

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

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.

⁽¹⁾ OJ L 56, 6.3.1996, p. 1.

⁽²⁾ OJ C 147, 13.6.2008, p. 5.

⁽³⁾ OJ C 147, 13.6.2008, p. 10.

- (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
 - 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

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.

(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

- (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.

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-

⁽⁴⁾ The Government of the USA provided the complete Internal Revenue Code updated to reflect all tax legislation up to 15 December 2006 (version December 2006), which is relevant for the current IP.

⁽⁵⁾ For instance (a) Biodiesel handling and use guide issued on September 2008 by the NREL (National renewable energy laboratory), (b) Biomass oil analysis issued in June 2004 by the NREL, (c) Public news, information and specifications issued on biodiesel by the ASTM, (d) Public news and information issued on biodiesel by NBB, (e) fact sheets issued by the US Department of energy under the Clean cities actions, etc.

⁽⁶⁾ Virgin oils, including esters derived from various agricultural commodities such as corn, soybeans, sunflower seeds, cottonseeds, canola, crambe, rapeseeds, safflowers, flaxseeds, rice bran, mustard seeds, etc., or animal fats.

- (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.
- (24) The investigation showed that most of the biodiesel blends sold for direct consumption in the USA are B20, i.e. blends with 20 % biodiesel as explained in recital (21) above, which can be used for Energy Policy Act of 1992 (EPAAct) ⁽¹⁰⁾ compliance, B6, B5 and B2. Publicly available information states that any diesel engine can operate on these blends with basically no modifications and keeping the warranty from car manufacturers. When used in low-level blends (between 2 % to 20 % of biodiesel) the performances of the mixture is similar to that of mineral diesel. When a biodiesel fuel above B20 is used in an engine, the user may experience a certain decrease in power, torque and fuel economy and the warranty of car manufacturers would generally not apply in case of damages caused to the engine.
- (25) The investigation has shown that pure biodiesel and high-level blends are generally not used for direct consumption in the USA. The pure biodiesel is generally intended to be blended before it is sold on the market. The blends are ultimately used in the transport sector as a fuel in diesel-power engines of road vehicles such as cars, trucks, busses and also in trains. Biodiesel can also be used as a heating fuel in domestic, commercial or industrial boilers and as a fuel for generators to produce electricity. Tests are currently being conducted as to the possibility to use biodiesel blends in aircrafts.
- (26) Hence, the product concerned by the investigation should be defined as fatty acid monoalkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', whether in pure form or in blends, which are above B20. In other words, the product concerned covers pure biodiesel (B100) originating in the USA and all blends above B20, namely blends which contain more than 20 % biodiesel originating in the USA ('the product concerned'). This threshold is considered to be appropriate to allow a clear distinction between the various types of blends which are available on the US market.

⁽⁷⁾ In fact 99,9 % as it suffice to add 0,1 % mineral diesel to avail the blender's credit in the USA.

⁽⁸⁾ Basically, the blends from B99 down to B50.

⁽⁹⁾ Basically, the blends from B2 up to B20.

⁽¹⁰⁾ See Energy Policy Act of 1992

- (27) It has been found that all types of biodiesel and the biodiesel in the blends covered by this investigation, despite possible differences in terms of raw material used for the production, or variances in the production process, have the same or very similar basic physical, chemical and technical characteristics and are used for the same purposes. The possible variations in the product concerned do not alter its basic definition, its characteristics or the perception that various parties have of it.
- (28) The product concerned is falling 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.
- (32) One interested party alleged that the product concerned, in particular pure biodiesel, has different physical and chemical characteristics than the like biodiesel produced in the Community. While the EC production of biodiesel would be based on rapeseed oil, US producers would use only soybean oil. Therefore it was claimed that these two types of product would not be interchangeable and would not directly compete with each other in the Community market. The interested party pointed in particular to the fact that the cold flow properties and the iodine values would be different.
- (33) The Commission investigated this claim and found the following:

2.1. Like product

- (29) It was found that the products produced and sold on the domestic market of the USA, which are covered by this investigation, have similar basic physical, chemical and technical characteristics and uses as those exported from this country to the Community market. Similarly, the products manufactured by Community producers and sold on the Community market have similar basic physical, chemical and technical characteristics and uses when compared to those exported to the Community from the country concerned.
- (30) It has been claimed that certain users, in particular in Germany, are directly using pure biodiesel (B100) as a cheaper alternative to the use of mineral diesel or to the usual blends used for direct consumption in the Community market. The examination of this claim showed that most of the sales made by the Community producers in the Community market were mainly intended to companies which were blending it with mineral diesel. The fact that certain fleet owners revert to B100 is rather an exception at the Community level. Rather than substituting mineral diesel, biodiesel is a complementary product on the Community market.
- (31) This does not change the fact that the various types of the product concerned produced in the USA and exported to the Community are interchangeable with those produced and sold in the Community by Community biodiesel producers. There is no significant difference in the uses and the perception by operators and users in the market which are such as to alter the definition of the like product.
- (a) The product concerned and the Community like product share very similar basic characteristics and are sold via similar or identical sales channels, namely to similar customers in the Community market;
- (b) The product concerned and the Community like product both serve the same or very similar end-uses (see recital (25) above);
- (c) As to the cold flow properties, it should be clarified that it refers to the Cold Filter Plugging Point (CFPP) which is the temperature at which a fuel will cause a fuel filter to plug due to fuel components, which have begun to crystallize or gel. The investigation revealed that the CFPP of the Community like product is lower than that of the biodiesel exported from the USA. However, this is a minor difference which can easily be compensated either by mixing different types of biodiesel or by using additives in pure biodiesel, in particular in winter time. The difference in CFPP practically does not play any role in most of the blends sold in the Community market.
- (d) Regarding the iodine value which is a measurement for the stability of the fuel against oxidation, it was found that the values between rapeseed oil and soybean oil correlate to some extent: numbers range from 94 to 120 for rapeseed oil and from 117 to 143 for soybean oil. While the main feedstock used in the Community is rapeseed, it has to be noted that both Community and US producers use also a wide variety of feedstock to produce biodiesel. Often various types of biodiesel are mixed to obtain a more homogeneous product.

(34) Given that 'likeness' does not require that products are identical in all respects according to Article 1(4) of the basic Regulation, any minor variation in the various product types is not sufficient to change the overall finding of likeness between the product concerned and the Community like product.

(35) Therefore no differences were found between the various types of the product concerned and the Community like products sold on the Community market which would lead to the conclusion that the products produced and sold by Community producers on the Community market are not like products, sharing the same or very similar basic physical, chemical and technical characteristics as to the types of product concerned produced in the USA and exported to the Community. It is therefore provisionally concluded that all types of biodiesel are considered to be alike within the meaning of Article 1(4) of the basic Regulation.

3. DUMPING

3.1. Preliminary remark

(36) During the investigation it was found that the US authorities were granting a so-called blender's credit of USD 1 per gallon of pure biodiesel present in a blend of biodiesel with mineral diesel.

(37) All exporting producers selected in the sample claimed that an adjustment should be made for their export and domestic sales of blended biodiesel for the determination of their dumping margin, either by adjusting their sales price upward with the corresponding credit received or by subtracting the blender's credit from the cost of production of the relevant sales.

