

## Suspension of Anti-dumping Measures in the EU: A New Trend or Not?

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*Suspension of anti-dumping ('AD') measures is an exceptional tool available to the European Commission to be used under exceptional circumstances. In accordance with Article 14(4) of the basic AD Regulation, the Commission may suspend AD measures, if market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension. Although the suspension is not common, the Commission decided to suspend AD measures concerning imports of certain aluminium flat-rolled products ('AFRP') from China in October 2021. However, the Commission decided not to suspend AD measures concerning imports of birch plywood originating in Russia in December 2021. Better economic performance of Union producers in the post-investigation period (IP), or the absence thereof, was the main difference between the AFRP and birch plywood cases that led the Commission to reach the opposite conclusion. Given that the Commission recently suspended AD measures in the AFRP case, we may see more suspension requests from Union users and importers, and non-EU exporting producers. As a result, the Commission may initiate a few review investigations on suspension. However, the suspension will remain an exceptional tool and we will see a limited of cases of suspension.*

**Keywords:** EU trade defense instruments, anti-dumping, suspension

### I INTRODUCTION

In the EU trade defense instruments ('TDI'), suspension of anti-dumping ('AD') or countervailing measures is a tool only used under exceptional circumstances only. Article 14(4) of the basic EU AD Regulation<sup>1</sup> provides that, in the Union interest, AD measures may be suspended by a Commission decision on the ground that market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension. The Union industry must be given an opportunity to comment on a proposal regarding suspension and these comments must be taken into account. The Commission

may suspend AD measures for an initial period of nine months, which may be extended for additional period up to twelve months. The AD measures may be reinstated at any time if the reason for suspension is no longer applicable.<sup>2</sup>

Although the suspension is not common, the Commission suspended AD measures in the past where there were temporary shortages, imbalance of supply and demand, or significant price increases of the product concerned.<sup>3</sup> Before the most recent case of suspension in October 2021, as explained below, the last suspension was decided in 2009, and concerned glyphosate from China. Then, the Commission initially suspended the AD

### Notes

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<sup>1</sup> Article 14(4) of the basic EU AD Regulation provides:

In the Union interest, measures imposed pursuant to this Regulation may be suspended by a decision of the Commission in accordance with the advisory procedure referred to in Article 15(2) for a period of nine months. The suspension may be extended for a further period, not exceeding one year, by the Commission acting in accordance with the advisory procedure referred to in Article 15(2).

Measures may only be suspended where market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension, and provided that the Union industry has been given an opportunity to comment and those comments have been taken into account. Measures may at any time be reinstated in accordance with the advisory procedure referred to in Article 15(2) if the reason for suspension is no longer applicable.

<sup>2</sup> In addition, Art. 24(4) of the basic anti-subsidy ('AS') Regulation provides that the Commission may suspend countervailing measures in the same manner as the suspension of AD measures.

<sup>3</sup> **Glyphosate** (China, 2009, R298, Commission Decision 2009/383/EC, OJ L 120, 15 May 2009, at 20); **Silico-manganese** (China, Kazakhstan, 2007, AD513, Commission Decision 2007/789/EC, OJ L 317, 5 Dec. 2007, at 79); **Ferro molybdenum** (China, 2006, AD436, Commission Decision 2006/714/EC, OJ L 126, 9 June 1995, at 58); **Seamless pipes and tubes (or iron or non-alloy steel)** (Croatia, Ukraine, 2005, AD490, Commission Decision 2005/133/EC, OJ L 46, 17 Feb. 2005, at 46); **DRAMs** (Korea, Japan, 1995, Commission Decision 95/197/EC, OJ L 126, 9 June 1995, at 58); **EPROMs** (Japan, 1995, Commission Decision 95/272/EC, OJ L 165, 15 July 1995, at 2).

measures for nine months, given the temporary change in market conditions, and in particular the level of prices on the Union market and the high profit levels of the Union industry,<sup>4</sup> and extended the suspension for additional twelve months.<sup>5</sup>

In a recent case, the Commission suspended AD measures concerning imports of certain aluminium flat-rolled products ('AFRP') from China in October 2021. It found that market conditions changed temporarily and that there was no likelihood of recurrence of injury as a result of a suspension. However, two months later in December 2021, the Commission decided **not** to suspend AD measures concerning imports of birch plywood originating in Russia. Contrary to the AFRP case, the Commission concluded that the market conditions had not temporarily changed to an extent that injury would be likely to resume as a result of a suspension.

