Commission Implementing Decision (EU) 2019/245 of 11 February 2019 accepting undertaking offers following the imposition of definitive countervailing duties on imports of biodiesel originating in Argentina

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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)], and in particular Articles 13 and 15 thereof,

After consulting the Committee established by Article 15(1) 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[(2)],

Whereas:

A. PROCEDURE

(1) On 31 January 2018, the European Commission ('the Commission') initiated an anti-subsidy investigation with regard to imports into the Union of biodiesel originating in Argentina pursuant to Article 10 of Regulation (EU) 2016/1037. It published a Notice of Initiation in the *Official Journal of the European Union*[(3)] ('the Notice of Initiation').

(2) On 21 September 2018, by means of an information document, the Commission provided all interested parties with its preliminary findings, noting that no provisional countervailing duty would be imposed on imports into the Union of biodiesel originating in Argentina ('the product concerned') and confirming that the investigation would continue.

(3) On 3 December 2018, the Commission disclosed to all parties the essential facts and considerations on the basis of which it intended to impose a definitive countervailing duty on imports of the product concerned into the Union. All parties were granted a period within which they could make comments on the final disclosure.

B. UNDERTAKING OFFERS

1. Undertaking Offers

(4) Following the final disclosure, all cooperating exporting producers, including their related companies, and together with the Argentine Chamber of Biofuels (Cámara

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Argentina de Biocombustibles, 'CARBIO') offered price undertakings in accordance with Article 13(1) of Regulation (EU) 2016/1037.

2. **Evaluation of the Undertaking Offers**

(5) In order to ensure that the undertakings are practicable, the Argentine exporters presented undertaking offers with one minimum import price ('MIP') for the product concerned.

(6) Furthermore, in order to ensure that the injurious subsidisation is removed and make it feasible and practical to monitor the exporting producers offering the undertakings, these Argentine exporters offered to ensure that the volume of imports made under the undertakings would be set at an annual level roughly corresponding to their overall market performance, while ensuring a proper level playing field.

(7) In order to assess whether those price undertakings remove the injurious effect of subsidisation, the Commission analysed, inter alia, the current export prices of the product concerned, the level of the definitive countervailing duty as well as other relevant findings made in the investigation.

(8) The Commission concluded that the injurious subsidisation could be removed by price undertakings covering imports within the proposed annual level together with an *ad valorem* definitive duty levied on imports exceeding the annual level as referred to in recital 6.

(9) CARBIO also undertook to provide the Commission with regular and detailed information concerning the Argentine exporting producers' Union sales, thus allowing the undertakings to be monitored effectively by the Commission. In view of CARBIO's active role, and the safety net in the form of the annual level referred to in recital 6, the Commission considered that the risk of circumventing the undertaking offers is limited.

C. **COMMENTS OF PARTIES AND ACCEPTANCE OF THE UNDERTAKING OFFERS**

(10) The undertaking offers have been made available to interested parties.

(11) The Union industry submitted that the undertaking offers could not be accepted as they are disconnected from the findings of the investigation and thus the undertakings will not remove the injurious effects of subsidization.

(12) In particular, the European Biodiesel Board ('the EBB') advocated for a MIP equivalent to the export price(s) in the investigation period plus the amount of subsidisation/injury margins, possibly indexed to take into account the price evolution of the main raw material. The EBB submitted that only such a price level would ensure that the Argentine prices would not undercut Union prices. The Association of the German Biofuel Industry ('VDB') also submitted that the MIP should be calculated using the import price plus the countervailing duty. The Union for the Promotion of Oil and Protein Plants ('UFOP') supported this VDB claim. The European Farmers European Agri-Cooperatives ('COPA-Cogeca') noted the dramatic increase of the Union's import of Argentine biodiesel since the anti-dumping measures have relaxed

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and, together with the European Oilseed Alliance ('EOA'), recalled that Directive (EU) 2015/1513 of the European Parliament and of the Council[(4)] limits the production of European biofuel.

(13) The Commission recalled that the proposed annual level of imports (around 10 % of the average annual Union consumption between 2014 and the period of investigation) is directly linked to the findings of the investigation. Based on the level of imports examined in the current investigation, the Commission established a threat of material injury to the Union industry. Therefore, the Commission considered that, in principle, the proposed annual level should not impair the overall performance of the Union industry.

(14) As far as the construction of the MIP is concerned, it is linked to the average monthly soybean oil price quotations published by the Ministry of Agriculture of the Government of Argentina which reflect the inclusion of the export tax (quotations are at free on board ('FOB') level). Beyond the annual level, the *ad valorem* duty applies. Therefore, in principle, the Commission considered that such a MIP reduces the impact on prices for inputs which are subject to the GOA's support policy.

(15) The Commission thus considered that the combination of the MIP with the proposed annual level plus the *ad valorem* duty applicable to imports of the product concerned exceeding that annual level removes the effects of injurious subsidization. Those claims were therefore rejected.

(16) The EBB further submitted that the MIP can be easily manipulated because the profit likely to be accumulated when the Argentine exporting producers sell the product concerned within the annual level would allow them to absorb much more easily the countervailing duty due beyond the annual level.

(17) The Commission noted that that argument contradicts the argument made by the EBB that the MIP has been set at a level that is too low. If so, no additional profits could be misused as alleged. CARBIO further submitted that the Argentine exporting producers do not have the choice of making some sales at the MIP and some duty-paid. They are only allowed to sell duty-paid once the annual level is entirely exhausted. Thus, the alleged risk will be mitigated.