(38) It should be noted that, in accordance with the relevant legal provisions, namely Article 14(1) of the basic Regulation and Article 24(1) of Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidized imports from countries not members of the European Community ⁽¹⁾, no product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from export subsidization. However, the AS proceeding showed that the blender's credit is a subsidy available both to export and to domestic sales exactly in the same way and for the same amounts and is therefore not an export subsidy. Hence, it was provisionally considered that the claims for an adjustment could not be accepted.

3.2. Normal value

(39) For the determination of normal value in accordance with Article 2(2) of the basic Regulation, the Commission first established whether the domestic sales of the product concerned to independent customers were made in representative volumes, i.e. whether the total volume of such sales represented at least 5 % of the total export sales volume to the Community during the IP.

(40) In the case of one sampled exporting producer it was found that it had no representative sales of the product concerned on the domestic market. For this exporting producer, normal value had to be constructed on the basis of Article 2(3) of the basic Regulation.

3.2.1. *Sampled cooperating exporting producers with overall representative domestic sales volume*

(41) For the sampled exporting producers with overall representative domestic sales, the Commission subsequently identified those product types sold on the domestic market by the exporting producer, which were identical or directly comparable to the types sold for export to the Community.

(42) Domestic sales of a particular product type were considered as sufficiently representative when the volume of that product type sold on the domestic market to independent customers during the IP represented 5 % or more of the total volume of the comparable product type sold for export to the Community.

(43) The Commission subsequently examined whether the domestic sales of the companies concerned could be considered as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. This was done by establishing for each product type the proportion of profitable sales to independent customers on the domestic market during the investigation period.

(44) Where the sales volume of a product type, sold at a net sales price equal to or above the calculated cost of production, represented more than 80 % of the total sales volume of that type, and where the weighted average price of that type was equal to or above the cost of production, normal value was based on the actual domestic price. This price was calculated as a weighted average of the prices of all domestic sales of that type made during the IP, irrespective of whether these sales were profitable or not.

⁽¹⁾ OJ L 288, 21.10.1997, p. 1.

(45) Where the volume of profitable sales of a product type represented 80 % or less of the total sales volume of that type, or where the weighted average price of that type was below the cost of production, normal value was based on the actual domestic price, calculated as a weighted average of profitable sales of that type only.

(46) For product types not sold in representative quantities on the domestic market or not sold in the ordinary course of trade, normal value had to be constructed on the basis of Article 2(3) of the basic Regulation. To this end, the selling, general and administrative ('SG&A') expenses and a reasonable profit margin were added to the exporter's own average cost of manufacturing per product type during the IP. In accordance with Article 2(6) of the basic Regulation, the percentage for SG&A and profit margin were based on the weighted average SG&A and profit margin of sales in the ordinary course of trade of the like product of the respective exporting producer.

3.2.2. The sampled cooperating exporting producer without overall representative domestic sales volume

(47) For the cooperating exporting producer without representative domestic sales, normal value was constructed in accordance with Article 2(3) of the basic Regulation by adding to the company's own manufacturing costs for the product concerned the SG&A expenses and a reasonable profit margin. In accordance with Article 2(6)(a) of the basic Regulation, the percentage for SG&A and profit margin were based on the weighted average SG&A and profit margin determined for other exporting producers subject to the investigation in respect of their production and sales of the like product on the domestic market.

(48) As regards this company, an adjustment was made to take into account its start-up situation, as provided for in Article 2(5) of the basic Regulation. An adjustment regarding its overhead costs was made in order to take into account the low capacity utilisation of the production installations during the start-up phase.

3.3. Export price

(49) Export sales prices were established on the basis of the prices actually paid or payable for the product concerned in accordance with Article 2(8) of the basic Regulation.

(50) Where export sales to the Community were made through related trading companies located inside or

outside the Community, export prices were established on the basis of the resale prices to the first independent customers in the Community, pursuant to Article 2(9) of the basic Regulation, duly adjusted for all costs incurred between importation and resale, and profits.

3.4. Comparison

(51) The comparison between normal value and export price was made on an ex-works basis.

(52) For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation.

(53) On this basis, allowances for transport, ocean freight and insurance costs, handling loading and ancillary costs, credit costs and commissions have been made where applicable and justified.

3.5. Dumping margins

3.5.1. For the sampled cooperating exporting producers

(54) For the sampled companies, the weighted average normal value of each type of the product concerned exported to the Community was compared with the weighted average export price of the corresponding type of the product concerned, as provided for in Article 2(11) and (12) of the basic Regulation.

(55) On this basis, the provisional weighted average dumping margins expressed as a percentage of the CIF Community frontier price, duty unpaid, are the following:

Company	Provisional dumping margin
Archer Daniels Midland Company	3,4 %
Cargill Inc.	10,4 %
Green Earth Fuels of Houston LLC	73,4 %
Imperium Renewables Inc.	29,5 %
Peter Cremer North America LP	57,3 %
World Energy Alternatives LLC	51,7 %

3.5.2. For the other cooperating exporting producers

- (56) The weighted average dumping margin of the cooperating exporting producers not included in the sample was calculated in accordance with the provisions of Article 9(6) of the basic Regulation. This margin was calculated on the basis of the margins established for the sampled exporting producers. On this basis, the dumping margin calculated for the cooperating companies not included in the sample was provisionally set at 33,7 % of the CIF Community frontier price, duty unpaid.

3.5.3. For the non-cooperating exporting producers

- (57) With regard to all other exporters in the USA, the Commission first established the level of cooperation. A comparison was made between the total export quantities indicated in the sampling replies received from all cooperating exporting producers and the total imports from the USA as derived from US export statistics. The percentage of cooperation found was 81 %. On this basis, the level of cooperation was deemed to be high. It was therefore considered appropriate to set the dumping margin for the non-cooperating exporting producers at a level corresponding to the one found for the cooperating exporting producer in the sample with the highest individual dumping and injury margin in order to ensure the effectiveness of the measures.

- (58) On this basis, the country-wide level of dumping was provisionally established at 57,3 % of the CIF Community frontier price, duty unpaid.

4. COMMUNITY INDUSTRY

4.1. Community production and standing

- (59) All available information, including information provided in the complaint and data collected from Community producers before and after the initiation of the investigation was used in order to establish total Community production and the support for the investigation.

- (60) Based on this information it was found that overall Community production was around 5 400 thousand tonnes during the IP. Three companies belonging to the same group were found to be related to exporting producers in the USA and the group was also itself importing significant quantities of the product concerned from its related exporters in the USA. Therefore, these companies were excluded from the notion of Community production within the meaning of Article 4(1) and Article 5(4) of the basic Regulation. As a consequence, the production volume on the basis of

which standing was established was in the range of 4 200 to 4 600 thousand tonnes.

- (61) It was established that the companies that supported the complaint and co-operated in the investigation represented more than 60 % of the Community production of biodiesel during the IP indicated in recital (60). The company referred to in recital (63) below which failed to co-operate with the investigation was not considered as a supporter of the complaint. It is concluded that the complaint and the investigation are supported by a major proportion of Community production within the meaning of Article 4(1) and Article 5(4) of the basic Regulation.

4.2. Sampling

- (62) Because of the large number of Community producers, it was decided to resort to sampling to establish the existence of material injury. Sampling forms were sent to all potential producers of the like product in the Community. Initially more than 40 companies provided meaningful information to the sampling forms and agreed to cooperate with the proceeding. The three companies mentioned in recital (60) were not considered for the sampling exercise for the reasons mentioned in that recital.

