

COMMISSION IMPLEMENTING REGULATION (EU) 2021/1267**of 29 July 2021****imposing definitive countervailing duties on imports of biodiesel originating in the United States of America following an expiry review pursuant to Article 18 of Regulation (EU) 2016/1037 of the European Parliament and of the Council**

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 Article 18(1) thereof,

Whereas:

1. PROCEDURE**1.1. Previous investigations and measures in force**

- (1) By Regulation (EC) No 598/2009 ⁽²⁾ the Council imposed a definitive countervailing duty, ranging from EUR 211,2 to EUR 237 per tonne net, 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, at that time falling under 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), ex 3824 90 91, ex 3824 90 97 (TARIC code 3824 90 97 87), and originating in the United States of America ('USA' or 'the country concerned'). The countervailing duty imposed by this regulation is hereafter referred to as 'the original measures'. The investigation that led to the imposition of the original measures will hereafter be referred to as 'the original investigation'.
- (2) By Implementing Regulation (EU) No 443/2011 ⁽³⁾, following an anti-circumvention investigation, the Council extended the definitive anti-countervailing imposed by Council Regulation (EC) No 598/2009 to imports of biodiesel consigned from Canada, whether declared as originating in Canada or not, with the exception of those produced by the companies BIOX Corporation, Oakville and Rothsay Biodiesel, Guelph, Ontario, Canada. By the same Regulation, the Council also extended the definitive countervailing duty imposed by Council Regulation (EC) No 598/2009 to imports of biodiesel in a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the USA.
- (3) By Implementing Regulation (EU) 2015/1519 ⁽⁴⁾, the European Commission re-imposed the definitive countervailing measures on imports of biodiesel originating in the USA following an expiry review (the 'previous expiry review').

⁽¹⁾ OJ L 176, 30.6.2016, p. 55.

⁽²⁾ Council Regulation (EC) No 598/2009 of 7 July 2009 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America (OJ L 179, 10.7.2009, p. 1).

⁽³⁾ Council Implementing Regulation (EU) No 443/2011 of 5 May 2011 extending the definitive countervailing duty imposed by Regulation (EC) No 598/2009 on imports of biodiesel originating in the United States of America to imports of biodiesel consigned from Canada, whether declared as originating in Canada or not, and extending the definitive countervailing duty imposed by Regulation (EC) No 598/2009 to imports of biodiesel in a blend containing by weight 20 % or less of biodiesel originating in the United States of America, and terminating the investigation in respect of imports consigned from Singapore (OJ L 122, 11.5.2011, p. 1).

⁽⁴⁾ Commission Implementing Regulation (EU) 2015/1519 of 14 September 2015 imposing definitive countervailing duties on imports of biodiesel originating in the United States of America following an expiry review pursuant to Article 18 of Council Regulation (EC) No 597/2009 (OJ L 239, 15.9.2015, p. 99).

- (4) Moreover, Regulation (EU) 2015/1519 as amended by Regulation (EU) 2016/675 ⁽⁵⁾ also extended the definitive countervailing duty to imports of biodiesel consigned from Canada, whether declared as originating in Canada or not, with the exception of those produced by the companies BIOX Corporation, Oakville and Rothsay Biodiesel, Guelph, both located in Ontario, Canada as well as by the company DSM Nutritional Products Canada Inc., Dartmouth, Nova Scotia, Canada. By the same Regulation, the European Commission also extended the definitive countervailing duty to imports of biodiesel in a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the USA.
- (5) The countervailing duties currently in force are fixed amounts ranging from EUR 211,2 to EUR 237 per tonne net on imports from the exporting producers.

1.2. Request for an expiry review

- (6) Following the publication of a notice of impending expiry ⁽⁶⁾ the European Commission ('the Commission') received a request for a review pursuant to Article 18 of 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 ('the basic Regulation').
- (7) The request for review was lodged on 11 June 2020 by the European Biodiesel Board ('EBB' or 'the applicant'), on behalf of Union producers representing more than 25 % of the total Union production of biodiesel. The request for review was based on the grounds that the expiry of the measures would likely result in continuation or recurrence of subsidised biodiesel entering the Union and of recurrence of injury to the Union industry.

2. INITIATION OF AN EXPIRY REVIEW

- (8) Having determined, after consulting the Committee established by Article 15(1) of Regulation (EU) 2016/1036 of the European Parliament and of the Council ⁽⁷⁾ that sufficient evidence existed for the initiation of an expiry review, the Commission initiated, on 14 September 2020, an expiry review with regard to imports of biodiesel originating in the USA on the basis of Article 18(1) of the basic Regulation. It published a Notice of Initiation in the *Official Journal of the European Union* ⁽⁸⁾ ('the Notice of Initiation').
- (9) On the same day, 14 September 2020, the Commission initiated in parallel an expiry review of the anti-dumping measures in force on imports of biodiesel originating in the USA.
- (10) The Government of Canada commented on this initiation, noting that, if the measures were to be maintained, the exemption granted to three Canadian producers of biodiesel should be retained. The Commission maintained the exemption in Article 2 of the present Regulation.

2.1. Review investigation period and period considered

- (11) The investigation of a continuation or recurrence of subsidisation covered the period from 1 July 2019 to 30 June 2020 ('the review investigation period' or 'the RIP'). The examination of trends relevant for the assessment of the likelihood of a continuation or recurrence of injury covered the period from 1 January 2017 to the end of the review investigation period ('the period considered').

⁽⁵⁾ Commission Implementing Regulation (EU) 2016/675 of 29 April 2016 amending Implementing Regulation (EU) 2015/1519 imposing definitive countervailing duties on imports of biodiesel originating in the United States of America following an expiry review pursuant to Article 18 of Council Regulation (EC) No 597/2009 (OJ L 116, 30.4.2016, p. 27).

⁽⁶⁾ Notice of the impending expiry of certain anti-subsidy measures (OJ C 18, 20.1.2020, p. 19).

⁽⁷⁾ 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 (OJ L 176, 30.6.2016, p. 21).

⁽⁸⁾ Notice of initiation of an expiry review of the anti-subsidy measures applicable to imports of biodiesel originating in the United States of America (OJ C 303, 14.9.2020, p. 7).

2.2. Withdrawal of the United Kingdom from the EU

- (12) This case was initiated on 14 September 2020, that is during the transition period agreed between the United Kingdom ('UK') and the EU in which the UK remained subject to the Union law. This period ended on 31 December 2020. Consequently, as of 1 January 2021, companies and associations from the UK no longer qualified as interested parties in this proceeding.
- (13) By a note to the case file ⁽⁹⁾ on 15 January 2021, the Commission invited UK operators that considered that they still qualified as interested parties to contact it. BP OIL International Limited and Argent Energy requested to continue to be considered as interested parties and were granted this right based on the evidence submitted. In particular, both companies provided proof of the existence of related entities within the respective group active on the Union market. On the other hand, the UK parent company Valero Energy Limited was replaced by its Irish subsidiary Valero Energy Limited Ireland since the latter one is active on the Union market.

2.3. Interested parties

- (14) In the Notice of Initiation, interested parties were invited to contact the Commission in order to participate in the investigation. In addition, the Commission specifically informed the applicant, other known Union producers, the known producers in the USA and the US authorities, known importers, users, traders, as well as associations known to be concerned about the initiation of the expiry review and invited them to participate.
- (15) Interested parties had an opportunity to comment on the initiation of the expiry review and to request a hearing with the Commission and/or the Hearing Officer in trade proceedings.

