Commission Regulation (EC) No 194/2009 of 11 March 2009 imposing a provisional countervailing duty on imports of biodiesel originating in the United States of America

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community[(1)] ('the basic Regulation'), and in particular Article 12 thereof,

After consulting the Advisory Committee,

Whereas:

1. PROCEDURE

(1) On 13 June 2008, the Commission announced, by a notice ('notice of initiation') published in the *Official Journal of the European Union*[(2)], the initiation of an anti-subsidy proceeding ('AS investigation' or 'the investigation') with regard to imports into the Community of biodiesel originating in the United States of America ('USA' or 'country concerned').

(2) On the same day, the Commission announced by a notice published in the *Official Journal of the European Union*[(3)], the initiation of an anti-dumping proceeding with regard to imports into the Community of biodiesel originating in the USA and commenced a separate investigation ('AD proceeding').

(3) The AS investigation was initiated following a complaint lodged on 29 April 2008 by the European Biodiesel Board ('the complainant') on behalf of producers representing a major proportion, in this case more than 25 % of the total Community production of biodiesel. The complaint contained *prima facie* evidence of subsidisation of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of the AS investigation.

(4) Prior to the initiation of the proceeding and in accordance with Article 10(9) of the basic Regulation, the Commission notified the Government of the USA that it had received a properly documented complaint alleging that subsidised imports of biodiesel originating in the USA were causing material injury to the Community industry. The Government of the USA was invited for consultations with the aim of clarifying the situation as regards the contents of the complaint and arriving

at a mutually agreed solution. The Government of the USA accepted the offer of consultations and consultations were subsequently held on 2 June 2008. During the consultations, no mutually agreed solution could be arrived at. However, due note was taken of comments made by the authorities of the USA highlighting that for some state programmes in the complaint, it was not always clear from the information contained therein that there were countervailable benefits to producers/exporters of biodiesel in the USA. Having examined the available information, it was decided to exclude the following state schemes from the scope of investigation even though they are listed in the notice of initiation: Florida renewable energy technology grants program, Texan new technology research and development program, Washington state energy freedom program (second part), Alabama alternative fuels and research development fund, North Dakota biodiesel sales equipment tax credit and Nebraska alternative fuel vehicle and refuelling infrastructure loans.

(5) The Commission officially advised exporters/producers in the USA, importers, suppliers, users and associations known to be concerned, the authorities of the USA, the complainant Community producers and other Community producers known to be concerned of the initiation of the proceeding. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation. All interested parties who so requested and showed that there were particular reasons why they should be heard were granted a hearing.

1.1. Sampling of exporters in the USA

(6) In view of the apparent large number of exporters/producers in the USA, sampling was provided for in the notice of initiation for the determination of subsidisation in accordance with Article 27 of the basic Regulation.

(7) In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, exporters/producers in the USA were requested to make themselves known within 15 days of the date of the initiation of the investigation and to provide basic information on their export and domestic sales, their precise activities with regard to the production, blending and trading of biodiesel and the names and activities of all their related companies involved in the production, blending and trading of the product concerned during the period 1 April 2007 to 31 March 2008 (‘IP’), as also defined in recital (17) below.

(8) More than 50 companies identified themselves in the context of the sampling exercise and provided the requested information within the 15 day period. These companies accounted for more than 80 % of the total imports of biodiesel from the United States of America to the Community.
Selection of the sample of cooperating companies in the USA

(9) In accordance with Article 27(1)(b) of the basic Regulation, a sample was selected based on the largest representative volume of exports of the product concerned to the Community that could be reasonably investigated within the time available. In accordance with Article 27(2) of the basic Regulation, the companies who requested

to be included in the sample, the professional association of biodiesel producers in the United States of America (the National Biodiesel Board) as well as the Government of the United States of America were consulted on the proposed sample. Based on the comments received from the interested parties, seven companies were originally chosen to constitute the sample. It has been provisionally decided, however, that one of the companies originally selected in the sample should be excluded therefrom in order to ensure parallelism with the sample chosen in the AD proceeding concerning imports of biodiesel from the USA. It is noted that said company was merely a trader of biodiesel in contrast with the other sampled companies who produce biodiesel. This company is, however, being granted individual examination, in accordance with Article 27(3) of the basic Regulation, and will have its own anti-subsidy duty established. The six companies that constitute the sample accounted for 50 % of the total export volumes from the USA during the IP based on US export statistics and accounted for 73 % of imports of biodiesel from the companies that made themselves known as explained in recital (8).

Individual examination of companies not selected in the sample

(10) Ten cooperating companies not selected in the sample requested the calculation of individual margins with a view to the application of Articles 27(3) and 15(3) of the basic Regulation. Questionnaires were sent to the companies concerned. Only one company replied to the questionnaire within the set deadline. However, the application was subsequently withdrawn.