- (63) From the remaining companies a sample of 11 companies was selected on the basis of the largest representative volume of production and sales within the Community, as indicated in recital (11) above. One producer originally considered for the sample had to be excluded as it failed to cooperate with the investigation. The remaining ten sampled companies are considered to be representative for the entire Community production.

- (64) Reference hereafter to 'Community industry' or 'sampled Community producers' refers to these ten sampled producers.

5. INJURY

- (65) As mentioned in recital (15) above, the examination of the trends concerning the assessment of injury covered the period from January 2004 to the end of the IP. However the investigation showed that the Community industry was practically starting up in 2004. It was, thus, considered more appropriate to make an analysis based on trends for the period 2005 to the IP ('period analysed'). The information collected regarding 2004 is nevertheless also presented in the assessment that follows.

5.1. Community consumption

Table 1

Community Consumption	2004	2005	2006	2007	IP
Tonnes	1 936 034	3 204 504	4 968 838	6 644 042	6 608 659
<i>Index 2005 = 100</i>	60	100	155	207	206

- (66) Community consumption was established on the basis of volume of the overall Community production on the Community market of all Community producers, as ascertained in recital (60) above, minus their exports plus imports from the country concerned by this investigation and imports from other third countries.
- (67) As to the volumes of imports from the USA, the following sources of information were available:
- the Eurostat data for the different CN codes under which the product was classified;
 - the USA export statistics;
 - other statistical information of confidential nature on imports provided by interested parties.
- (68) However, analysis of this information showed that the Eurostat data could not be used for the purpose of assessing consumption since until the end of 2007 there was no distinct CN code available for the customs classification of the various types of the product concerned. Imports of the product concerned were classified under a number of codes which also contained import data of other products. Hence, it was considered more appropriate to use the US exports statistics for establishing reliable imports and consumption figures and import trends. In using this source of information, account was taken of the shipment time needed for the goods to arrive from the USA to the Community and thus the export statistics were adjusted by one month in order to take account of this time-lag.
- (69) With regard to imports from other countries and exports of the Community producers, in view of the limitation regarding the use of Eurostat data described above, the investigation relied on the data reported in the complaint.
- (70) Based on the above, it was found that Community consumption of biodiesel increased by 107 % between 2005 and 2007 and then slightly decreased in the IP by 1 percentage point. Overall, consumption more than doubled over the period analysed.
- (71) The increase in demand was mainly due to the incentives taken by Member States to promote the use of bio-fuels following the adoption of Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of bio-fuels or other renewable fuels for transport⁽¹²⁾ and Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity⁽¹³⁾.

⁽¹²⁾ OJ L 123, 17.5.2003, p. 42.

⁽¹³⁾ OJ L 283, 31.10.2003, p. 51.

5.2. Volume of the imports from the country concerned and market share

Table 2

Imports from USA	2004	2005	2006	2007	IP
Tonnes	2 634	11 504	50 838	730 922	1 137 152
<i>Index 2005 = 100</i>	23	100	442	6 354	9 885
Market share	0,1 %	0,4 %	1,0 %	11,0 %	17,2 %
<i>Index 2005 = 100</i>	25	100	250	2 750	4 300

Source: USA export statistics.

- (72) Import volumes from the USA increased significantly from around 11 500 tonnes in 2005 to around 1 137 000 tonnes in the IP.
- (73) During the period analysed, the dumped imports from the USA continuously increased their share of the Community market from 0,4 % in 2005 to 17,2 % in the IP. Therefore, there has been a significant increase in dumped imports both in absolute terms and in relative terms compared to the Community consumption over that period.
- (74) *Splash and dash* is a term used by biodiesel operators to describe a pattern by which biodiesel of allegedly foreign origin is transhipped to the Community via the USA where it is mixed with basically a drop (0,01 % of the final blend) of conventional diesel in order for the blender to avail himself of a subsidy in the USA.
- (75) US parties have claimed that *splash and dash* explains the surge of US imports into the Community market, as it allegedly represented 40 % of US imports during the IP. These parties have also claimed that because the investigation was initiated against imports of biodiesel originating in the USA, the quantities concerned by the *splash and dash* should be separated from the injury analysis and treated as imports from other third countries.
- (76) On the other hand the complainant argued that imports of *splash and dash*, if any, would at most represent 10 % of the US export volumes, and would thus be insignificant and not alter the findings that large quantities of dumped imports from the USA entered the Community market, in particular during the IP.
- (77) The investigation has shown that the US export statistics do not allow one to distinguish between any biodiesel exported under the alleged *splash and dash* process and the other US exports recorded in their 'Exports' chapter. In the same statistics there were hardly any quantities found to be declared under the 'Re-Exports' chapter. The US authorities also stated that all quantities included in their 'Exports' chapter are products deemed to be originating in the USA.
- (78) Moreover, most of the US companies investigated declared that it was not possible to differentiate the quantities exported to the Community or sold on the domestic market between the quantities produced or sourced in the USA and those exported under the *splash and dash* process.
- (79) Also, it was found in the case of the investigated companies in the USA that all the exports of biodiesel were declared, both upon exportation by the US exporters and upon importation by the related importers in the Community, as US origin biodiesel.

- (80) On the basis of the above and taking into account, in particular, that *splash and dash* exports, if any, were declared with a US origin and deemed as originating in the USA by the US authorities, it was considered that there was no ground to treat them as non-US imports.

5.3. Prices of the dumped imports and price undercutting

5.3.1. Unit selling price

Table 3

	2004	2005	2006	2007	IP
Prices in EUR/tonne	463	575	600	596	616
Index 2005 = 100	81	100	104	104	107

Source: US export statistics and questionnaire replies of the sampled US exporters.

- (81) The US export statistics were also used to establish the price trends of the dumped imports originating in the USA, in particular for 2007 and the IP. In order to reflect the price level at Community border, the average export prices were adjusted with the relevant freight and insurance costs. It should be noted that for earlier periods of the period analysed, namely 2005 and 2006, and also for 2004, the US export statistics were not fully reliable in terms of sales values as the computed average export prices were found to be disproportionately high compared to the prices reported by the cooperating exporting producers. Under these circumstances the average US export price for these years was based on the questionnaire responses provided by the sampled exporting producers in the USA.
- (82) Average prices for imports from the USA fluctuated during the period considered and overall showed an increase of 7 % between 2005 and the IP.

5.3.2. Price undercutting

- (83) For the purposes of analysing price undercutting, the weighted average sales prices of the sampled Community producers charged to unrelated customers on the Community market, adjusted to an ex-works level, were compared to the corresponding weighted average prices of the imports from the USA, established on a CIF basis for the sampled exporting producers in the USA. An adjustment for the customs duties, post-importation costs and for the differences in feedstock (see next recital) used for the production of biodiesel was applied where appropriate.
- (84) The investigation identified different types of the product concerned in particular based on the feedstock used in the production process. Whilst the main feedstock used in the Community is rapeseed, the US producers use other feedstock such as soybeans, canola, palm, etc. Given that feedstock is by far the main raw material for the production of the product concerned, it was considered that an adjustment for feedstock difference should be granted. This adjustment was thus calculated to correspond to the market value of the difference between the relevant types of the product concerned compared to the type of products produced from rapeseed. In this way both the weighted average sales prices of the Community industry and the weighted average price of the imports concerned were compared on the same feedstock basis, namely rapeseed.
- (85) Based on the above methodology, the difference between the US and Community prices, expressed as a percentage of the Community industry's weighted average ex-works price, i.e. the price undercutting margin, was found to range from 18,9 % to 33,0 %.