2.4. Sampling

- (16) In the Notice of Initiation, the Commission stated that it might use sampling in accordance with Article 27 of the basic Regulation.

Sampling of Union producers

- (17) On 14 September 2020, the Commission notified to interested parties the provisional sample of Union producers pursuant to Section 5.3 of the Notice of Initiation. It selected the sample on the basis of the size of the production and sales volume of the like product in 2019 as well as the geographic location of the producers of the like product. This sample consisted of three Union producers. The sampled Union producers accounted for 17,5 % of the estimated total production volumes of the like product in the Union and it also ensures a good geographical spread. The Commission invited interested parties to comment on the provisional sample. No comments were received within the deadline of 7 days of the notification of the provisional sample of Union producers.

Sampling of importers

- (18) In order to decide whether sampling was necessary and, if so, to select a sample, the Commission asked unrelated importers to provide the information specified in the Notice of Initiation.
- (19) Only one unrelated importer, Shell Trading Rotterdam BV, provided the requested information and, consequently, the Commission decided that sampling was not necessary.

Sampling of exporting producers

- (20) In order to decide whether sampling was necessary and, if so, to select a sample, the Commission asked all exporting producers in the USA to provide the information specified in the Notice of Initiation. In addition, it asked the authorities of the exporting country to identify and/or contact other exporting producers, if any, that could be interested in participating in the investigation.

⁽⁹⁾ Tron document: t21.000417.

- (21) Three exporting producers in the USA came forward and expressed their willingness to cooperate with the Commission in the investigations. In view of the low number, it decided that sampling was not necessary and all three companies were invited to submit a questionnaire reply.

2.5. Cooperation from the country concerned

- (22) On 15 October 2020, one of the originally cooperating companies sent an email to the Commission informing that it would not cooperate further. Moreover, the other two other companies did also not provide the requested information within the required deadline by completing and returning the questionnaire replies.
- (23) On 10 November 2020, the Commission sent a letter informing all three companies about its intention to apply Article 28 of the basic Regulation and base the findings of the investigation on facts available. The US authorities were also informed about this intention. The deadline for providing comments to the letter was 17 November 2020. No comments were received.
- (24) Moreover, at the initiation, by Note Verbale dated 14 September 2020, the Commission requested the authorities of the USA to complete and return the anti-subsidy questionnaire intended for the Government of USA. It did not receive a reply within the required deadline.
- (25) On 10 November 2020, the Commission sent a Note Verbale informing the US authorities about its intention to apply Article 28 of the basic Regulation and base the findings of the investigation on facts available given its lack of cooperation.
- (26) The deadline for providing comments to the Note Verbale was 17 November 2020. No comments were received.
- (27) The Commission therefore concluded that neither any exporting producer nor the Government of USA cooperated in the expiry review investigation. As a consequence, it decided to apply the provisions of Article 28 of the basic Regulation and base its findings, affirmative or negative, on the facts available.

2.6. Questionnaires

- (28) At the initiation, a copy of the questionnaires was made available in the file for inspection by interested parties and on DG Trade's website.
- (29) Questionnaire replies were received from the three sampled Union producers as well from an unrelated Union importer.

2.7. Verification

- (30) In view of the outbreak of COVID-19 and the confinement measures put in place by various Member States as well as by various third countries, the Commission could not carry out verification visits pursuant to Article 26 of the basic Regulation. The Commission instead cross-checked remotely all the information deemed necessary for its determination in line with its Notice on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations ⁽¹⁰⁾. The Commission carried out remote crosschecks ('RCC') of the following companies/parties:

Union producers

- SAIPOL Bu Diester, France
- CAMPA Iberia S.A.U., Spain
- VERBIO Vereinigte BioEnergie AG, Germany

Importers

- Shell Trading Rotterdam BV, The Netherlands

⁽¹⁰⁾ Notice on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations (OJ C 86, 16.3.2020, p. 6).

2.8. Disclosure

- (31) On 21 May 2021, the Commission disclosed the essential facts and considerations on the basis of which it intended to maintain the countervailing duties in force. All parties were granted a period within which they could make comments on the disclosure.
- (32) The comments made by interested parties were considered by the Commission and taken into account, where appropriate. The parties who so requested were granted a hearing.

3. PRODUCT CONCERNED AND LIKE PRODUCT

3.1. Product concerned

- (33) The product concerned is the same as in the original investigation and previous expiry review namely 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, originating in the USA, currently falling under CN codes ex 1516 20 98 (TARIC code 1516 20 98 29), ex 1518 00 91 (TARIC code 1518 00 91 29), ex 1518 00 99 (TARIC code 1518 00 99 29), ex 2710 19 43 (TARIC code 2710 19 43 29), ex 2710 19 46 (TARIC code 2710 19 46 29), ex 2710 19 47 (TARIC code 2710 19 47 29), ex 2710 20 11 (TARIC code 2710 20 11 29), ex 2710 20 16 (TARIC code 2710 20 16 29), ex 3824 99 92 (TARIC code 3824 99 92 12), ex 3826 00 10 (TARIC codes 3826 00 10 29, 3826 00 10 59, 3826 00 10 99), ex 3826 00 90 (TARIC code 3826 00 90 19) ('the product concerned').
- (34) Biodiesel is a renewable fuel produced from a wide range of raw materials, i.e. vegetable oils such as rapeseed oil, soybean oil, palm oil, used frying oils (UFO), animal fats or biomass.
- (35) Biodiesel is used in the transport sector, mainly blended with mineral diesel (i.e. petroleum/conventional diesel) and very marginally in its pure form (B100).

3.2. Like product

- (36) As established in the original investigation as well as in the previous expiry review, this expiry review investigation confirmed that the following products have the same basic physical, chemical and [technical] characteristics as well as the same basic uses:
- the product concerned;
 - the product produced and sold on the domestic market of the USA; and
 - the product produced and sold in the Union by the Union industry.
- (37) These products are therefore considered to be like products within the meaning of Article 2(c) of the basic Regulation.

3.3. Claims regarding product scope

- (38) The Swedish company Preem AB and Valero Energy Ltd Ireland, fuel producers and suppliers and as such users of the product concerned, argued that Fatty Acid Methyl Ester (FAME) biodiesel and Hydrotreated Vegetable Oil (HVO) biodiesel are two different types of biodiesel, and that HVO should be excluded from the current product scope. In the 2009 Regulation imposing provisional measures ⁽¹⁾, all types of biodiesel and biodiesel blends were considered to be biodiesel fuels. FAME and HVO can both be blended with diesel and despite some differences in physical characteristics, the product end-use is the same and both products are produced by the Union industry. In addition, the complaint in the original investigation explicitly defined diesel fuel produced from HVOs as part of the product concerned and no party challenged this statement at that time. Therefore, the claim was rejected.

⁽¹⁾ 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 (OJ L 67, 12.3.2009, p. 22).

4. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF SUBSIDISATION

4.1. Preliminary remarks

- (39) In accordance with Article 28(1) of the basic Regulation, the Commission examined whether the expiry of the existing measures would likely lead to a continuation or recurrence of subsidisation of the product concerned originating in the USA and a continuation or recurrence of injury to the Union industry. Due to the lack of cooperation from the exporting producers and from the US authorities as described in recitals (22) to (27) above, it was not possible to carry out an analysis based on verified data supplied by the exporting producers and by the US authorities.
- (40) Consequently, in accordance with Article 28 of the basic Regulation, the findings in relation to the likelihood of continuation or recurrence of subsidisation were based on facts available. The Commission made use of the following sources of information: the request for an expiry review and subsequent submissions from the applicant, Eurostat, the Global Trade Atlas ('GTA') and the websites of the US Energy Information Administration ('EIA') and the US Department of Agriculture ('USDA').
- (41) In particular, the Commission analysed the following Federal and State subsidy schemes, which were identified in the request for review and which the Commission identified as still active.

Federal Schemes

- (a) The Biodiesel Mixture Credit and the Biodiesel Credit
- (b) The Small Agri-biodiesel Producer Income Tax Credit
- (c) The USDA bioenergy programme for advanced biofuels
- (d) Credit for Production of Cellulosic Biofuel
- (e) USDA Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Programme

State Schemes

- (a) Iowa – The Iowa Biodiesel Producer Tax Refund
 - (b) Kentucky – The Kentucky Biodiesel Production Tax Credit
 - (c) Texas – The Texas Fuel Ethanol and Biodiesel Production Incentive Programme
- (42) On the other hand, due to the lack of cooperation by the US authorities and US exporting producers, and in view of the conclusions as regards continuation of subsidisation on the basis of the schemes mentioned above, the Commission did not further analyse the following Federal and State subsidy schemes.

Federal Schemes

- (a) Second Generation Biofuel Plant Depreciation Special Allowance
- (b) Rural Energy for America Program

State Schemes

- (a) Alabama Biofuel Production Jobs Tax Credit
- (b) Hawaii Renewable Fuels Production Tax Credit
- (c) Kentucky Alternative Fuel Production Tax Incentives
- (d) Louisiana Provision for Green Jobs Tax Credit
- (e) Minnesota Biofuel Production Grant Program
- (f) Montana Alternative Fuel and Vehicle Production Property Tax Incentive
- (g) New York Biofuel Production Tax Credit

- (h) North Dakota Biodiesel Production Equipment Tax Credit
- (i) North Dakota Biofuel Loan Program
- (j) Oregon Alternative Fuel Loans
- (k) South Carolina Biofuels Production Facility Tax Credit
- (l) Virginia Green Jobs Tax Credit

4.2. Subsidisation – Federal Schemes

4.2.1. Biodiesel mixture credit and biodiesel credit

4.2.1.1. Legal basis

- (43) Title 26, Section 40A (b) of the US Code (U.S.C.) is the legal basis for a tax credit scheme for biodiesel blenders, retailers and end-users. They provide for the following biodiesel fuel credits:
- (1) The Biodiesel Mixture Credit;
 - (2) The Biodiesel Credit;
 - (3) The Small Agri-biodiesel Producer Credit.
- (44) The Biodiesel Mixture Credit has been in place in the US Federal legislation since 2005 ⁽¹²⁾. According to Section 202(a) of the US Energy and Improvement and Extension Act 2008, this tax credit was due to expire on 31 December 2009 ⁽¹³⁾. However, this subsidy scheme has never truly expired, but has instead been repeatedly reinstated retroactively until now. Lastly, on 20 December 2019 by the Further Consolidated Appropriations Act the U.S. Congress reinstated the scheme for two years as from 31 December 2017 and prolonged it for 3 years, that is until 31 December 2022 ⁽¹⁴⁾. This 5-year extension is the longest extension made since the introduction of this subsidy scheme.
- (45) Following disclosure, the applicant informed the Commission that a bill has been introduced on 25 May 2021 in both the U.S. Senate and the U.S. House of Representatives with a view to extending the Biodiesel Mixture Credit Scheme further for an additional 3 years, i.e. until 31 December 2025.
- (46) Like the Biodiesel Mixture Credit the Biodiesel Credit has been in place in the US Federal legislation since 2005 ⁽¹⁵⁾. According to Section 202(a) of the US Energy and Improvement and Extension Act 2008, this tax credit was due to expire on 31 December 2009 ⁽¹⁶⁾. However, also this subsidy scheme has never expired and have been repeatedly reinstated retroactively until now. Lastly, on 20 December 2019 by the Further Consolidated Appropriations Act the U.S. Congress scheme reinstated the scheme for two years as from 31 December 2017 and prolonged it for 3 years, that is until 31 December 2022 ⁽¹⁷⁾.
- (47) The Small Agri-biodiesel Producer Income Tax Credit is a tax credit, which applies only to small agri-biodiesel producers. This scheme is examined in recitals (63) to (70) below.

4.2.1.2. Eligibility

- (48) In order to be eligible for the Biodiesel Mixture Credit referred to in recital (43) (1) above, a company must create a mixture of biodiesel and diesel fuel, which is sold as a fuel or for use as a fuel.

⁽¹²⁾ Established in 2005 by the American Jobs Creation Act of 2004, §302 (P.L. 108-357), extended by the Energy Policy Act of 2005, §1344 (P.L. 109-58).

⁽¹³⁾ See Section 202(a) of the Energy Improvement and Extension Act 2008 (P.L. 110-343, Division B).

⁽¹⁴⁾ Public Law 116-94—Dec. 20, 2019 Further Consolidated Appropriations Act, 2020, Section 121.

⁽¹⁵⁾ Established in 2005 by the American Jobs Creation Act of 2004, §302 (P.L. 108-357), extended by the Energy Policy Act of 2005, §1344 (P.L. 109-58).

⁽¹⁶⁾ See Section 202(a) of the Energy Improvement and Extension Act 2008 (P.L. 110-343, Division B).

⁽¹⁷⁾ Public Law 116-94—Dec. 20, 2019 Further Consolidated Appropriations Act, 2020, Section 121.

- (49) The person claiming the incentive must obtain a certification from the producer or importer of biodiesel, which identifies the product and the percentage of biodiesel and agri-biodiesel ⁽¹⁸⁾ in the product. This credit takes the form of an excise tax credit or, if a company's excise tax liability is less than the total excise tax credit, the company may then claim the residual credit as a refundable income tax credit. A refundable income tax credit is a credit against the taxpayer's income taxes or a direct payment. It is refundable because the excess credit can be disbursed to the taxpayer as a direct cash payment if the credit is greater than the individual's tax liability.
- (50) The Biodiesel Credit referred to in recital (43) (2) above is a non-refundable income tax credit for retailers or end-users of unmixed neat (pure) biodiesel. The neat biodiesel credit is available only to the person who places neat biodiesel into the fuel tank of a vehicle or uses it as fuel. It should be noted that also biodiesel producers, producing their own biodiesel, would be able to receive this credit. Thus to claim the credit, the biodiesel producer must be acting as either a retailer (putting the gallon of biodiesel into the end-user's gas tank) or an end-user (e.g. putting the biodiesel into his own vehicles).