This article examines the Commission's recent decisions on suspension of AD measures in the two recent cases and expected trend on suspension of AD measures in the EU. In particular, section 2 analyses the Commission's reasoning for its conclusions in the AFRP and birch plywood case; section 3 explains the key difference between the two cases; and section 3 discusses expected trend on suspension of AD measures in the EU and implications on stakeholders in EU AD investigations.

## 2 COMMISSION'S DECISIONS ON SUSPENSION OF AD MEASURES IN THE AFRP AND BIRCH PLYWOOD CASE

### 2.1 Aluminium Flat-Rolled Products: Suspension

#### 2.1.1 History

On 14 August 2020, the Commission initiated an AD investigation with regard to imports of certain AFRP originating in China<sup>6</sup> and on 12 April 2021, the Commission imposed provisional AD duties. On 13 July 2021, the Commission communicated the final disclosure,

which concluded that definitive AD duties should be imposed. After the final disclosure, car heat exchanger manufacturers, Valeo and TitanX, as well as importing company, Airoidi Metalli, submitted a request to suspend the AD duties, pointing to a change of market conditions, which occurred after the investigation period ('IP'). On 28 July 2021, the Commission circulated questionnaires to Union producers, users, and importers to assess the possibility of the suspension. On 1 September 2021 the Commission disclosed its intention to suspend AD measures for nine months as of the date of their imposition. On 11 October 2021, the Commission imposed AD duties<sup>7</sup> ranging from 14.3% to 24.6%, but, on the same date, also suspended the AD measures for nine months until July 2022.<sup>8</sup>

#### 2.1.2 Key Reasoning to Suspend AD Measures

The Commission's decision to suspend the AD measures in the AFRP case are based on following two reasoning: (1) **market conditions changed temporarily**; and (2) **there is no likelihood of recurrence of injury as a result of a suspension**. These are requirements that must be fulfilled for the Commission to suspend AD measures.

First, the Commission found that **market condition changed in the post-IP (1 July 2020–30 June 2021)<sup>9</sup> concerning the supply and demand, and that the changed market conditions were temporary in nature**. The Commission first recalled its finding that during the period considered (1 January 2017–30 June 2020),<sup>10</sup> Union producers had suffered from material injury as a consequence of the dumped imports from China, which led to significant losses in production, sales, market share and profitability.<sup>11</sup>

After assessing the injury situation of Union producers in the post-IP (1 July 2020–30 June 2021), the Commission found that most of injury indicators showed a significant improvement in the first half of 2021 in terms of sales, production volume, production capacity, average sales price, and profitability, when compared with the IP (1 July 2019–30 June 2020) and 2017, which was the best year in the period considered (1 January 2017–30

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<sup>4</sup> Commission Decision 2009/383/EC, OJ L 120, 15 May 2009, at 20.

<sup>5</sup> Implementing Regulation of the Council (EU) No 126/2010 of 11 Feb. 2010 extending the suspension of the definitive anti-dumping duty imposed by Regulation (EC) No 1683/2004 on imports of glyphosate originating in the People's Republic of China, OJ L 40, 13 Feb. 2010, at 1.

<sup>6</sup> Aluminium flat-rolled products (China), AD668.

<sup>7</sup> Commission Implementing Regulation (EU) 2021/1784 of 8 Oct. 2021 imposing a definitive anti-dumping duty on imports of aluminium flat-rolled products originating in the People's Republic of China, OJ L 359, 11 Oct. 2021, at 6.

<sup>8</sup> Commission Implementing Decision (EU) 2021/1788 of 8 Oct. 2021 suspending the definitive anti-dumping duties imposed by Implementing Regulation (EU) 2021/1784 on imports of aluminium flat-rolled products originating in the People's Republic of China (OJ L 359, 11 Oct. 2021, at 105–116) ('Decision (EU) 2021/1788').

<sup>9</sup> The IP was from 1 July 2019 to 30 June 2020. The period considered to examine trends relevant for the assessment of injury was from 1 Jan. 2017 to 30 June 2020 ('period considered').

<sup>10</sup> The period considered to examine trends relevant for the assessment of injury was from 1 Jan. 2017 to 30 June 2020 ('period considered').

<sup>11</sup> Decision (EU) 2021/1788, recital 21.