5.4. Economic situation of the Community industry

- (86) In accordance with Article 3(5) of the basic Regulation, the examination of the impact of dumped imports on the Community industry included an evaluation of all economic indicators established for the Community industry over the period analysed.

5.4.1. Production capacity, production and capacity utilisation

Table 4

	2004	2005	2006	2007	IP
Production capacity (tonnes)	529 000	920 000	1 306 572	2 189 910	2 520 508
<i>Index 2005 = 100</i>	58	100	142	238	274
Production (tonnes)	475 710	813 657	1 214 054	1 832 649	2 016 573
<i>Index 2005 = 100</i>	58	100	149	225	248
Capacity utilisation	90 %	88 %	93 %	84 %	80 %
<i>Index 2005 = 100</i>	102	100	106	95	91

Source: Questionnaire replies of the sampled Community producers.

- (87) In line with the increased consumption, the production capacity of the sampled Community producers continuously increased during the period analysed. It increased by 42 % between 2005 and 2006 followed by a further increase of 68 % in 2007 and a further increase of 15 % between 2007 and the IP. It marked an overall increase of 174 % over the period analysed. The increase in production capacity resulted from new investments in anticipation of the growth in demand.
- (88) Indeed the Community industry growth in production capacity has to be seen against the background of a Community bio-fuels and other renewable fuels consumption target of 5,75 %, set by Directive 2003/30/EC, which is calculated on the basis of energy content of all petrol and diesel, for transport purposes, placed on the Community market by 31 December 2010. Moreover, in March 2007, the European Council endorsed a 10 % binding minimum target to be achieved by all Member States for the share of bio-fuels in the overall Community transport petrol and diesel consumption by 2020 ⁽¹⁴⁾. This target would increase the Community consumption of bio-fuels to around 33 million tonnes of oil equivalent by that year. The production capacity in the whole Community in 2006 was estimated at 6 million tonnes only. In view of the above, it is understandable that Community producers invested in additional capacities in anticipation of the growth in demand.
- (89) Production of the like product by the Community industry increased also continually to reach an overall increase of 148 % over the period analysed.
- (90) As a result of the relative slower pace in the increase of production volumes *vis-à-vis* the increase of production capacity, the capacity utilisation of the Community industry decreased by 9 % over the period analysed.

⁽¹⁴⁾ Following this endorsement, the Parliament and the Council have agreed, in December 2008, on a Directive for the promotion of the use of energy from renewable sources containing a 10 % target for the use of renewable energy in transport in 2020, which is expected to be met mainly by bio-fuels.

5.4.2. Sales volume, market share and average unit prices in the Community

Table 5

	2004	2005	2006	2007	IP
Sales volumes (tonnes)	476 552	810 168	1 194 594	1 792 502	1 972 184
<i>Index 2005 = 100</i>	59	100	147	221	243
Market share	24,6 %	25,3 %	24,0 %	27,0 %	29,8 %
<i>Index 2005 = 100</i>	97	100	95	107	118
Average prices (EUR/tonne)	655	759	900	892	933
<i>Index 2005 = 100</i>	86	100	119	118	123

Source: Questionnaire replies of the sampled Community producers.

- (91) In line with the evolution of consumption, the volume of sales made by the Community industry on the Community market increased steadily, recording an overall increase of 143 % during the period analysed. During the same period the Community industry increased also its market share by 4,5 percentage points.
- (92) Average sales prices of the Community industry in the Community market increased by 23 % over the period analysed. The increase in prices was justified in view of the increase of costs of raw materials and other inputs.

5.4.3. Growth

- (93) The growth of the Community industry is reflected in its volume indicators such as production, sales but, in particular, in its market share. Despite a booming consumption in the Community market during the period analysed the growth of the market share of the sampled Community producers was relatively modest. In particular between 2006 and the IP, the sampled Community producers only gained 5,8 percentage points of market share. During the same time, dumped imports managed to gain over 16 percentage points of market share. The fact that the Community industry could not fully benefit from the market growth had an overall negative impact on its economic situation. Several injury factors such as production, utilisation of production capacity, productivity, sales, investments policy, return on investments, were severely affected.

5.4.4. Stocks

Table 6

	2004	2005	2006	2007	IP
Stocks (tonnes)	11 195	14 663	34 123	55 410	58 566
<i>Index 2005 = 100</i>	76	100	233	378	399

Source: Questionnaire replies of the sampled Community producers.

- (94) Over the period analysed stocks of biodiesel increased by around 200 %. This growth in inventories took place throughout the period analysed and followed in a more pronounced manner the growth in production volumes of the Community industry over the same period. However, it is considered that because biodiesel cannot be stored for a period of time exceeding 6 months (on average the storage period is only around three months), data related to stocks have only limited value for assessing the economic situation of the Community industry.

5.4.5. Profitability, investments, return on investments, cash flow and ability to raise capital

Table 7

	2004	2005	2006	2007	IP
Profitability	9,3 %	18,3 %	18,0 %	5,7 %	5,7 %
<i>Index 2005 = 100</i>	51	100	98	31	31
Investments in EUR 000	19 497	70 885	237 115	140 014	131 358
<i>Index 2005 = 100</i>	28	100	335	198	185
Return on investments	92 %	114 %	108 %	23 %	23 %
<i>Index 2005 = 100</i>	81	100	95	20	20
Cash flow in EUR 000	24 113	131 211	213 560	167 042	180 602
<i>Index 2005 = 100</i>	18	100	163	127	138

Source: Questionnaire replies of the sampled Community producers.

- (95) Profitability of the sampled Community producers was established by expressing the net pre-tax profit of the sales of the like product in the Community market as a percentage to the turnover of these sales. Over the period analysed the profitability of the sampled Community producers decreased from a profit of 18,3 % in 2005 to 5,7 % in the IP. This represents a drop of 12,6 percentage points over the period analysed.
- (96) The level of investments in the production of biodiesel made by the sampled Community producers increased by 235 % between 2005 and 2006. This increase was related to the expansion of production capacity in anticipation of an increasing demand in the Community. In this regard it is noted that in most cases investments are planned for at least two years before a biodiesel plant becomes fully operational. The same producers continued to invest in 2007 and in the IP yet at a much lower pace. This period coincides with the surge of dumped imports in the Community market.
- (97) The sampled Community producers' return on investment, which expresses their pre-tax result as a percentage of the average opening and closing net book value of the assets employed in the production of biodiesel followed the negative trend in profitability. The actual decline was however more dramatic as it decreased by 91 percentage points over the period analysed. It is considered that the deterioration of the return on investments is a clear indication of the deterioration of the economic situation of the Community industry.
- (98) The trend of the cash flow, which is the ability of the industry to self-finance the activities, has shown an increase of 38 % over the period analysed. Despite the fall in profitability over the same period, this indicator shows a positive trend mainly due to the increase in the depreciation costs which are included for establishing the level of cash flow. Another reason was that the fall in profits in absolute terms, over the period considered was not as pronounced as the fall in turnover. Between 2006 and the IP, however, cash flow has shown a decrease of 15 % signifying a downturn in the latter part of the period analysed when dumped imports were more present in the Community market.