4.2.1.3. Practical implementation

- (51) Biodiesel that is mixed with diesel fuel is entitled to an excise tax credit, or an income tax credit. During the review investigation period, the credit prevailing was USD 1 per gallon for all types of biodiesel, i.e. including agri-biodiesel and diesel from biomass.
- (52) The final tax credit for the blended fuel depends on the proportion of biodiesel it contains. The minimum requirement, and what is the most common practice, is to add 0,1 % mineral diesel to 99,9 % biodiesel (this blended product is referred to as B99 in the USA), as this ensures that the maximum tax credit is obtained. The proportion of biodiesel in a blended product qualifies for the tax credit (e.g. 100 gallons of B99 will contain 99,9 gallons of biodiesel and be eligible for a tax credit of USD 99,90). The conversion of biodiesel from a pure product (B100) to a mixed product (B99) is a simple process. It implies the addition of 0,1 % of mineral diesel into pure biodiesel and does not entail a major transformation of the product concerned. It is the activity of blending that triggers the eligibility for the credit.
- (53) The producers of biodiesel can claim the incentive when they are themselves performing a blending activity. The producer must blend the neat biodiesel with diesel fuel. In terms of entitlement to the incentive, there are no differences between blended biodiesel destined for domestic sale and sale for export.
- (54) Companies that do not produce but rather purchase pure biodiesel and blend it into a biodiesel mixture are also entitled to the tax credit. Such companies must obtain a certificate from the producer or the importer (and if applicable any intervening resellers) of the biodiesel in which the producer effectively certifies not to have claimed the tax credit ⁽¹⁹⁾.
- (55) The incentive can be claimed either as a credit against excise or income tax liability or as a direct cash payment. The total amount of the incentive remains the same (USD 1 per gallon) whether the incentive is claimed as an excise tax credit, an income tax credit, a direct payment to the taxpayer, or any combination of the foregoing.
- (56) The U.S.C. provides that the biodiesel mixture credit will not be granted unless the company (blender) that makes the mixture of biodiesel and mineral diesel obtains a certificate ('Certificate for Biodiesel') from the producer of the biodiesel in which the producer certifies, inter alia, the quantity of biodiesel to which the certificate relates and whether the biodiesel is agri-biodiesel or biodiesel other than agri-biodiesel.

⁽¹⁸⁾ According to the US law, the term 'agri-biodiesel' means biodiesel derived solely from virgin oils, including esters derived from virgin vegetable oils from corn, soybeans, sunflower seeds, cottonseeds, canola, crambe, rapeseeds, safflowers, flaxseeds, rice bran, mustard seeds, and camelina, and from animal fats (Title 26, Section 40A (d)(2) of the US Code).

⁽¹⁹⁾ <https://www.law.cornell.edu/uscode/text/26/40A>

- (57) In regard to the Biodiesel Credit, and similar to the previous expiry review, the retailer (or a biodiesel producer acting as a retailer) or end-user of unblended biodiesel can claim USD 1,00 per gallon for all types of unmixed (neat) biodiesel placed into the fuel tank of a vehicle or used as fuel. A non-refundable general business credit is a credit against the business's income tax. It is non-refundable because, if the business's credits are greater than its tax liability, the excess credit cannot be disbursed to the business as a direct cash payment.
- (58) Given that biodiesel producers are eligible for these schemes and on the basis of facts available ⁽²⁰⁾ (since there was no cooperation as – indicated in recital (27) above), the Commission concluded that the US exporting producers benefited from it.

4.2.1.4. Conclusion

- (59) The Biodiesel Mixture Credit as well as the Biodiesel Credit have to be regarded as a fiscal incentive whether or not they are given as a cash payment (only possible for Biodiesel Mixture Credit) or has to be offset against tax liabilities (applicable to both tax credits).
- (60) The Commission found, in line with its findings in the original investigation, the schemes to constitute a subsidy in the sense of Article 3(1)(a)(i) and Article 3(1)(a)(ii) of the basic Regulation as the schemes provides a financial contribution by the Government of the USA in the form of direct grants (cash payments, only possible for the biodiesel mixture credit) and revenue foregone which is otherwise due (tax offset) (applicable to both tax credits). The incentives confer a benefit on the companies receiving them.
- (61) The schemes are limited to companies that are involved in the biodiesel industry and are therefore considered to be specific under Article 4(2)(a) of the basic Regulation and thus countervailable.
- (62) Finally, as the Biodiesel Mixture Credit scheme provides for a subsidy of USD 1 per gallon for all types of biodiesel, the Commission considered that this scheme provided significant amount of subsidies to the US biodiesel exporting producers and remained by far the most important scheme during the review investigation period. Such a subsidy of USD 1 per gallon would amount to about EUR 302 per tonne.

4.2.2. *Small Agri-biodiesel Producer Income Tax Credit*

4.2.2.1. Legal basis

- (63) Title 26, U.S.C., Section 40A also provides for a Small Agri-biodiesel Producer Income Tax Credit, like the Biodiesel Mixture Credit and the Biodiesel Credit.
- (64) Moreover, similar to the Biodiesel Mixture Credit and the Biodiesel Credit, as laid down in the recitals (44) and (46), the Small Agri-biodiesel Producer Income Tax Credit has been in place in the US Federal legislation since 2005 ⁽²¹⁾. According to Section 202(a) of the US Energy and Improvement and Extension Act 2008, this tax credit was due to expire on 31 December 2009 ⁽²²⁾. However, this subsidy scheme has never expired but have been repeatedly reinstated retroactively. Lastly, on 20 December 2019 by the Further Consolidated Appropriations Act the U.S. Congress scheme reinstated the scheme for two years as from 31 December 2017 and prolonged it for 3 years, that is until 31 December 2022.

4.2.2.2. Eligibility

- (65) This scheme is only available to small producers of neat agri-biodiesel. Any mixer, blender, or trader who purchases but does not produce biodiesel is not eligible for the credit. A small producer is any person whose production capacity is not more than 60 million gallons of agri-biodiesel per year.

⁽²⁰⁾ See Sections 3.1.1.1 and 3.1.1.2 of the request for review.

⁽²¹⁾ Energy Policy Act of 2005, §1345 (P.L. 109-58); amended by the Energy Improvement and Extension Act of 2008 (P.L. 110-343, Division B), §202-203; extended by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312), §701.

⁽²²⁾ See Section 202(a) of the Energy and Improvement and Extension Act 2008 (P.L. 110-343, Division B).

- (66) The small agri-biodiesel producer can claim a USD 0,10 non-refundable general business income tax credit for each gallon of agri-biodiesel produced. The qualified production of a producer may not exceed 15 million gallons in any taxable year. For the producer to claim the credit, the agri-biodiesel must be used as a fuel, sold for use as a fuel, or used to create a mixture of biodiesel and diesel fuel that is used as a fuel or sold for use as a fuel. Thus small agri-biodiesel producers can combine this scheme with the biodiesel mixture credit scheme and thus receive altogether USD 1,10 per gallon. By contrast, big agri-biodiesel producers are eligible only for the biodiesel mixture credit scheme.

4.2.2.3. Practical implementation

- (67) Claims for the non-refundable general business income tax credits are made annually when the claimant is making its income tax return. The credit for each gallon of biodiesel produced by the claimant during the relevant tax year, up to a maximum of 15 million gallons, is offset against the claimant's liability for corporate income tax. If the claimant's tax liability is less than the amount of credit claimed, the excess amount can be carried forward to subsequent tax years.
- (68) Given that biodiesel producers are eligible for this scheme and on the basis of facts available ⁽²³⁾ (since there was no cooperation as in indicated in recital (27) above), the Commission concluded that the US exporting producers benefited from it by applying facts available in accordance with Article 28 of the basic Regulation.