June 2020).<sup>12</sup> The Commission also noted that Union producers could not supply the requested products, because they had reached capacity for orders in 2021 and for at least the first half of 2022. This resulted in an imbalance between supply and demand, which led to significantly longer lead times and a significant increase in prices for AFRP.<sup>13</sup>

At the same time, the Commission found that **the changed market conditions were temporary in nature, and were not structural changes**, and it is likely that supply and demand would align again after the temporary suspension of the AD measures.<sup>14</sup> In so doing, the Commission considered the following factors: (1) the Union producers are making efforts to increase its supply by increasing production and capacity; and (2) the duration of the strong sudden and unexpected rebound of demand is uncertain and is expected to diminish over time.

Second, the Commission found that **there is no likelihood of recurrence of injury during the nine months period that the suspension would last**. In particular, the Commission considered that the overall performance of Union producers in the coming months would not be impacted by the suspension of the measures, given that: (1) many users already switched to source AFRP from Chinese producers to Union producers; (2) the demand is exceptionally high and Union producers were already fully booked until, at least, the first half of 2022; and (3) Union producers cannot currently meet the volume needed by users.<sup>15</sup> In other words, Union producers' positive prospects for the coming months show that the injury is unlikely to resume as a result of the suspension.

The Commission also noted that the suspension is **in the Union interest**, since a nine-month suspension would give users additional time to validate Union producers as suppliers and ensure a smooth transition from changing their source of supply from Chinese producers to Union producers.<sup>16</sup> Further, the Commission stressed that if import originating in China enter the EU in very high quantities and cause injury to Union producers, AD measures could be quickly reinstated,<sup>17</sup> which would address the concern of Union producers.

Given the above-mentioned factors, the Commission decided to suspend the AD measures. After the suspension

took effect, the Commission has been monitoring imports of AFRPs from China and has provided import statistics to interested parties on a monthly basis.<sup>18</sup>

## 2.2 Birch Plywood: No Suspension

### 2.2.1 HISTORY

On 14 October 2020, the Commission initiated an AD investigation with regard to imports of birch plywood originating in Russia<sup>19</sup> and on 11 June 2021, the Commission imposed provisional AD duties. On 31 August 2021, the Commission communicated its final disclosure, which concluded that definitive AD duties should be imposed. After the final disclosure, several interested parties submitted a request to suspend the AD duties, pointing to a change of market conditions, which occurred after the IP. Then, the Commission circulated questionnaires to Union producers, users, and importers to assess whether the duties should be suspended. On 11 October 2021, the Commission disclosed its intention **not** to suspend AD measures for nine months as of the date of their imposition. On 9 November 2021, the Commission imposed the AD measures<sup>20</sup> ranging from 14.4% to 15.8%, and on 6 December 2021, the Commission published its decision **not** to suspend the AD measures.<sup>21</sup>

### 2.2.2 Key Reasoning not to Suspend Measures

The Commission's decision not to suspend the AD measures in the birch plywood case is based on following ground: **market conditions had not changed temporarily so that the injury would be likely to resume if the duties were to be suspended**.

At the outset, the Commission recalled its finding that during the period considered (1 January 2017–30 June 2020),<sup>22</sup> the economic situation of Union producers showed a negative trend in all major injury indicators, namely

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<sup>12</sup> *Ibid.*, recital 23.

<sup>13</sup> *Ibid.*, recitals 28–30.

<sup>14</sup> *Ibid.*, recital 31.

<sup>15</sup> *Ibid.*, recital 49.

<sup>16</sup> *Ibid.*, recitals 63, 30, 48, 49, and 54.

<sup>17</sup> *Ibid.*, recital 60.

<sup>18</sup> In Dec. 2021, the Commission published its first report on imports of AFRP from China to allow the Commission and interested parties to react and take actions should there be abnormally low prices and/or high volumes that prove to be persistent enough to cause injury to Union producers.

<sup>19</sup> Birch Plywood (Russia), AD672.

<sup>20</sup> Commission Implementing Regulation (EU) 2021/1930 of 8 Nov. 2021 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of birch plywood originating in Russia, OJ L 394, 9 Nov. 2021, at 7.

<sup>21</sup> Commission Implementing Decision (EU) 2021/2145 of 3 Dec. 2021 not to suspend the definitive anti-dumping duties on imports of birch plywood originating in Russia imposed by Implementing Regulation (EU) 2021/1930, OJ L 433, 6 Dec. 2021, at 19 ('Decision (EU) 2021/2145').

<sup>22</sup> The period considered to examine trends relevant for the assessment of injury was from 1 Jan. 2017 to 30 June 2020 ('period considered').

production, sales, market share, and profitability.<sup>23</sup> In other words, Union producers had suffered from material injury as a consequence of the dumped imports from Russia.