5.4.6. *Employment, productivity and wages*

Table 8

	2004	2005	2006	2007	IP
Employment – Full time equivalent (FTE)	61	182	278	462	506
<i>Index 2005 = 100</i>	34	100	153	254	278
Productivity (tonnes/FTE)	7 798	4 470	4 367	3 967	3 985
<i>Index 2005 = 100</i>	174	100	98	89	89
Wages EUR/FTE	62 374	59 395	54 290	55 433	55 555
<i>Index 2005 = 100</i>	105	100	91	93	94

Source: Questionnaire replies of the sampled Community producers.

- (99) In line with the increase in production and sales volumes, employment of the Community industry increased by 178 % in the period analysed. It is noted that the biodiesel industry is a capital intensive industry not requiring a large labour force in the production process.
- (100) Average wages decreased by 6 % over the period analysed. This is explained by the fact that the additional workforce enrolled by the Community industry for expanding production towards the end of the period analysed required less qualification.
- (101) Productivity decreased by 11 % between 2005 and the IP.

5.4.7. *Magnitude of the actual margin of dumping and recovery from past dumping*

- (102) The dumping margins for exporting producers in the USA are specified above in the dumping section and are significantly above *de minimis*. Furthermore, given the volumes and the prices of the dumped imports, the impact of the actual margin of dumping cannot be considered to be negligible.

5.4.8. *Producers in the Community not included in the sample*

- (103) The analysis of data pertaining to the Community market suggested that Community producers other than those included in the sample and the ones mentioned in recital (60) lost considerable market share over the period analysed on the sales of their own produced biodiesel on the Community market. The loss in market share by these producers is estimated to be above 20 percentage points over the period analysed.
- (104) From the information provided by the complainant, it appeared that many of these companies either ceased or reduced their biodiesel activity and were not able to adequately cooperate with the investigation.
- (105) Moreover, a number of companies that submitted information in the framework of the sampling exercise indicated that they had to downsize production and staff in view of the cheap imports from the USA. Similar comments were made by other producers which were ready to start production but which had to delay their entering into the market because of the surge of low-priced imports from the USA, in particular during the IP.

- (106) The above data relating to producers not included in the sample would reinforce the conclusions regarding the injury suffered by the sampled Community producers.

5.5. Conclusion on injury

- (107) In the context of a growing demand, the investigation showed that the situation of the sampled Community producers improved with regard to volume indicators such as production (+150 %), production capacity (+174 %) and sales volume (+143 %) over the period analysed. The sampled Community producers also increased their market share from 25,3 % in 2005 to 29,8 % during the IP, namely a modest increase of 4,5 percentage points. Employment and investments also increased in view of the increasing demand for biodiesel in the Community market during that period. However, because the production volume did not follow the market growth, the utilisation of production capacity fell by 9 % and productivity decreased by 11 % over the period analysed.
- (108) The main indicators related to the financial situation of the sampled Community producers worsened during the period analysed. Profitability decreased from around 18 % in 2005 and 2006 to below 6 % during the IP. Notwithstanding their ability to self finance their activities, in particular because of the increase in cash flow, the return on investments declined dramatically by 80 % during the IP.
- (109) The investigation also showed that the sampled Community producers experienced a sharp increase in their costs between 2005 and 2007 (+36 %) and between 2005 and the IP (+42 %), because of increases in the feedstock prices (mainly rapeseed and soy bean oil), which represent close to 80 % of the full costs of biodiesel. These cost increases could not be fully passed on to customers on the Community market.
- (110) In the light of the foregoing it can be concluded that the Community industry as a whole has suffered material injury within the meaning of Article 3(5) of the basic Regulation.

6. CAUSALITY

6.1. Introduction

- (111) In accordance with Article 3(6) and Article 3(7) of the basic Regulation, it was examined whether the dumped imports originating in the USA have caused injury to the Community industry to a degree that enables it to be classified as material. Known factors other than the dumped imports, which could at the same time be injuring the Community industry, were also examined to ensure that possible injury caused by these other factors was not attributed to the dumped imports.

6.2. Effect of the dumped imports

- (112) The investigation showed that low-priced dumped imports from the USA significantly increased in terms of volume, namely by 100 times, during the period analysed. This resulted in a significant increase in their market share by 16,8 percentage points, from 0,4 % in 2005 to 17,2 % in the IP. In order to demonstrate the significance of the impact that the surge of the dumped imports from the USA had on the Community, it is noted that an increase in market share of 16,8 percentage points was achieved within a period of 15 months.
- (113) At the same time, despite the significant increase in consumption, the Community industry, in its core market, was only able to gain around 4,5 percentage points of market share during the period analysed. The investigation showed that this was exclusively at the expense of other Community producers which ceased to produce or which downsized production in the period analysed.

- (114) The average prices of the dumped imports increased by 7 % between 2005 and the IP, but were significantly lower than those of the Community industry during the same period. Hence, the prices of the dumped imports significantly undercut Community industry prices with an average undercutting margin of 25 % during the IP.
- (115) The pressure exercised by the surge of low-priced dumped imports on the Community market did not allow the Community industry to set its sales prices in line with market conditions and the cost increases. Indeed, in the IP the average prices of feedstock used by the Community industry to produce biodiesel, were 25 % higher than in 2006. The Community industry was only able to pass to its customers a price increase limited to 4 % while its full costs increased by 20 % over the same period. It is noteworthy that the price of the main feedstock used by the US producers, namely soybean oil, also increased markedly over the same period. However, as shown in recital (109) above these increases in costs were not reflected in the prices of the dumped imports.
- (116) In order to further demonstrate the causal link between the surge of low-priced dumped imports from the USA and the injury suffered by the Community industry, the situation on the Community market in the period 2005 to 2006, when dumped imports were not present, was compared to the situation prevailing in the market between 2006 to the IP, when the surge of low-priced dumped imports took place.
- (117) In the period from 2005 to 2006, when dumped imports were absent from the Community market, consumption increased by around 1,8 million tonnes. All the producers in the Community could prepare their business plans with a perspective of a fast growing and healthy market. In that period prices increased by 19 % and the Community industry achieved profits as high as 18,3 %. In 2007 and during the IP, the situation changed dramatically. Low-priced dumped imports from the USA started to penetrate the market. Although the market continued to expand by 1,6 million tonnes, most of this market increase (over 1 million tonnes) was taken by the dumped imports from the USA. The Community industry only gained modest market share, its main costs to produce biodiesel significantly increased by around 25 % but its average sales price increased only by around 4 % in the same period. Accordingly, its overall economic and financial situation deteriorated during the IP as profits were significantly reduced to less than 6 % on turnover.
- (118) Based on the above, it is provisionally concluded that the low-priced dumped imports from the USA, which significantly undercut the prices of the Community industry during the IP and which also significantly increased in volume, have had a determining role in the material injury suffered by the Community industry, which is reflected in particular in the deterioration of its financial situation during the IP.

6.3. Effect of other factors

6.3.1. Imports from other third countries

Table 9

Other third countries	2004	2005	2006	2007	IP
Total imports (tonnes)	0	30 000	55 000	144 596	147 812
<i>Index</i>	0	100	183	482	493
Market share	0 %	0,9 %	1,1 %	2,2 %	2,2 %
<i>Index 2005 = 100</i>	0	100	122	244	244

Source: Information provided by the complainant.