4.2.2.4. Conclusion

- (69) The Commission found, in line with its finding in the original investigation, that this scheme is a subsidy in the sense of Article 3(1)(a)(ii) of the basic Regulation as the scheme provides a financial contribution by the Government of the USA in the form of revenue foregone which is otherwise due. The incentive confers a benefit on the companies receiving them.
- (70) The scheme is limited to companies that produce biodiesel and is therefore considered to be specific under Article 4(2)(a) of the basic Regulation and thus countervailable.

4.2.3. The USDA Bioenergy Programme for Advanced Biofuel

4.2.3.1. Legal basis

- (71) The US Department of Agriculture ('USDA') Bioenergy Programme for Advanced Biofuel (BPAB) is governed by Title IX, Section 9005 of the Farm Security and Rural Investment Act of 2002 (the '2002 Farm Bill') and is currently codified under Title 7, Section 8105 of the US Code.
- (72) The programme was scheduled to expire in 2012, but was extended in 2013 ⁽²⁴⁾ and subsequently in 2014 ⁽²⁵⁾. In this respect, the Agriculture Act of 2014 extended the programme for another 5 years, until the end of 2018. More recently, the Agricultural Improvement Act dated 20 December 2018 extended this subsidy programme for another five years, i.e. until the end of 2023 ⁽²⁶⁾.

⁽²³⁾ See Section 3.1.1.3 of the request for review.

⁽²⁴⁾ American Taxpayer Relief Act of 2 January 2013 (Public law 112-240, §701(f)(4)).

⁽²⁵⁾ Agricultural Act of 7 February 2014 (Public law 113-79, §9005(2)).

⁽²⁶⁾ Agriculture Improvement Act of 2018 (Public law 115-334), §9005(2)(B).

4.2.3.2. Eligibility

- (73) This programme provides direct grants to producers of advanced biofuels, which are generally defined as 'fuel derived from biomass other than corn kernel starch'. The definition includes diesel produced from biomass ⁽²⁷⁾. No more than five per cent of the programme's funds may be distributed to eligible producers with a refining capacity exceeding 150 million gallons of advanced biofuel per year. Blenders are not eligible for the programme.

4.2.3.3. Practical implementation ⁽²⁸⁾

- (74) Participants receive direct payments from the government after having applied for the programme. Producers have to register first with the authority and sign a contract. The producers must submit payment applications for each quarter of the fiscal year in order to receive payment for that quarter's production of advanced biofuel. Payments are provided for both actual production and incremental production. Actual production payments are calculated quarterly for the amount of actual advanced biofuel produced each quarter.
- (75) Incremental production payments are made for the quantity of eligible advanced biofuel produced in a fiscal year that exceeded the quantity produced in the prior fiscal years (since 2009).
- (76) The funding is divided among all producers who come forward based on the Btu ⁽²⁹⁾ value of the production. The funding is distributed evenly among all producers depending on Btu value.
- (77) Given that biodiesel producers are eligible for this scheme and on the basis of facts available ⁽³⁰⁾ (since there was no cooperation as in indicated in recital (27) above), the Commission concluded that the US exporting producers benefited from it by applying facts available in accordance with Article 28 of the basic Regulation.

4.2.3.4. Conclusion

- (78) The Commission considered that this scheme is a subsidy in the sense of Article 3(1)(a)(i) of the basic Regulation as the scheme provides a financial contribution by the Government of the USA in the form of a direct grant. The incentive confers a benefit on the companies receiving them.
- (79) The scheme is limited to companies that produce biodiesel and is therefore considered to be specific under Article 4(2)(a) of the basic Regulation and thus countervailable.

4.2.4. *Credit for Production of Cellulosic Biofuel*

4.2.4.1. Legal basis

- (80) The programme exists since 1 January 2009 and was established by the Food, Conservation, and Energy Act of 2008 and is administered by the Internal Revenue Service. It is codified under Title 26, Section 40 (b)(6) of the US Code.
- (81) This subsidy was originally supposed to expire on 31 December 2012. However, it was extended several times and, lastly, by the Further Consolidated Appropriations Act of 20 December 2019 until 1 January 2021.

⁽²⁷⁾ See Code of Federal Regulations (CFR), Title 7 Part 428.102 of the US Code, 'Definitions' of the implementing regulations: 'Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat'. Potentially 'biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste' could also include production of biodiesel.

⁽²⁸⁾ https://www.rd.usda.gov/sites/default/files/fact-sheet/508_RD_FS_RBS_AdvancedBioFuel.pdf

⁽²⁹⁾ The British thermal unit (BTU or Btu) is a unit of energy equal to about 1055 joules.

⁽³⁰⁾ See Section 3.1.1.4 of the request for review.

4.2.4.2. Eligibility

- (82) This scheme provides for USD 1,01 per gallon non-refundable general business income tax credit to second generation biofuel used as fuel or sold for use as fuel. Producers are eligible, including producers of biofuel derived from any lignocellulosic or hemicellulosic matter that is available on a renewable or recurring basis, as well as algae-based fuels.

4.2.4.3. Practical implementation

- (83) Given that biodiesel producers are eligible for this scheme and on the basis of facts available ⁽³¹⁾ (since there was no cooperation as in indicated in recital (28) above), the Commission concluded that the US exporting producers benefited from it by applying facts available in accordance with Article 28 of the basic Regulation.
- (84) Moreover, it is expected that the cellulosic biofuels will constitute a significant part of US production in the future as demonstrated by the ongoing several projects that aims at developing cellulosic diesel capacities ⁽³²⁾.

4.2.4.4. Conclusion

- (85) The Commission considered that this scheme is a subsidy in the sense of Article 3(1)(a)(i) of the basic Regulation as the scheme provides a financial contribution by the Government of the USA in the form of a direct grant. The incentive confers a benefit on the companies receiving them.
- (86) The scheme is limited to companies that produce biofuel derived from any lignocellulosic or hemicellulosic matter that is available on a renewable or recurring basis, as well as algae-based fuels. It is therefore considered to be specific under Article 4(2)(a) of the basic Regulation and therefore countervailable.

4.2.5. *The USDA Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Programme*

4.2.5.1. Legal basis

- (87) The USDA Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Programme is provided under Title 7, Section 8103 (Biorefinery assistance) of the U.S. Code and is administered by the U.S. Department of Agriculture (USDA).
- (88) The same programme was called 'Advanced biofuels loan guarantees' in the previous expiry review, but was not analysed during the previous expiry review.
- (89) The programme was in force during the review investigation period on the basis of the request for review.

4.2.5.2. Eligibility

- (90) This programme provides loan guarantees up to \$250 million to assist in the development of new and emerging technologies for advanced biofuels (including biodiesel), renewable chemicals, and biobased products. In broad terms, two types of projects are eligible for the programme: biorefineries, and biobased Product Manufacturing facilities. Advanced biofuel is defined as fuel derived from renewable biomass other than corn kernel starch. The project must be located in a US State.
- (91) Eligible applicants include, but are not limited to, individuals, state or local governments, farm cooperatives, national laboratories, institutions of higher education, and rural electric cooperatives.

⁽³¹⁾ See Section 3.2.1 of the request for review.

⁽³²⁾ Request for review, version open for interested parties, lodged on 11 June 2020 by the European Biodiesel Board ('EBB' or 'the applicant'), on behalf of Union producers representing more than 25 % of the total Union production of biodiesel, recital 102, p. 21.