The Commission then analysed the injury situation of Union producers in the post-IP (1 July 2020–30 June 2021) and found that the situation of Union producers had not significantly changed, when compared with the IP (1 July 2019–30 June 2020) and 2017.<sup>24</sup> The Commission noted that Union producers' sales, production volume, production capacity developed somewhat positively during the post-IP, only when compared with the IP. However, the Commission eventually found that these signs of recovery were not strong enough to reverse the injurious situation of Union producers, since Union producers' sales, production volume, production capacity still showed a negative trend when compared to 2017. Further, Union producers were still loss-making in the post-IP.

As a result, the Commission concluded that **Union producers are still injured and, thus, market conditions had not changed temporarily so that the injury would be likely to resume if the duties were to be suspended.** Accordingly, the Commission decided not to suspend the AD measures.

### 3 KEY DIFFERENCE BETWEEN AFRP AND BIRCH PLYWOOD CASES

Our analysis above of the AFRP and birch plywood cases shows that the Commission suspended AD measures only in exceptional circumstances, when the conditions for suspension are strictly met: market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension.

In particular, as an important part of the Commission's analysis in the two cases – and as the main difference between these cases, it was crucial for the Commission to first review **whether the injury situation of Union producers in the post-IP, such as sales, production volume, production capacity, profitability, demonstrated that Union producers are no longer injured when compared with both the IP (1 July 2019–30 June 2020, in both cases) and the beginning of the period considered to examine trends relevant for assessing injury (2017, in both cases).** Only when the evidence clearly showed a significant improvement in the injury indicators of Union producers, the Commission considered other factors such as imbalance of supply and demand to decide whether market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension and whether it is in the Union

interest to suspend AD measures.<sup>25</sup> In other words, **better economic performance of Union producers in the post-IP, or the absence thereof, was the main difference between the AFRP and birch plywood cases that led the Commission to reach the opposite conclusion.**

In the AFRP case, the Commission found as the first step of its analysis that Union producers' injury situation improved significantly in the post-IP, when compared with both the IP and 2017. This led the Commission to continue its analysis and conclude that: (1) market condition changed in the post-IP in the context of significant improvement of Union producers' economic performance, together with imbalance of supply and demand; and (2) the changed market conditions were temporary in nature. Given Union producers' positive prospects for the coming months,<sup>26</sup> the Commission considered that there was no likelihood of recurrence of injury during the nine months of suspension and, thus, decided to suspend the AD measures.

However, in the birch plywood case, the Commission was not convinced that Union producers no longer suffered from material injury in the post-IP, when compared to the IP and the beginning of the period considered for the injury assessment (2017). While a few injury indicators showed a slight improvement of the economic situation of Union producers in the post-IP when compared to the IP, the overall evidence showed that Union producers were still suffering from injury during the post-IP. The absence of significant improvement of Union producers' economic performance in the post-IP was sufficient for the Commission to conclude that market conditions have not temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension. As a result, the Commission rejected the suspension request.

## 4 EXPECTED TRENDS ON SUSPENSION OF EU AD MEASURES AND IMPLICATIONS ON STAKEHOLDERS IN EU AD INVESTIGATIONS

### 4.1 EXPECTED TRENDS ON SUSPENSION OF EU AD MEASURES

Starting from the second half of 2021, Union users and non-EU exporting producers (e.g., from China) have increasingly submitted requests to suspend measures in on-going or concluded AD investigations, often citing the imbalance of supply and demand, disruption in supply chain due to COVID-19, high shipping costs and delays

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<sup>23</sup> Decision (EU) 2021/2145, recital 8.

<sup>24</sup> *Ibid.*, recitals 9–12.

<sup>25</sup> *Ibid.*, recitals 29–31, 47–56, and 62–63.

<sup>26</sup> For instance, the demand is exceptionally high and Union producers were already fully booked until, at least, the first half of 2022.

in shipment. For instance, several Union users and non-EU exporting producers in two AD investigations on aluminium converter foil ('ACF') and fastener have submitted suspension requests.<sup>27</sup> Further, after the Commission imposed AD measures on Polyvinyl Alcohol ('PVA') from China in September 2020,<sup>28</sup> Union users and importers requested for suspension of AD measures.<sup>29</sup>

At the time of the writing this article, the Commission has not yet started its review on the possibility of suspension in the ACF and fastener cases, although the Commission expressed its intention to review the potential suspension of the AD measures in a separate procedure.<sup>30</sup> In the PVA case, the Commission initiated the partial interim review regarding the suspension in September 2021 – one year after the imposition of AD measures. While there is ample evidence that Union producers cannot supply sufficient volume of PVA to users, it is less clear whether the injury situation of Union producers improved significantly after the imposition of the AD measures.