- (119) Import volumes from third countries could not be accurately assessed in the investigation for the reasons explained in recital (69) above. Thus, the data of the table above is based on estimates provided by the complainant.
- (120) The imports from third countries not concerned by this investigation increased from about 30 000 tonnes in 2005 to 147 812 tonnes during the IP. This resulted in a moderate market share increase of 1,3 percentage points over the same period. It was therefore provisionally concluded that imports from other third countries cannot have made more than negligible contribution to the injury suffered by the Community industry.

6.3.2. *Development of demand*

- (121) In view of the significant growth in demand over the period considered and the period analysed, the material injury suffered by the Community industry during the IP cannot be attributed to the negligible contraction in demand (-0,5 %) observed on the Community market between 2007 and the IP.

6.3.3. *Public Policy Decisions*

- (122) One interested party alleged that the reintroduction of energy taxes in Germany for biodiesel⁽¹⁵⁾, would have negatively influenced the economic situation of Community producers supplying that particular Member State.
- (123) The investigation revealed that indeed pure bio-fuels used in Germany have benefitted from a tax incentive since 1999 which was reduced as of 1 August 2006. However, on 1 January 2007 a mandatory blending requirement was introduced⁽¹⁶⁾ fixing the biodiesel quota to 4,4 % calculated on the basis of energy content of all petrol and diesel placed on the German market for transport purposes. Operators that fail to fulfil this quota have to pay a fine of EUR 0,60 per litre of biodiesel for which they fall short of the quota. To a large extent this mandatory blending requirement appears to have compensated the alleged sales losses and to have counterbalanced the reduction in incentives. Indeed, the investigation has shown that the sales volumes of the sampled Community producers supplying the German market rose by 68 % between 2006 and the IP.
- (124) Based on the above, it is considered that decisions taken by public authorities in the Community cannot break the casual link between the dumped imports and the material injury suffered by the Community industry.

6.3.4. *Idle production capacity of Community producers*

- (125) One interested party alleged that, spurred by public policy measures to promote the production of biodiesel, many companies in the Community decided to invest in expanding existing production capacities and in new plants. That party alleged that the production capacity for biodiesel in the Community was as high as 11,5 million tonnes during the IP. It further alleged that, since the development of consumption did not meet the expectations, a significant part of production capacity remained idle and would have remained idle even without the imports from the USA. As a result, the relative fixed costs had a negative effect on profitability and also on the return on investment and cash flow of Community producers.

⁽¹⁵⁾ The 'Energiesteuergesetz' entered into force on 1 August 2006 imposing a tax of 9 Eurocents per litre B 100.

⁽¹⁶⁾ 'Biokraftstoffquotengesetz' BGBl. 2006, part I Nr. 62 of 21.12.2006, p. 3180, implementing Directive 2003/30/EC of the European Parliament and the Council and Council Directive 2003/96/EC.

- (126) In this regard it is noted that the investigation focused on the situation of the Community producers. Even if it is a fact that the production capacity of the Community industry increased (+189 %) relatively more than the demand (+106 %), it is noteworthy that the main cost drivers in the biodiesel production are the variable costs. Indeed, as mentioned in recital (109) above, raw material for the production of biodiesel represents 80 % of full costs. The further examination of this claim showed that the share of the fixed costs in the production and sales of biodiesel represented only 6 % of the overall costs. Hence, any alleged impact of increased fixed costs, as a result of unused capacity, cannot explain the significant deterioration in the financial situation of the Community industry during the IP.
- (127) In addition, it is noteworthy that as indicated in table 4 above, the capacity utilisation rate of the sampled Community producers was 80 % during the IP. Hence, the alleged over capacity in the Community was not evidenced in the case of the sampled Community producers.
- (128) On the basis of the above, it is considered that any negative impact the idle production capacity may have had on the Community industry was not such as to break the causal link between the dumped imports and the injury suffered by the Community industry.

6.3.5. *Increased demand for feedstock and increasing prices*

- (129) One interested party claimed that the increased demand for rapeseed and rapeseed oil led to high raw material prices in the Community. The fact that Community producers rely on rapeseed oil as the main raw material would explain why they may have suffered more than other producers using other vegetable oils such as soybean oil or palm oil to produce biodiesel.
- (130) It is firstly noted that the investigation revealed that the sampled Community producers were not relying solely on rapeseed oil for their production of biodiesel but also other vegetable oils (soybean, palm, sunflower) and occasionally animal fat.
- (131) Moreover, it is indeed acknowledged in recital (109) above that the Community industry faced a significant increase in its raw material (feedstock) costs over the period analysed. However, this development has to be seen against a general increase in prices of agricultural products worldwide and it is noted in this respect that the price increase for soybean oil (the main feedstock used by the producers in the country concerned) was more pronounced over the same period. Accordingly, all types of biodiesel were affected by feedstock price increase.
- (132) In a market governed by effective competition, it should be expected that producers would be able to recover the costs increases and pass it on to the market. However, the investigation showed that it was the pressure exercised by the surge of low-priced dumped imports on the Community market which did not allow the Community producers to set their sales prices in line with market conditions and the cost increases. As mentioned also the main feedstock used by the US producers, namely soybean oil, marked a pronounced price increase in the period analysed. However, these increases in costs in the USA were not reflected in the prices of the dumped imports in the Community market.
- (133) Against this background the raw material price increase cannot break the casual link between the dumped imports and the injury suffered by the Community industry.

6.3.6. Price development of mineral diesel

- (134) One interested party argued that because of a strong correlation between mineral diesel prices and biodiesel prices, the increase of the biodiesel prices, which was sharper than the increase of the mineral diesel prices, especially in Germany, would have caused a drop in sales for the producers supplying the market of this Member State.
- (135) It is firstly noted that the party in question did not provide any information to substantiate its claim. Moreover, contrary to what was suggested by this party, the investigation revealed that the Community industry had increased its sales and market share over the period analysed. In addition, since crude oil prices are quoted on a world-wide basis, sales of the product concerned should have been affected in the same manner as the sales of biodiesel produced in the Community.
- (136) On the basis of the above, this argument had to be rejected.

6.3.7. Importance of the location of the biodiesel plants in the Community

- (137) One interested party claimed that the location of any biodiesel producer would be an important element in terms of competitiveness and uses Germany as an example to demonstrate that landlocked locations of biodiesel producers would have to bear high transportation costs since all big customers, in particular refineries and their blending facilities are located at the coast.
- (138) The investigation showed that only a small number of Community industry producers was located in landlocked locations. Moreover, for certain of these producers it was found that refineries existed also in landlocked locations close to these producers. For others the investigation revealed that any disadvantage for landlocked biodiesel producers in terms of being far away from their customers (blenders, refineries) was compensated by being close to crushing mills and/or feedstock providers.
- (139) On the basis of the above, the claim that the location of plant in landlocked locations is causing material injury to the Community industry was rejected.

6.3.8. Producers related to the US exporters

- (140) It should be noted that the impact of the imports from the USA by the three companies referred to in recital (60) has been taken into account in the analysis of the effect of dumped imports from the USA made in recitals to (112) to (118) above. As far as their sales of own produced biodiesel are concerned, the investigation did not point to a different pricing or behaviour than that of the sampled Community producers, in particular during the IP.

