Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union[(1)] ('the basic Regulation'), and in particular Article 15 thereof,

Whereas:

1. PROCEDURE

1.1. Initiation

(1) On 6 December 2018, the European Commission ('the Commission') initiated an anti-subsidy investigation with regard to imports into the European Union ('the Union') of biodiesel originating in Indonesia on the basis of Article 10 of the basic Regulation.

(2) The Commission published a Notice of initiation in the *Official Journal of the European Union*[(2)] ('the Notice of initiation').

(3) The Commission initiated the investigation following a complaint lodged on 22 October 2018 by the European Biodiesel Board ('the complainant' or 'the EBB') on behalf of producers representing 32 % of total Union production.

1.2. Provisional measures

(4) On 14 August 2019, the Commission imposed provisional countervailing duties on imports into the Union of biodiesel originating in Indonesia by Commission Implementing Regulation (EU) 2019/1344[(3)] ('the provisional Regulation').

(5) As stated in recital 13 of the provisional Regulation, the investigation of subsidisation and injury covered the period from 1 October 2017 to 30 September 2018 ('the investigation period' or 'IP') and the examination of trends relevant for the assessment of injury covered the period from 1 January 2015 to the end of the investigation period ('the period considered').

1.3. Subsequent procedure

(6) Following the disclosure of the essential facts and considerations on the basis of which provisional countervailing duties were imposed ('provisional disclosure'), the EBB, the Government of Indonesia ('GOI') and all four Indonesian exporting producers made written submissions making their views known on the provisional findings.

(7) The parties who so requested were granted an opportunity to be heard. Hearings took place with the EBB, the GOI, and all four Indonesian exporting producers.

(8) The Commission considered the comments submitted by interested parties and addressed them as detailed in this Regulation.

(9) The Commission informed all interested parties of the essential facts and considerations on the basis of which it intended to impose a definitive countervailing duty on imports into the Union of biodiesel originating in Indonesia ('final disclosure').

(10) Following final disclosure, the EBB, the GOI and three out of the four Indonesian exporting producers made written submissions making their views known on the definitive findings. The Commission noted that the submissions of the GOI and two exporting producers were in all respects the same, and in this Regulation these comments on final disclosure will be summarised as the comments of the GOI.

(11) The parties who so requested were granted an opportunity to be heard. Hearings after the final disclosure took place with the EBB, the GOI and two out of the four Indonesian exporting producers.

(12) In their comments to the final disclosure, the GOI and two of the exporting producers submitted that their rights of defence had not been respected, in particular regarding the undercutting calculations and the disclosure to interested parties of the product control numbers ('PCNs') of the Union industry used in the calculations, the feedstock used in the blends of the Union industry, and the cold filter plugging point ('CFPPs')[4] of the Union industry sales.

(13) The GOI and two out of the four Indonesian exporting producers requested a hearing in the presence of the Hearing Officer and such hearing took place on 14 October 2019.

(14) All of these points were already dealt with in the final disclosure and were explained to the GOI during the hearings that took place after the final disclosure was sent.

(15) The Commission considered the comments submitted by interested parties following final disclosure and addressed them as detailed in this Regulation.

1.4. Investigation period and period considered

(16) In the absence of comments concerning the investigation period and period considered, recital 13 of the provisional Regulation was confirmed.

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. **Claims regarding the product scope**

(17) After the publication of the provisional Regulation, the Wilmar Group ('Wilmar'), an exporting producer in Indonesia, made a claim that their exports of fractionated methyl esters should not be considered as exports of the product concerned. Wilmar noted that this claim had been made within the deadline, as it was to be found in Annex I of their sampling form.

(18) The claim was however not made separately, and therefore was not noted by other interested parties until the receipt of comments to the provisional Regulation.

(19) The Commission noted that the same claim was made during the previous anti-dumping investigation into imports of biodiesel from Indonesia by the same exporting producer on the basis of the same information, and was rejected in both the provisional Regulation[(5)] and the definitive Regulation[(6)] ('the original investigation').

(20) In this investigation, the Commission again rejected the product exclusion request for the same three reasons as set out in the previous anti-dumping regulation, as follows.

(21) First, fractionated methyl esters are fatty acid methyl esters and can be used for biodiesel. In this sense, biodiesel declared for non-fuel use can be used for fuel as it has the same physical and technical properties.

(22) Second, it is difficult to distinguish one fatty acid methyl ester from another without chemical analysis at the port of importation.

(23) Third, although fractionated methyl esters do not meet the European norm (EN 14214), they can be mixed with other biodiesels to create a blend that meets the norm.

(24) Wilmar also requested that the Commission confirms that as a matter of principle fractionated methyl esters can benefit from the customs procedure of end-use, where duties are exempted, provided the company can prove to the satisfaction of the national customs authority that the end use of the fractionated methyl ester is not fuel.

(25) The Commission noted that suspension of duties subject to end-use customs supervision has been granted on some imports of fractionated methyl esters as set out in Council Regulation (EU) 2018/2069[(7)]. However, this relief concerns only the autonomous Common Customs Tariff duties and is without prejudice to the application of the countervailing duties. Consequently, the Commission rejected the end-use relief request as far as the application of the countervailing duties is concerned.

