the Commission observes that, in principle, acts of the European Union be adopted in accordance with the procedural rules in force at the time of their adoption. However, precisely because of the repeal of Article 15(2) of Regulation (EC) 1225/2009 in the form as it stood at the time of the underlying investigation, a proceeding like the current re-opening of an anti-circumvention investigation initiated pursuant to Article 13(3) of Regulation (EC) 1225/2009 can, as from the repeal of Article 15(2) of Regulation (EC) 1225/2009 in the form as applicable at the time of adoption of Regulation (EU) 723/2011, be completed only on the basis of the committee procedure currently in place for the imposition of anti-circumvention measures[(19)]. Pursuant to Article 15(3) of Regulation (EC) 1225/2009, as amended and codified in Regulation (EU) 2016/1036[(20)], the procedure to be followed for the purposes of this re-opening is the one contained in Article 5 of Regulation (EU) 182/2011.

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(19) Since, in this particular case, the observations by Eurobolt in its capacity as an interested party in connection with the investigation initiated by the Commission under Article 13(3) of Regulation (EC) 1225/2009 were not appropriately communicated to the Advisory Committee, the Commission intends to analyse those observations (as well as any additional information provided by interested parties as provided in section 2.2) and reflect the outcome of that analysis in the proposal to be submitted to the Committee.

(20) The Commission will, subsequently, consult the Committee on the basis of the examination procedure set out in Article 5 of Regulation (EU) 182/2011, as referred to in Article 15(3) of Regulation (EU) 2016/1036, no later than 14 days before the meeting of that committee. This is to enable the governments of the Member States to familiarise themselves with all relevant information relating to those observations, so that those governments may, by means of internal and external consultations, define a position in order to protect the specific interests of each of them.

2.2. **Written submission**

(21) Interested parties are invited to come forward and to make their views known, submit information and provide supporting evidence on issues pertaining to the reopening of the investigation within 20 days of the date of publication of this Regulation in the Official Journal of the European Union.

2.3. **Possibility to be heard by the Commission investigation services**

(22) Interested parties may request to be heard by the Commission investigation services. Any request to be heard should be made in writing and should specify the reasons for the request. For hearings on issues pertaining to the reopening of the investigation the request must be submitted within 15 days of the date of publication of this Regulation in the *Official Journal of the European Union*. Thereafter, a request to be heard must be submitted within the specific deadlines set by the Commission in its communication with these parties.

2.4. **Instructions for making written submissions and sending correspondence**

(23) Information submitted to the Commission for the purpose of trade defence investigations should be free from copyright. Interested parties, before submitting to the Commission information and/or data which is subject to third party copyright, must request specific permission to the copyright holder explicitly allowing a) the Commission to use the information and data for the purpose of this trade defence proceeding and b) to provide the information and/or data to interested parties to this investigation in a form that allows them to exercise their rights of defence.

(24) All written submissions and correspondence provided by interested parties for which confidential treatment is requested shall be labelled '*Limited*'[21].

(25) Interested parties providing '*Limited*' information are required to furnish non-confidential summaries of it pursuant to Article 19(2) of 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[22], which will be labelled '*For inspection by interested parties*'. These summaries should be sufficiently detailed to permit a reasonable understanding of the substance of the information submitted in confidence. If an interested party providing confidential information does not furnish a non-confidential summary of it in the requested format and quality, such information may be disregarded.

(26) Interested parties are invited to make all submissions and requests by e-mail or TRON.tdi (https://webgate.ec.europa.eu/tron/TDI)[23] including scanned powers of attorney and certification sheets. By using e-mail or TRON.tdi, interested parties express their agreement with the rules applicable to electronic submissions contained in the document 'CORRESPONDENCE WITH THE EUROPEAN COMMISSION IN TRADE DEFENCE CASES' published on the website of the Directorate-General for Trade: http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_148003.pdf. The interested parties must indicate their name, address, telephone and a valid e-mail address and they should ensure that the provided e-mail address is a functioning official business e-mail which is checked on a daily basis. Once contact details are provided, the Commission will communicate with interested parties by e-mail only, unless they explicitly request to receive all documents from the Commission by another means of communication or unless the nature of the document to be sent requires the use of a registered mail. For further rules and information concerning correspondence with the Commission including principles that apply to submissions by e-mail, interested parties should consult the communication instructions for interested parties referred to above.

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2.5. **Non-cooperation**

(27) In cases where any interested party refuses access to or does not provide the necessary information within the time limits, or significantly impedes the investigation, findings, affirmative or negative, may be made on the basis of facts available, in accordance with Article 18 of the basic Regulation.