6.4. Conclusion on causation

- (141) The above analysis has demonstrated that there was a substantial increase in the volume and market share of the low-priced dumped imports originating in the USA between 2005 and the IP. At the same time, it was found that these imports were significantly undercutting the price of the Community industry during the IP.
- (142) The various findings of the investigation and the analysis carried out, for the period 2005 and 2006 compared to the period 2007 to the IP, showed that there was a clear coincidence in time between the surge of the low-priced imports from the USA and the significant deterioration of the economic situation of the Community industry, in particular during the IP.

- (143) Based on the above analysis, which has properly distinguished and separated the effects of all known factors on the situation of the Community industry from the injurious effects of the dumped imports, it was provisionally concluded that the dumped imports from the USA have caused material injury to the Community industry within the meaning of Article 3(6) of the basic Regulation.

7. COMMUNITY INTEREST

7.1. Preliminary remark

- (144) In accordance with Article 21 of the basic Regulation, the Commission examined whether, despite the conclusion on injurious dumping, compelling reasons existed for concluding that it was not in the Community interest to adopt measures in this particular case. The determination of the Community interest was based on an appreciation of all the various interests involved, including those of the Community industry, the importers, the raw material suppliers and the users of the product concerned.

7.2. Interest of the Community industry

7.2.1. *Effects of the imposition or non-imposition of measures on the Community industry*

- (145) As mentioned above, the Community industry suffered material injury caused by dumped imports originating in the USA. Not taking measures would most likely lead to a continuation of the negative trend of the financial situation of the Community industry. The situation of the Community industry was particularly marked by a decrease in profitability of 12,6 percentage points between 2005 and the IP due to insufficient price increases. Indeed, in view of the downwards trend in profitability, it is most likely that the financial situation of the Community industry will deteriorate further in the absence of any measures. This would ultimately lead to cuts in production and more closures of production sites, which would therefore threaten employment and investments in the Community.
- (146) It is considered that the imposition of measures would restore fair competition on the market. It should be noted that the Community industry's downwards trend in profitability is the result of its difficulty in competing with the dumped, low-priced, imports originating in the USA. The imposition of anti-dumping measures would likely put the Community industry in the position to maintain its profitability at levels considered necessary for this capital intensive industry.

- (147) In conclusion, it was expected that measures would be effective in giving the Community industry the opportunity to recover from the injurious dumping found during the investigation.

7.3. Interest of unrelated importers/traders in the Community

- (148) Around 25 unrelated importers/traders in the Community were contacted upon initiation. However no cooperation was received from these parties.
- (149) In these circumstances, it was provisionally not possible to precisely assess the possible impact of the measures on importers.

7.4. Interest of users

- (150) All known user companies involved in mineral diesel production and distribution, and also involved in the mandatory blending of mineral diesel with biodiesel were contacted and questionnaires were sent to them upon initiation.

- (151) Cooperation was obtained from only one user company. This user submitted a questionnaire response by which it stated that it is in favour of putting an end to the flows of cheap USA imports, because they create distortions of competition in the Community which causes injury to the companies in charge of manufacture and sale of diesel, since certain competitors that do not refrain from buying this cheap priced product have an unfair competition advantage when compared to those that refrain from doing so. It also claimed that measures would allow the restarting of ester production factories (in particular in Germany) and/or will allow projects of creating new esterification factories in the Community to continue. As the European ester is made traditionally of rapeseed (raw material of better quality than the palm or soya used for the production of B99), the augmentation in the number of producers in Europe would therefore mean more products of better quality that would result in a drop in the prices of the ester, for the consumer's final benefit.
- (152) One users association, representing the interests of Shippers in one Member State claimed that the imposition of measures would have an adverse effect on the activity of its members. It alleged that diesel is responsible for 20 to 25 % of the costs of the transport sector and that given the low profitability of the sector (0-5 %), the price of diesel is determinant for the survival of thousands of companies. These allegations could not, however, be verified as no replies to the users questionnaire were received from individual members of the association in question.
- (153) In these circumstances, it was provisionally concluded that, on the basis of the information provided, the effect of anti-dumping measures would appear to be mixed and thus no clear conclusion can be made regarding the existence of compelling reasons, in the interest of users, not to adopt measures in this particular case.

7.5. Interest of suppliers of raw materials

- (154) Six suppliers replied to the questionnaire. Four supported the imposition of anti-dumping measures by submitting that, if anti-dumping measures are not to be imposed, the long-term presence of the Community industry would be at risk. Should this happen, there would be a clear negative impact on their situation.
- (155) Two others that were related to exporting producers of biodiesel in the USA, submitted that possible measures would not be of significant impact as they would result to a shift in trade flows (switch to imports from countries not covered by the measures).
- (156) On the basis of the above, it could be concluded that the imposition of measures would overall have a positive effect on the situation of raw material suppliers.

7.6. Competition and trade distorting effects

- (157) One interested party alleged an incoherence of the present proceeding with international and Community policy decisions to promote bio-fuels production and sales related to environmental protection and decrease in the dependency from mineral fuels.
- (158) In this regard it has to be noted that Article 21 of the basic Regulation requires that special consideration shall be given to the need to eliminate trade distorting effects of injurious dumping and to restore effective competition. Against this background, general considerations on environmental protection and supply of mineral diesel cannot be taken into account in the analysis and at the same time cannot justify unfair trade practices.

- (159) With respect to the Community market, following the imposition of anti-dumping measures, the USA exporting producers concerned, given their strong market positions, would likely continue to sell their products, albeit at non-dumped prices. It is also likely that there would still be a sufficient number of major competitors on the Community market, namely the Community producers that ceased temporarily production and others that have not been able to launch their production activities due to the dumped imports. It should be noted in this respect that, at the beginning of the period analysed, sales from Community producers not represented in this investigation accounted for at least 30 % of the Community market and this share decreased dramatically due to the dumped import from the USA. Therefore, it is likely that users will continue to have the choice of different suppliers of biodiesel. If, however, no measures were to be imposed, the future of the Community industry would be at stake. Its disappearance would severely reduce competition on the Community market.

7.7. Conclusion on Community interest

- (160) The imposition of measures on imports of biodiesel originating in the USA would clearly be in the interests of the Community industry. It would allow the Community industry to grow and to recover from the injury caused by the dumped imports. If, however, no measures were to be imposed, it is likely that the economic situation of the Community industry would continue to deteriorate and more operators would go out of business. Furthermore, while no clear conclusions could be made with regard to users and importers, the imposition of measures was also expected to be in the interests of raw material suppliers.
- (161) In view of the above, it was provisionally concluded that there were no compelling reasons of Community interest against the imposition of anti-dumping duties in the present case.

8. PROPOSAL FOR PROVISIONAL ANTI-DUMPING MEASURES

8.1. Injury elimination level

- (162) In view of the conclusions reached with regard to dumping, injury, causation and Community interest, provisional anti-dumping measures should be imposed in order to prevent further injury being caused to the Community industry by the dumped imports.
- (163) The level of any anti-dumping measures should be sufficient to eliminate the injury to the Community industry caused by the dumped imports, without exceeding the dumping margins found. When calculating the amount of duty necessary to remove the effects of injurious dumping it was considered that any measures should allow the Community industry to obtain a profit before tax that could be reasonably achieved under normal conditions of competition, i.e. in the absence of dumped imports.
- (164) For this purpose a profit margin of 15 % on turnover could be regarded as an appropriate level which the Community industry could have expected to obtain in the absence of injurious dumping based on the performance of the Community industry over the first part of the period considered (2004, 2005 and 2006) and deemed reasonable for guaranteeing the productive investment on a long-term basis for this newly established industry.
- (165) The necessary price increase was then determined on the basis of a comparison of the weighted average import price, as established for the price undercutting calculations, with the non-injurious price of the like product sold by the Community industry on the Community market. The non-injurious price has been obtained by adjusting the sales prices of the sampled Community producers by the actual profit/loss made during the IP and by adding the above mentioned profit margin. Any difference resulting from this comparison was then expressed as a percentage of the total CIF import value.