(26) Following final disclosure, Wilmar again made its claim for end-use relief with respect to countervailing duties for their exports of fractionated methyl esters. No new information or reasons why end-use relief should be extended to provide relief from countervailing duties, was provided and the claim was therefore rejected. The Commission did not find any valid reason to exclude fractionated methyl esters from the product scope. Simply that fractionated methyl esters may be used by Wilmar on

other uses than fuel does not mean that such a product type must be excluded from the scope of this investigation.

(27) In the absence of any other comments with respect to the product scope, the Commission confirmed the conclusions set out in recitals 31 to 37 of the provisional Regulation.

3. SUBSIDISATION

3.1. Government support to the biodiesel industry through direct transfer of funds via the Oil Palm Plantation Fund

3.1.1. *Financial contribution*

(28) Following the provisional disclosure, the GOI claimed that the Commission failed to prove the existence of a financial contribution in favour of the exporting producers.

(29) The GOI as well as all exporting producers claimed that the Oil Palm Plantation Fund (the 'OPPF') is exclusively financed by the collection of the export levy on crude palm oil ('CPO') and derivative products and in large part by the biodiesel producers themselves. Additionally, the GOI claimed that the export levy is paid directly by the exporting producers to the OPPF prior to exporting the goods. According to the GOI therefore no money is withdrawn from the general budget of the State and therefore there is no financial contribution.

(30) In this regard, the Commission reiterated that, as stated in the provisional Regulation in recitals 56 to 61, the Oil Palm Plantation Fund Management Agency (the 'Management Agency') acts as a public body in the sense of Article 2(b) of the basic Regulation read in conjunction with Article 3(1)(a)(i) of the basic Regulation and in accordance with the relevant WTO case-law. Therefore, the funds used by the Management Agency constitute public funds.

(31) Further, during the verification visit carried out at the GOI's premises, the Commission sought to obtain and verify evidence to support the GOI's claim that the OPPF's funds are not part of the State budget. The GOI, however, could not provide such evidence.

(32) Instead, the GOI provided evidence indicating that the exporting producers did indeed pay the export levy prior to exporting their goods. However, it could not provide any indication that these payments are made into a specific account of the OPPF that would be distinct from the general State budget and would thus prevent the payments collected from the export levy on CPO and its derivative products from going into the general State budget and being used for any other purpose deemed fit by the GOI. Moreover, there is no indication that the OPPF has separate accounts for the collection of export levies derived from biodiesel and other products (including CPO). This implies that the funds available to the Management Agency are not dependent on the exporting producers of biodiesel first paying the levy, since the GOI may have already collected public revenue through the imposition of export levies upon other products.

Thus, absent further evidence showing the contrary, the Commission confirmed the findings made in recital 64 of the provisional Regulation.

(33) The Commission further observed that the qualification of the OPPF as a public body was not disputed by neither the GOI nor any of the exporting producers. Hence, and considering the failure of the GOI to provide compelling evidence to the contrary, the funds available to the OPPF shall be considered as public funds and therefore drawn from government resources (such as the compulsory export levy).

(34) The GOI and all exporting producers additionally claimed that the Commission erred in analysing the payments of the OPPF in isolation, and not as part of the payment made by the GOI when purchasing biodiesel. The GOI and all exporting producers also claimed that the Commission mischaracterised the scheme as a grant, whereas it should be at most qualified as a government's purchase of goods for more than adequate remuneration.

(35) For the reasons set out below, the Commission rejected the claim that the Commission examined the payments made by the OPPF in isolation and that the programme should be regarded as a purchase of goods (biodiesel) by the GOI.

(36) The Commission observed that the GOI does not purchase the biodiesel, which is purchased by the selected blenders instead (Pertamina and AKR). The GOI, via the OPPF, does not have any contractual purchase relation with the biodiesel producers and does not receive anything in exchange of the money it disburses to the biodiesel producers. The fact that the GOI has any contractual relation with the biodiesel producers has also not been claimed by any of the interested parties during the investigation.

(37) The applicable legislation mandates the biodiesel suppliers willing to participate in this programme to deliver the palm methyl ester ('PME') to the Petrofuel Entities (see recitals 45 and 46 of the provisional Regulation), Pertamina or AKR, which will then blend it with mineral diesel to obtain the B20 diesel. The applicable legislation gives the biodiesel producers participating in this programme the right to receive (a) the payment for the biodiesel by the blenders; and (b) the additional money from the OPPF. There are no contractual obligations of the biodiesel producers towards the GOI nor towards the OPPF, other than the duty to comply with the mandate received in accordance with the relevant rules and for which they receive compensation. Lacking any mutual contractual obligation, the money disbursed by the OPPF are not therefore part of a contract for consideration (such as the purchase of biodiesel by the government in exchange of a price). Simply put, the GOI mandates each of the biodiesel producers participating in the programme to sell specific quantities of biodiesel to Pertamina or AKR at a given price (mineral diesel reference price) and the GOI provides additional funds directly to the biodiesel producers. Whereas the purpose and context of the programme is to incentivise the use of biodiesel on the domestic market, the GOI does not purchase biodiesel directly and then uses it for governmental purposes or resells it on the market. Rather, the GOI supports the sales of biodiesel by providing additional funds to biodiesel producers also in transactions where private operators (such as AKR)