- (92) The total amount of a federal participation (loan guarantee, plus other federal funding) must not exceed 80 per cent of the total eligible project costs. The borrower and other principals involved in the project must make a significant cash equity contribution.

4.2.5.3. Practical implementation

- (93) Given that biodiesel producers are eligible for this scheme and on the basis of facts available ⁽³³⁾ (since there was no cooperation as in indicated in recital (27) above), the Commission concluded that the US exporting producers benefited from it by applying facts available in accordance with Article 28 of the basic Regulation.

4.2.5.4. Conclusion

- (94) The Commission considered that this scheme is a subsidy in the sense of Article 3(1)(a)(i) of the basic Regulation as it provides a financial contribution by the Government of the USA in the form of a fiscal incentive. The incentive confers a benefit on the companies receiving them.
- (95) The scheme is limited to companies that are involved in the advanced biofuel industry and is therefore considered to be specific under Article 4(2)(a) of the basic Regulation and therefore countervailable.

4.3. Subsidisation – State Schemes

4.3.1. *The Iowa Biodiesel Producer Tax Refund*

4.3.1.1. Legal basis

- (96) The legal basis of this scheme operated by the Iowa Department of Revenue is Section 423.4(9) of the Iowa Code.
- (97) The scheme was scheduled to expire on 1 January 2015 but was first extended until 1 January 2018 by the 85th General Assembly of the State of Iowa in 2014. In 2016, the 86th General Assembly of the State of Iowa through an act adopted on 24 May 2016 (Chapter 1106) extended this scheme for another nine-year period, i.e. until 1 January 2025.

4.3.1.2. Eligibility

- (98) The producer must be a manufacturer of biodiesel, registered by the United States Environmental Protection Agency, pursuant to 40 C.F.R. §79.4. The biodiesel must be for use in biodiesel blended fuel in accordance with Iowa Code Section 214A.2. The biodiesel must be produced in Iowa.

4.3.1.3. Practical implementation

- (99) Eligible biodiesel producers need to introduce a refund claim providing data on the number of biodiesel gallons produced during the quarter. The Department of Revenue reviews the refund claim and, if approved, refunds each eligible biodiesel producer.
- (100) The refund claims are filed in April, July, October and January of each year, and the refund checks are issued in May, August, November and February of each year.
- (101) The programme provides a refund of USD 0,02 per gallon of biodiesel produced in Iowa. The refund is limited to the first 25 million gallons produced at each facility.
- (102) Given that biodiesel producers are eligible for this scheme and on the basis of facts available ⁽³⁴⁾ (since there was no cooperation as in indicated in recital (27) above), the Commission concluded that the US exporting producers benefited from it by applying facts available in accordance with Article 28 of the basic Regulation.

⁽³³⁾ See Section 3.2.2 of the request for review.

⁽³⁴⁾ See Section 3.1.2.1 of the request for review.

4.3.1.4. Conclusion

- (103) The Commission considered that this scheme is a subsidy in the sense of Article 3(1)(a)(ii) of the basic Regulation as the scheme provides a financial contribution by the State of Iowa in the form of revenue foregone which is otherwise due. The incentive confers a benefit on the companies receiving them.
- (104) The scheme is limited to companies that produce biodiesel and other types of fuel and is therefore considered to be specific under Article 4(2)(a) of the basic Regulation and therefore countervailable.

4.3.2. *The Kentucky Biodiesel Production Tax Credit*

4.3.2.1. Legal basis

- (105) The legal basis of this scheme operated by the Kentucky Department of Revenue is the Kentucky Revised Statutes (KRS) under Sections 141.422 to 141.425.
- (106) The scheme was created by the 2005 Kentucky Acts, Chapter 168, Sec. 137, and became effective on 18 March 2005. It has been amended in 2006 and 2007. It is currently governed by the 2019 version of the KRS, as mentioned in the previous recital.

4.3.2.2. Eligibility

- (107) Any biodiesel producer, biodiesel blender, or renewable diesel producer physically located in Kentucky is entitled to the production tax credit.

4.3.2.3. Practical implementation

- (108) An eligible applicant must submit to the Department of Revenue a tax credit claim for biodiesel gallons produced or blended (or for the renewable diesel produced) in Kentucky by the 15th day of the first month following the close of the preceding calendar year.
- (109) An applicant claiming the tax credit must attach the credit certificate issued by the department to its tax return on which the tax credit is claimed ⁽³⁵⁾.
- (110) The amount of the tax credit is one dollar (USD 1) per biodiesel gallon produced by a biodiesel producer, or one dollar (USD 1) per gallon of biodiesel used in the blending process by a biodiesel blender, and one dollar (USD 1) per gallon of renewable diesel (that is diesel from biomass) produced by a renewable diesel producer, unless the total amount of approved credit for all biodiesel producers, biodiesel blenders, and renewable diesel producers exceeds the annual cap of USD 10 million.
- (111) Given that biodiesel producers are eligible for this scheme and on the basis of facts available ⁽³⁶⁾ (since there was no cooperation as indicated in recital (27) above), the Commission concluded that the US exporting producers benefited from it by applying facts available in accordance with Article 28 of the basic Regulation.

4.3.2.4. Conclusion

- (112) The Commission found that this scheme is a subsidy in the sense of Article 3(1)(a)(ii) of the basic Regulation as the scheme provides a financial contribution by the State of Kentucky in the form of revenue foregone which is otherwise due. The incentive confers a benefit on the companies receiving them.
- (113) The scheme is limited to companies that produce biodiesel and other types of fuel and is therefore considered to be specific under Article 4(2)(a) of the basic Regulation and therefore countervailable.

⁽³⁵⁾ <https://revenue.ky.gov/Business/Pages/Biodiesel-Tax-Credit.aspx>

⁽³⁶⁾ See Section 3.1.2.2 of the request for review.

4.3.3. *The Texas Fuel Ethanol and Biodiesel Production Incentive Programme*

4.3.3.1. Legal basis

- (114) The legal basis of this scheme operated by the Texas Economic Development and Tourism Office is Chapter 16 of the Texan Agriculture Code entitled 'Fuel Ethanol, Renewable Methane, Biodiesel, And Renewable Diesel Production Incentive Program'.
- (115) Since 2011, there has been no change in Chapter 16 of the Texan Agriculture Code. This scheme is therefore still in force.

4.3.3.2. Eligibility

- (116) Under this scheme, the Texas government distributes grants to eligible companies producing ethanol, renewable methane, biodiesel, or renewable diesel in Texas.
- (117) To be eligible, such companies must be registered before the Texas Economic Development and Tourism Office.

4.3.3.3. Practical implementation

- (118) Registered Producers that paid a fee of 32 cents for each gallon of fuel ethanol or MMBtu of renewable methane and 1,6 cents for each gallon of biodiesel produced are entitled to receive the grant amounting to 20 cents for each gallon of fuel ethanol or MMBtu of renewable methane and 10 cents for each gallon of biodiesel produced in each registered plant (in the limit of 18 million gallons annually per plant) until the 10th anniversary of the date production from the plant begins ⁽³⁷⁾.
- (119) Given that biodiesel producers are eligible for this scheme and on the basis of facts available ⁽³⁸⁾ (since there was no cooperation as in indicated in recital (27) above), the Commission concluded that the US exporting producers benefited from it by applying facts available in accordance with Article 28 of the basic Regulation.