(18) In any case, the Commission noted that both CARBIO and the exporting producers offering the undertakings are aware (through the text of the undertakings) that the Commission's decision to accept the undertaking offers is based on trust. Any breach of that trust will lead to the withdrawal of the acceptance of the undertaking and the full application of the countervailing duties.

(19) In addition, exporting producers offering the undertakings committed not to undermine their effects also with regard to sales beyond the annual level. A violation of the undertakings would lead to their withdrawal. Those claims were therefore rejected.

(20) The EBB further submitted that the MIP offered was too low and did not reflect the sustainability premium.

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(21) CARBIO countered by stating that the fixed amount reflects a sufficient price increase. The Commission noted that, as stated in recital 11, the combination of the MIP with the proposed annual level together with the *ad valorem* duty applicable to imports of the product concerned exceeding that annual level in principle should remove the effects of injurious subsidization. Those claims were therefore rejected.

(22) The EBB further submitted that the source of soybean oil price quotations should not be based in Argentina but should be a reputable independent source.

(23) The undertaking offers explain that while the quotations are indeed published by the Ministry of Agriculture of the Government of Argentina, they are based on the Chicago Board of Trade closing prices plus premiums based on daily contracts and buy-sell premiums provided by the Bolsa de Cereales de Buenos Aires. As such they are linked to international commodity quotations and their reliability can be monitored, also with regard to historical trends. This was further confirmed by CARBIO and the Government of Argentina. The latter also guaranteed transparency and predictability of the source proposed.

(24) The advantage of the source proposed in the undertaking offers is that it is publicly available and can therefore be monitored. The Commission will carefully monitor the reliability of the quotations to ensure that there are no circumstances and actions that undermine the effects of the undertakings. Any breach of trust will justify the immediate withdrawal of the acceptance of the undertakings by the Commission and the imposition of the countervailing duties.

(25) Furthermore, the undertakings also stipulate that any change in circumstances which may occur during the implementation and the application of the undertakings from those prevailing at the time of their acceptance and which would have been relevant to the decision accepting the undertaking offers may give rise to the withdrawal of the acceptance of the undertakings. That claim was therefore rejected.

(26) The EBB further submitted that the Government of Argentina could lower the export tax and as a result the MIP would be reduced. This would in turn lead to a situation in which the Argentine exporters would be able to maximize their market share.

(27) The Commission considered that the fluctuation of the MIP in line with the changes in raw material price is a reasonable indexation method which reflects market conditions. Further, any change in circumstances which may occur during the implementation and the application of the undertakings from those prevailing at the time of its acceptance which would have been relevant to the decision accepting the undertakings may give rise to the withdrawal of the acceptance of the undertakings. That claim was therefore rejected.

(28) The EBB also stated that the fixed amounts added to the average quarterly soybean oil prices should not be defined before every shipment. The EBB's understanding of the fixed amount is not correct. The fixed amount is not defined before every shipment. In response to EBB's comments CARBIO explained that the

fixed amount is predetermined at a fixed level and does not depend (or can be adjusted depending) on the behaviour of the Argentine exporting producers. The comment was therefore rejected.

(29) The EBB advocated for a European vegetable oil price reference on a spot (daily) basis and not on a quarterly basis, including a mix of European soybean oil and vegetable oils used in Europe. Apart from a general description, the EBB failed to provide a concrete alternative source of price reference. In addition, the management of price reference system has to be practical and a daily reference would not be practically manageable when monitoring the undertakings. In any case, the Commission considered the price quotation proposed in the undertaking offers to be reasonable as detailed in the preceding recitals. That claim was therefore rejected.

(30) The EBB proposed that the Commission should manage the annual level per Member State and on a monthly or quarterly basis. The Commission could not accommodate such a request. First, as also stated by CARBIO, countervailing measures, in any form, apply to the whole customs territory of the Union. In any case, such a monitoring system would be too complex and thus not practically implementable by the Commission. The EBB's proposal to split the annual level on a monthly or quarterly basis contradicts the argument that the Argentine producers could cross compensate for sales within the annual level with sales beyond. A monthly or quarterly split would exacerbate this risk significantly. That claim was therefore rejected.

(31) The EBB also proposed that the annual level for sales under the MIP should commence at a lower level and rise gradually thereafter to reach the annual level proposed in the undertaking offers. In response to that claim CARBIO submitted that the current trade rules do not provide for any such progressivity in the imposition of measures (irrespective of their form) in order to 'test' their efficiency. Indeed, the EBB did not put forward any substantive justification for the progressive introduction of the annual level. In any case, the Commission assessed the undertaking offers as submitted by the exporting producers. The Commission considered that the combination of the MIP with the proposed annual level together with the *ad valorem* duty applicable to imports of the product concerned exceeding that annual level in principle should remove the effects of injurious subsidization. Those claims were therefore rejected.

(32) The EBB requested clarification concerning the MIP for sales to related parties in the Union. The Commission confirmed that sales made to the related parties in the Union will be made at a MIP increased by an amount to take account of SG&A and profit.

(33) The EBB finally submitted that the undertakings should have clauses that allow for a review or withdrawal in case of changes in circumstances or breaches. The Commission confirmed that such clauses are indeed part of the undertaking offers. The undertaking offers stipulate that any change in circumstances which may occur during the implementation and the application of the undertakings from those prevailing at the time of their acceptance and which would have been relevant to the decision accepting the undertaking offers may give rise to the withdrawal of the acceptance