8.2. Provisional measures

- (166) In the light of the foregoing, it is considered that, in accordance with Article 7(2) of the basic Regulation, provisional anti-dumping duties should be imposed in respect of imports originating in the USA at the level of the lower of the dumping and the injury margins, in accordance with the lesser duty rule.
- (167) However, in the parallel AS proceeding, countervailing duties on imports of biodiesel originating in the USA are also imposed. The subsidies found in this parallel proceeding are not export subsidies and are therefore considered not to have affected the export price and the corresponding dumping margin. Therefore, in view of the fact that the imports examined are common to both proceedings, the anti-dumping duties can be imposed together with the countervailing duties to the extent that both duties taken together do not exceed the injury elimination margin.
- (168) On the basis of the above, anti-dumping duty rates have been established by comparing the injury elimination margins, dumping margins and the countervailing duty rates. Consequently, the proposed anti-dumping duties are as follows:

Company	Injury margin	Dumping margin	Countervailing duty rate	Anti-dumping duty rate
Archer Daniels Midland Company	54,6 %	3,4 %	35,1 %	3,4 %
Cargill Inc.	58,9 %	10,4 %	34,5 %	10,4 %
Green Earth Fuels of Houston LLC	39,8 %	73,4 %	39,0 %	0,8 %
Imperium Renewables Inc.	41,6 %	29,5 %	29,1 %	12,5 %
Peter Cremer North America LP	69,9 %	57,3 %	41,0 %	28,9 %
World Energy Alternatives LLC	41,7 %	51,7 %	37,6 %	4,1 %
Co-operating non sampled companies	51,4 %	33,7 %	36,0 %	15,4 %

- (169) In view of the fact that the anti-dumping duty will apply to blends containing by weight more than 20 % of biodiesel, in proportion to their biodiesel content, it is considered appropriate for the effective implementation of the measures by the customs authorities of the Member States to determine the duties as fixed amounts on the basis of biodiesel content.
- (170) The individual company anti-dumping duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the country-wide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in the country concerned and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation with its name and address, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.

9. DISCLOSURE

- (171) The above provisional findings will be disclosed to all interested parties which will be invited to make their views known in writing and request a hearing. Their comments will be analysed and taken into consideration where warranted before any definitive determinations are made. The provisional findings may have to be reconsidered for the purposes of any definitive findings.

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on imports of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, falling within CN codes ex 1516 20 98 (TARIC code 1516 20 98 20), ex 1518 00 91 (TARIC code 1518 00 91 20), ex 1518 00 99 (TARIC code 1518 00 99 20), ex 2710 19 41 (TARIC code 2710 19 41 20), 3824 90 91, ex 3824 90 97 (TARIC code 3824 90 97 87), and originating in the United States of America.

2. The rate of the provisional anti-dumping duty applicable to the products described in paragraph 1 and manufactured by the companies below shall be:

Company	AD duty rate Euro per tonne net	TARIC additional code
Archer Daniels Midland Company, Decatur	23,6	A933
Cargill Inc., Wayzata	60,5	A934
Green Earth Fuels of Houston LLC, Houston	70,6	A935
Imperium Renewables Inc., Seattle	76,5	A936
Peter Cremer North America LP, Cincinnati	208,2	A937
World Energy Alternatives LLC, Boston	82,7	A939
Companies listed in the Annex	122,9	see Annex
All other companies	182,4	A999

The anti-dumping duty on blends shall be applicable in proportion in the blend, by weight, of the total content of fatty-acid mono-alkyl esters and of paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

3. The release for free circulation in the Community of the product referred to in paragraph 1 shall be subject to the provision of a security, equivalent to the amount of the provisional duty.

4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

1. Without prejudice to Article 20 of Regulation (EC) No 384/96, interested parties may request disclosure of the essential facts and considerations on the basis of which this Regulation was adopted, make their views known in writing and apply to be heard orally by the Commission within 16 days of the date of entry into force of this Regulation.

2. Pursuant to Article 21(4) of Regulation (EC) No 384/96, the parties concerned may comment on the application of this Regulation within one month of the date of its entry into force.

Article 3

Article 1 of this Regulation shall apply for a maximum period of six months.

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11 March 2009.

For the Commission
Catherine ASHTON
Member of the Commission

ANNEX

US co-operating exporting producers not sampled

Company Name	City	TARIC additional code
AG Processing Inc.	Omaha	A942
Alabama Clean Fuels Coalition Inc.	Birmingham	A940
Central Iowa Energy, LLC	Newton	A940
Chesapeake Custom Chemical Corp.	Ridgeway	A940
Delta BioFuels, Inc.	Natchez	A940
East Fork Biodiesel, LLC	Algona	A940
Ecogy Biofuels, LLC	Tulsa	A940
ED & F Man Biofuels Inc.	New Orleans	A940
Freedom Biofuels, Inc.	Madison	A940
Fuel Bio	Elizabeth	A940
FUMPA Bio Fuels	Redwood Falls	A940
Galveston Bay Biodiesel, LP (BioSelect Fuels)	Houston	A940
Geo Green Fuels, LLC	Houston	A940
Griffin Industries, Inc.	Cold Spring	A940
Huish Detergents, Inc.	Salt Lake City	A940
Incobrasa Industries, Ltd.	Gilman	A940
Independence Renewable Energy Corp.	Perdue Hill	A940
Innovation Fuels, Inc.	Newark	A940
Iowa Renewable Energy, LLC	Washington	A940
Johann Haltermann Ltd.	Houston	A940
Lake Erie Biofuels, LLC	Erie	A940
Louis Dreyfus Agricultural Industries, LLC	Wilton	A940
Memphis Biofuels, LLC	Memphis	A942
Middletown Biofuels, LLC	Blairsville	A940
Musket Corporation	Oklahoma City	A940
Nova Biofuels Clinton County, LLC	Clinton	A940
Organic Fuels, Ltd	Houston	A940
Owensboro Grain Company LLC	Owensboro	A940
Peach State Labs, Inc.	Rome	A940

Company Name	City	TARIC additional code
Philadelphia Fry-O-Diesel Inc.	Philadelphia	A940
RBF Port Neches LLC	Houston	A940
REG Ralston, LLC	Ralston	A940
Riksch BioFuels LLC	Crawfordsville	A940
Sanimax Energy Inc.	DeForest	A940
Scott Petroleum	Itta Bena	A942
Soy Solutions	Milford	A940
SoyMor Biodiesel, LLC	Albert Lea	A940
Trafigura AG	Stamford	A940
U.S. Biofuels, Inc.	Rome	A940
United Oil Company	Pittsburgh	A940
Vinmar Overseas, Ltd	Houston	A938
Vitol Inc.	Houston	A940
Western Dubque Biodiesel, LLC	Farley	A940
Western Iowa Energy, LLC	Wall Lake	A940
Western Petroleum Company	Eden Prairie	A940