4.3.3.4. Conclusion

- (120) The Commission considered that this scheme is a subsidy in the sense of Article 3(1)(a)(i) of the basic Regulation as the scheme provides a financial contribution by the State of Texas in the form of direct grants. The incentive confers a benefit on the companies receiving them under Article 3(2) of the basic Regulation.
- (121) The scheme is limited to companies that produce biodiesel and other types of fuel and is therefore considered to be specific under Article 4(2)(a) of the basic Regulation and therefore countervailable.

4.4. **Likelihood of continuation or recurrence of subsidisation**

4.4.1. *Likelihood of continuation of subsidisation of the three federal schemes*

- (122) The main scheme, as in the original investigation and in the previous expiry review, continued to be the Biodiesel Mixture Credit scheme. This scheme was reinstated by the Further Consolidated Appropriations Act by the U.S. Congress on 20 December 2019 (see in this respect recital (44) above), and was in force during the review investigation period. It will at the earliest expire on 1 January 2023.
- (123) Like the Biodiesel Mixture Credit, the Biodiesel Credit and the Small Agri-biodiesel Producer Income Tax Credit have been also reinstated by the Further Consolidated Appropriations Act by the U.S. Congress on 20 December 2019 until 31 December 2022 (see in this respect respectively recitals (46) and (64) above).

⁽³⁷⁾ Chapter 16 of the Texan Agriculture Code, Section 16.006 (b).

⁽³⁸⁾ See Section 3.1.2.3 of the request for review.

- (124) Consequently, these three federal schemes (Biodiesel Mixture Credit, Biodiesel Credit and Small Agri-biodiesel Producer Credit) were enacted by the American Jobs Creation Act of 2004 ⁽³⁹⁾ and first entered into force on 1 January 2005. Moreover, they all have been repeatedly reinstated retroactively until now.
- (125) Furthermore, as explained in recital (72), the USDA bioenergy programme for advanced biofuels was scheduled to expire in 2012, but was extended in 2013 and subsequently in 2014. The Agriculture Act of 2014 extended the programme for another 5 years, until the end of 2018. More recently, the Agricultural Improvement Act dated 20 December 2018 extended this subsidy programme for another five years, i.e. until the end of 2023.
- (126) In addition, as described in recital (81), the 'Credit for production of cellulosic biofuel' was scheduled to expire in 2012. It was extended several times, and lastly, has been reinstated by the Further Consolidated Appropriations Act by the U.S. Congress on 20 December 2019 until 1 January 2021 ⁽⁴⁰⁾.
- (127) 'USDA Biorefinery, renewable chemical and biobased product manufacturing assistance programme' was previously called 'Advanced biofuels loan guarantees'. Throughout its existence, it has been constantly available to US biodiesel producers. It was still in force during the review investigation period, and has been characterised by continuous reinstatements since their first entry into force. All subsidy schemes analysed above, on the basis of which subsidies were granted, were in force during the review investigation period. On the basis of facts available ⁽⁴¹⁾, the Biodiesel Mixture Credit subsidy alone amounts to USD 300 for each tonne of biodiesel mixed with diesel fuel. As a result, given the magnitude of the subsidy amount alone provided by this Biodiesel Mixture Credit subsidy scheme, and the multitude of other available subsidy schemes to US biodiesel producers, the Commission concluded that the US biodiesel industry has continued to be subsidised with subsidy amounts above *de minimis*.

4.4.2. Likelihood of continuation of subsidisation of other schemes

- (128) All subsidy schemes analysed above, on the basis of which subsidies were granted, were in force during the review investigation period.
- (129) A number of other small state subsidy schemes are currently still in force, as those listed under recital (41), and there are no indications that these schemes will come to an end in the near future.

4.4.3. Conclusion on the continuation of subsidisation

- (130) In view of the findings above, and given the lack of cooperation from the US authorities and the US exporting producers, the Commission concluded that the US biodiesel producers have continued to benefit from all the federal and state schemes described in the above recitals, and that the subsidy amounts are above *de minimis*.

4.5. Likelihood of subsidised imports in significant quantities

- (131) Further to the finding of the existence of subsidisation during the review investigation period, the Commission investigated the likelihood of continuation of subsidised imports from the country concerned, should the measures be repealed. Following the imposition of measures in 2009, imports of biodiesel from the USA to the Union dropped to almost zero from the year 2013 onwards. For instance, about 156 tonnes were imported from the USA during the RIP (from 1 July 2019 to 30 June 2020). These volumes only represent 0,04 % of total US exports and even less of the Union consumption. The Commission analysed whether it was likely that subsidised imports would resume in significant quantities should the measure lapse. In particular, the following elements were analysed: the production capacity and spare capacity in the USA, the availability of other markets, and the attractiveness of the Union market.

⁽³⁹⁾ As extended by the Energy Policy Act of 2005, §1344 (P.L. 109-58) and amended by the Energy Improvement and Extension Act of 2008 (P.L. 110-343, Division B) §202-203.

⁽⁴⁰⁾ Further Consolidated Appropriations Act of 20 December 2019 (Public law 116-94).

⁽⁴¹⁾ See recital (50) of Section 3.1.1.1 of the request for review.

4.5.1. Existing spare capacities at US exporting producers

- (132) The Commission examined whether the subsidised exports from the USA to the Union would be made in significant volumes should the measures be allowed to lapse. Due to lack of cooperation from the exporting producers and from the Government of USA mentioned in recital (27) above, it was not possible to carry out an analysis based on verified data supplied by US producers and by the US authorities. The Commission therefore made use of the following sources of information: Eurostat, the request for an expiry review, subsequent submissions from the applicant and the websites of the US Energy Information Administration (EIA) and the US Department of Agriculture (USDA).
- (133) On the basis of data collected from the EIA, the US biodiesel producers' capacity during the review investigation period was 8 412 000 tonnes.
- (134) The US actual production of biodiesel during the RIP was 5 718 000 tonnes (EIA's data), which corresponds to a capacity utilisation of 68 % and a spare capacity of 32 %, or around 2 694 000 tonnes. This significant spare capacity of the US producers presents an incentive to increase production and sell biodiesel at subsidised prices to the Union market, and is therefore likely to be used to supply the Union market should measures be allowed to lapse. Indeed, the US producers can easily increase their production and export it to the EU with the economic benefit of the increase in capacity utilisation ratio and reduction of unit cost of production. The release in the Union market of the US spare capacity would have a significant impact as it amounts to nearly 18 % of the Union consumption during the RIP.
- (135) Moreover, during the RIP, the US production of biodiesel (5 718 000 tonnes) was lower than the consumption (5 934 000 tonnes). Consequently, the USA was importing more biodiesel than it was exporting. During the RIP the total imports amounted to 629 000 tonnes, and the total exports to 428 000 tonnes. However, if the available production capacity was not used to satisfy the domestic demand during the period considered it is unlikely that such available production capacity would be used in the future for the same purpose. The US production capacity reported in the RIP (8 412 000 tonnes, see previous recital) was significantly higher than the domestic consumption. This means that if export market opportunities open up, the US producers are likely to use their spare capacity for export sales rather than for domestic consumption.

4.5.2. Availability of other markets

- (136) It is unlikely that the spare capacity would be used to increase exports to third countries other than the EU. The large third country markets (Brazil, Indonesia, Argentina, China, Thailand) are self-sufficient in terms of domestic biodiesel production and the US has thus far not exported much to those countries in spite of their spare capacities. There is no reason to believe that this will change in the future.