Given that the Commission recently suspended AD measures in the AFRP case, we may see more requests from Union users and importers, and non-EU exporting producers to suspend AD measures. As a result, the Commission may initiate a few review investigations on suspension. However, the AFRP and birch plywood cases show that the Commission will be reluctant to suspend AD measures when evidences do not support that Union producers no longer suffer from material injury in the post-IP. In other words, it is highly likely that the suspension will remain an exceptional tool and we will see a limited of cases of suspension. The Commission will suspend AD measures only when evidences prove that Union producers no longer suffer from material injury and the conditions for suspension are fully satisfied.

## 4.2 IMPLICATIONS ON STAKEHOLDERS IN EU AD INVESTIGATIONS

In the long-term, the suspension of AD measures in the recent AFRP case is likely to have limited implications on stakeholders in EU AD investigations, namely Union users and importers, exporting producers and Union producers, because it is an exceptional measure

of a temporary nature. However, in the short-term, we are likely to witness more review investigations on suspension following an increased number of suspension requests, as mentioned above. We explain implications on stakeholders in EU AD investigations in this context.

Union users and importers, and non-EU exporting producers<sup>31</sup> are likely to submit more requests to suspend AD measures in on-going and concluded AD investigations. In their suspension request, they would include the following evidence, where relevant, to show the temporary change in market conditions and the unlikelihood of recurrence of injury in the event of suspension: (1) inability of Union producers, as well as non-EU producers, to meet the increasing demand of the product concerned; (2) a significant increase in prices of the product concerned; (3) high shipping costs and delay in shipment; (4) lack of raw materials to manufacture the product concerned; and (5) other relevant evidences.

If the Commission suspends the AD measures, Union users and importers, and non-EU exporting producers will temporarily benefit from the suspension for nine months with a possible extension up to twelve months. However, after the suspension, the Commission will still closely monitor imports of the product concerned (like in the AFRP case) and will restore the AD measures if imports enter the EU in high quantities and cause renewed injury to Union producers. In this regard, it remains to be seen whether suspension in the AFRP case will last for nine months, shortened or extended up to another twelve months.

In response, Union producers would firmly defend the necessity of maintaining AD measures when the Commission initiates a review on suspension. They would provide the following evidence, where applicable, to demonstrate that: (1) the alleged change in market conditions are caused by a number of different and unrelated factors; (2) increased price of the product concerned has been largely offset by increased price of raw materials; (3) their injury situation has not improved with respect to sales, production volume, production capacity, and profitability. Even if their economic indicators show somewhat positive pictures, they are not exceptional to justify the suspension.

If the Commission decides to suspend the AD measures, Union producers may consider challenging this decision before the Court of the Justice of the EU. In fact, European Aluminium, who was the complainant in

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<sup>27</sup> Aluminium converter foil (China, AD673), Certain iron or steel fasteners (China, AD676).

<sup>28</sup> Commission Implementing Regulation (EU) 2020/1336 of 25 Sept. 2020 imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols originating in the People's Republic of China, OJ L 315, 29 Sept. 2020, at 1.

<sup>29</sup> Polyvinyl alcohol (PVA) (China, R751).

<sup>30</sup> For the ACF case, the Commission stated in the definitive measure that following requests to assess a potential suspension of the AD measures from several interested parties, the potential suspension of the duties will be analysed in a separate procedure. See Commission Implementing Regulation (EU) 2021/2170 of 7 Dec. 2021 imposing a definitive anti-dumping duty on imports of aluminium converter foil originating in the People's Republic of China, OJ L 438, 8 Dec. 2021, at 46, recital 243.

<sup>31</sup> To clarify, Art. 14(4) of the basic AD Regulation does not define who can request the suspension. In principle, non-EU exporting producers who are subject to EU AD measures can also submit the suspension request. In the ACF case, Chinese exporting producers requested for suspension.

the AFRP case, challenged the Commission's decision before the General Court of the EU on 17 December 2021 and asked the court to annul the suspension.<sup>32</sup> It

would be important to monitor how this case develops further and to examine its implications on the Commission's practice on suspension in the future.

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<sup>32</sup> European Aluminium, Press release: Unjustified suspension of anti-dumping duties challenged before European Court, 20 Dec. 2021. European Aluminium lodged two cases. The first case is against the Commission's suspension decision. The second case is against the non-collection of the provisional anti-dumping duties that were already imposed in Apr. 2021.