Commission Regulation (EC) No 193/2009 of 11 March 2009 imposing a provisional anti-dumping 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 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community[(1)] (the 'basic Regulation'), and in particular Article 7 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-dumping proceeding ('AD 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 notice published in the *Official Journal of the European Union*[(3)], the initiation of an anti-subsidy proceeding with regard to imports into the Community of biodiesel originating in the USA and commenced a separate investigation ('AS proceeding').

(3) The AD 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 dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of the AD investigation.

(4) The Commission officially advised exporting 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 for exporting producers in the USA

(5) In view of the apparent large number of exporting producers in the USA, sampling was provided for in the notice of initiation for the determination of dumping, in accordance with Article 17(1) of the basic Regulation.

(6) In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, exporting producers in the USA were requested to make themselves known within 15 days from 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 investigation period 1 April 2007 to 31 March 2008 ('IP'), as also defined in recital (15) below.

(7) The authorities of the USA and the National Biodiesel Board (US producers' association) were also consulted with regard to the selection of a representative sample.

1.1.1. Pre-selection of cooperating exporting producers in the USA

(8) In total 54 exporting producers or groups of exporting producers came forward and provided the requested information within the given deadline set in the notice of initiation. Of this total, 29 companies reported exports of biodiesel to the Community during the IP and expressed a wish to participate in the sample, whereas 25 companies, two of which requested to be removed from the proceeding, reported no exports to the Community during the IP. Thus, 52 exporting producers or groups of exporting producers were considered to be cooperating in the present investigation.

(9) Exporting producers which did not make themselves known within the aforementioned deadline or did not provide the requested information in due time, were considered as non-cooperating with the investigation. The comparison between US export statistics and the volume of exports to the Community of the product concerned reported for the IP by the cooperating companies mentioned above suggests that the cooperation of US exporting producers was high as mentioned in recital (57) below.

1.1.2. Selection of the sample of cooperating exporting producers in the USA

(10) In accordance with Article 17(1) of the basic Regulation, a sample was selected based on the largest representative volume of exports of the product concerned to the Community which could reasonably be investigated within the time available. On the basis of the information received from the exporting producers, the Commission selected a sample of six exporting producers or groups of exporting producers having the largest volume of exports to the Community. Based on the sampling information, the selected companies or groups accounted for 73 % of the total volume of exports to the Community of the product concerned in the IP reported by the cooperating exporting producers referred to above in recital (8). It was therefore considered that such a sample

would allow to limiting the investigation to a reasonable number of exporting producers which could be investigated within the time available while ensuring a high level of representativeness. All exporting producers concerned, as well as the US producer's association and the US authorities, were consulted and agreed on the selection of the sample.

1.2. Sampling of Community producers

(11) Regarding the Community producers, in accordance with Article 17(1) 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 (63) 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 six sampled exporting producers or groups of producers in the USA, to the 11 sampled Community producers, to 18 users as well as to 90 raw material suppliers.

(13) Questionnaire replies were received from the six sampled exporting producers or producer groups in the USA, 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 dumping, resulting injury and Community interest. Verification visits were 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

Changes to legislation: *There are currently no known outstanding effects for the Commission Regulation (EC) No 193/2009. (See end of Document for details)*

— GATE Global Alternative Energy Germany GmbH, Wittenberg and Halle, Germany
— Neochim SA, Feluy, Belgium

(b) *Exporting producers in the USA*
— Peter Cremer North America LP, Cincinnati, Ohio
— Cargill Inc., Wayzata, Minnesota
— Imperium Renewables Inc., Seattle, Washington
— Archer Daniels Midland Company, Decatur, Illinois
— World Energy Alternatives LLC, Boston, Massachusetts
— Green Earth Fuels of Houston LLC, Texas

(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

(15) The investigation of dumping and injury covered the period from 1 April 2007 to 31 March 2008 ('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

(16) In the notice of initiation the product allegedly being dumped 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.

(17) According to the US Internal Revenue Code[4] (US. CODE), Title 26, $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 (ASTM) D6751.

(18) 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 (20) 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.

(19) 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'. The trans-esterification is a relatively simple chemical process but it requires the highest industrial standards to ensure a high quality of biodiesel.

(20) The investigation confirmed that biodiesel produced in the USA is generally blended by the producers with mineral diesel to produce various types of blends (here referred to as biodiesel blends or mixtures), which are then sold on the market to various types of customers. It also appeared that biodiesel was sold in its pure form to independent companies, which purchased or imported it for blending with mineral diesel. Blending biodiesel with mineral diesel is a relatively simple operation which may be accomplished for instance by mixing in tanks at the manufacturing point prior to delivery to a tanker truck or by a splash mixing in the tanker truck adding the desired percentages of biodiesel and mineral diesel or in-line mixing with the two components arriving at the tanker truck simultaneously.

(21) To clearly identify the various types of biodiesel blends or mixtures, there is an internationally recognized system known as the 'B' factor, which states the exact amount of biodiesel in any biodiesel blend: for instance, a blend containing 'X' % biodiesel would be labelled B'X', while pure biodiesel is referred to as B100, meaning 100 % biodiesel. In the USA, it was common to see 99 %[(7)] of biodiesel and 1 % mineral diesel (B99) being blended and sold on the market. Contrary to mineral diesel, pure biodiesel should be used relatively quickly and cannot be kept in stock for more than three to four months otherwise it would oxidise and become unfit for consumption. Blending biodiesel with mineral diesel allows a longer preservation of the fuel. The 1 % mineral diesel in the B99 is sufficiently toxic to retard mould of the biodiesel.

(22) The investigation showed that whilst biodiesel and the high-level biodiesel blends[(8)] are generally intended to be sold in the US market for further blending, the low-level biodiesel blends[(9)] are typically produced to be sold for consumption in the US market. Hence, there is a distinction between the market for high-level blends and the market for low-level blends in the USA.

(23) The complaint contained *prima facie* evidence that biodiesel and certain blends produced and sold in the USA and exported to the Community were affecting the economic situation of the complaining biodiesel producers in the Community. Consistent with the characteristics of the relevant US producers and domestic market, the definition of the product concerned intended to cover biodiesel also when incorporated into the relevant biodiesel blends. The definition of the product concerned as mentioned in the notice of initiation and in recital (16) above, should be clarified in order to identify the products which were intended to be covered by the investigation.