1.2. Sampling of Community producers

(11) Regarding the Community producers, in accordance with Article 27 of the basic Regulation, a sample was selected after consultation of the complainant on the basis of the largest representative volume of production and sales within the Community as mentioned in recital (164) below. This selection also allowed for a certain geographical spread of producers in the Community. As a result, eleven Community producers were selected in the sample. The Commission sent questionnaires to the eleven companies selected. However, one producer originally considered for the sample had to be excluded as it failed to provide a meaningful questionnaire response. Hence, ten complete replies were received from the other companies within the set time limits. These ten producers selected in the sample were considered to be representative of the overall producers in the Community.

1.3. Parties concerned by the proceeding

(12) The Commission sent questionnaires to all parties known to be concerned and to all the other companies that made themselves known within the deadlines set out in the notice of initiation. Questionnaires were thus sent to the authorities of the USA, to the seven companies originally chosen in the sample of US companies, to the ten companies referred to in recital (10), to the 11 sampled Community producers, to 18 users as well as to 90 raw material suppliers.

(13) Questionnaire replies were received from the authorities of the USA, from the seven companies originally chosen in the sample of US companies as well as from

one company requesting individual examination, referred to in recital (10) above, ten sampled Community producers, one user and six raw material suppliers.

(14) The Commission sought and verified all the information deemed necessary for a provisional determination of subsidisation, resulting injury and Community interest.

(15) Verification visits were carried out at the premises of the following authorities of the United States of America:

Federal authorities of the United States of America

— Department of the Treasury (DOT)

— Department of Agriculture (USDA)

— Office of the United States Trade Representative

State authorities

— Illinois State Authorities, Springfield

— Missouri State Authorities, Jefferson City

— North Dakota State Authorities, Bismarck

— Texas Comptroller of Public Accounts, Austin

— Texas Department of Agriculture, Austin

— Washington State Authorities, Olympia

(16) Verification visits were also carried out at the premises of the following companies:

(a) *Producers located in the Community*

— Biopetrol Industries AG, Schwarzheide, Germany

— Diester Group

  — Diester Industries SAS, Paris, France

  — Mannheim Bio Fuel GmbH, Mannheim, Germany

  — Natural Energy West GmbH, Neuss, Germany

  — Novaol Austria GmbH, Bruck an der Leitha, Austria

  — Novaol Srl, Milan, Italy

— Ecomotion group

  — Ecomotion GmbH, Sternberg, Germany

  — Daka Biodiesel a.m.b.a, Løsning, Denmark

— GATE Global Alternative Energy Germany GmbH, Wittenberg and Halle, Germany

— Neochim SA, Feluy, Belgium

(b) *Exporting producers in the USA*

— Archer Daniels Midland Company, Decatur, Illinois

— Cargill Inc, Wayzata, Minnesota

— Green Earth Fuels of Houston LLC, Houston, Texas

— Imperium Renewables Inc., Seattle, Washington

— Peter Cremer North America LP, Cincinnati, Ohio
— Vinmar Overseas Limited, Houston, Texas
— World Energy Alternatives LLC, Boston, Massachusetts

(c) *Related importers in the Community*
— Cremer Energy GmbH, Hamburg, Germany
— Cargill NV, Ghent, Belgium
— ADM Europoort BV, Rotterdam, The Netherlands
— ADM Hamburg AG, Hamburg, Germany
— ADM International, Rolle, Switzerland

1.4. Investigation period

(17) The investigation of subsidisation and injury covered the period from 1 April 2007 to 31 March 2008 ('investigation period' or 'IP'). The examination of trends relevant for the assessment of injury covered the period from January 2004 to the end of the IP ('period considered').

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product concerned

(18) In the notice of initiation, the product allegedly being subsidised was defined as fatty-acid monoalkyl esters and/or paraffinic gasoils from synthesis and/or hydro-treatment, of non-fossil origin (commonly known as 'biodiesel'), whether in pure form or in a blend, mainly but not exclusively used as renewable fuel originating in the USA ('the product concerned'), normally declared within CN codes 3824 90 91, ex 3824 90 97, ex 2710 19 41, ex 1516 20 98, ex 1518 00 91, ex 1518 00 99.

(19) According to the US Internal Revenue Code[4] (US. CODE), Title 26, Section 40A, point (d), the term biodiesel is defined as the monoalkyl esters of long chain fatty acids derived from plant or animal matter which meet (a) the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under section 211 of the Clean Air Act (42 U.S.C 7545), and, (b) the requirements of the American Society of Testing and Materials D6751.

(20) Based on market and publicly available information[5], all types of biodiesel and biodiesel blends (a mix of biodiesel with mineral diesel as explained in recital (22) below), which are produced and sold in the USA are considered to be biodiesel fuels and are part of a legislative package concerning energy efficiency and renewable energy and alternative fuels.

(21) The investigation showed that biodiesel produced in the USA, is predominantly 'fatty acid methyl ester' (FAME) derived from a wide range of vegetable oils which serve as a biodiesel feedstock[6]. The term 'ester' refers to the trans-esterification of vegetable oils, namely, the mingling of the oil with alcohol. The term 'methyl' refers to methanol; the most commonly used alcohol in the process, although ethanol can also be used in the production process, resulting in 'fatty acid ethyl esters'.