4.5.3. Attractiveness of the Union market

- (137) In order to establish the export price to third countries, the Commission based its findings on publicly available information, that is Global Trade Atlas ('GTA'). It extracted the quantities and values of the export of biodiesel under the HS code 3826 00 for the RIP. The export quantities (in tonnes) to all countries (EU included) amount to 389 075 tonnes, of which insignificant volumes were exported to the Union.
- (138) The average ex-works price of biodiesel sold in the Union by Union producers during the RIP, as shown in Table 1 below, was EUR 771 per tonne.
- (139) Table 1 below shows the average sales price in US dollars per tonne duly adjusted to ex-works (by deducting USD 82,52 per tonne for the inland freight as indicated in the request for the expiry review) for the six countries (outside the EU) to which the USA exported more than 0,1 % of their total exports during the RIP.

Table 1

US export volumes and prices during the RIP

Countries of destination	Export quantities (in tonnes)	Percentage of exports to all countries	Average ex-works price (USD) per tonne	Average ex-works price (EUR) per tonne
Canada	354 442	91,1	805,33	728,48
China	12 363	3,2	316,49	286,29
Norway	3 500	0,9	862,48	780,18
Peru	2 144	0,6	591,72	535,26
Mexico	1 204	0,3	661,23	598,13
South-Korea	475	0,1	363,15	328,49

Source: GTA

(140) Table 1 shows a lot of variation in the export prices among the various countries to which the USA exported the most during the RIP.

(141) Table 1 also shows that the highest average export prices are those to countries such as Canada and Norway to which the US is selling 92 % of their total exports. The expiry review request provides in this respect that the more expensive ‘... biodiesel exported to Canada shall be made from specific types of raw materials that have a better resistance to cold temperatures, such as canola, or can also be HVO which has excellent cold properties ...’. As a result, the more expensive average export prices to the two countries in question are explained by the higher cost price of the feedstock (such as for canola).

(142) Based on GTA, the Commission calculated, an average export price to all destinations subsequently during the RIP, taking into consideration the following elements:

- Due to the large variation of US export prices (as also shown in Table 1 in recital (139)), the Commission excluded from this calculation all countries which represent for the USA a share below 0,1 % of their total sales volume they exported during the RIP. There were in total six countries (apart from the EU) which share is above 0,1 % of the total export volumes of the USA as laid down in Table 1 above.
- As also demonstrated in Table 1, the highest average export prices are those to countries such as Canada and Norway to which the US is selling 92 % of their total exports. These higher export prices are due to the higher cost price of the feedstock (such as for canola).
- Biodiesel exports to the EU will be mainly a mix of different biodiesel types due to the various climates in the EU, whereby the biodiesel to be used in Northern Europe exports will mainly be those that have a better resistance to cold temperatures.
- As a consequence, the calculation of a simple average export price for the purposes of the current assessment gives a fair representation of the average price that would be observed on the Union market and avoids giving disproportionate weight to the exports to Canada and Norway, given the mix of biodiesel types that would likely be exported to the Union where climate conditions vary greatly among Member States.

(143) Taking into account all the above elements, the Commission calculated a simple average export price amounting to USD 682 per tonne (EUR 617). This average export price of EUR 617 is a FOB price to which the ocean freight and insurance costs need to be added to come to a CIF price. These costs amounted to about USD 52 per tonne (EUR 47 per tonne) if the destination would be the Union as per the request for an expiry review.

- (144) The Commission considered that the EUR 47 per tonne is a reasonable indication for the additional ocean freight and insurance costs to other destinations. The average US export price to third countries was thus established at EUR 617 (FOB), which is, even if we were to add ocean freight, insurance costs, the existing customs duty (6,5 %) (in total rounded up to 104 euros per tonne to cover also some additional post-importation expenses) from US to the EU (in total around EUR 721 per tonne) would be far below the Union industry ex-works price of EUR 771 per tonne.
- (145) As a result, this shows that the exporting producers from the USA would be able to sell at a price below EUR 771 per tonne to penetrate the Union market, and that this would be for them an incentive to redirect some of the current exports to third countries towards the Union market, as it is more attractively priced than some other third countries' markets.

4.6. Circumvention and absorption practices

- (146) As mentioned in recital (1), the anti-subsidy measures imposed in 2009 were found to be circumvented by means of transshipments via Canada and by a change in the composition of the blend. The existence of such practices shows the interest of some US producers to enter the Union market, even after the imposition of measures, and is therefore considered as an indication of the attractiveness of the Union market for US biodiesel producers

4.7. Conclusion

- (147) In view of the above considerations, the Commission concluded that there was continuation of subsidisation. In view of the significant spare capacity of the US biodiesel industry and the attractiveness of the Union market in terms of size and sales price, in particular with regard to the price level of US exports to third countries, the Commission found that it is likely that US biodiesel producers will resume exporting biodiesel at subsidised prices to the Union market at large volumes, if measures are allowed to lapse.

5. INJURY

5.1. Definition of the Union industry and Union production

- (148) According to the data provided by the applicant, the like product was manufactured by 49 producers in the Union during the period considered. They constitute the 'Union industry' within the meaning of Article 9(1) of the basic Regulation.
- (149) The total Union production during the review investigation period was established at around 14 million tonnes. The Commission established the figure on the basis of information provided by the Union industry. As indicated in recital (17), three Union producers were selected in the sample representing 17,5 % of the total Union production of the like product.

5.2. Union consumption

- (150) The Commission established the Union consumption on the basis of industry information and Comext for import data.
- (151) Union consumption developed as follows:

Table 2

Union consumption (tonnes) ⁽⁴²⁾

	2017	2018	2019	Review Investigation period
Total Union consumption (tonnes)	13 843 702	15 444 700	15 762 282	16 955 685
Index	100	112	114	122

Source: Union industry data, Comext

⁽⁴²⁾ Consumption is based on EU-27 data, excluding data related to the United Kingdom.

- (152) During the review investigation period, consumption of biodiesel in the Union, calculated as the sum of imports of biodiesel and the total sales of the Union industry on the EU market, increased by 22 %, that is from 13,8 million tonnes in 2017 to 16,9 million tonnes.

5.3. Imports of the product concerned from the USA

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

- (153) The Commission established the volume of imports on the basis of the information provided by Eurostat (Comext database). The market share of the imports was established on the basis of data provided by the applicant for the Union industry domestic sales and Comext for trade data.

- (154) Imports from the country concerned developed as follows:

Table 3

Import volume (tonnes), market share and prices ⁽⁴³⁾

	2017	2018	2019	Review Investigation period
Volume of imports from the country concerned (tonnes)	176	2 339	139	156
<i>Index</i>	100	1 329	79	89
Market share	0 %	0 %	0 %	0 %
Average price EUR/tonne	1 243	972	1 269	1 812
<i>Index</i>	100	78	102	146

Source: Comext, EU industry sales data for the calculation of the market share

- (155) Since the imposition of measures in 2009, imports from the US have virtually ceased and amounted to only 156 tonnes during the RIP (as compared to more than 1 137 000 tonnes during the original investigation period). Given the negligible import quantities, the average prices could not be considered representative.

5.3.2. Prices and price undercutting

- (156) There were virtually no imports of biodiesel from the US to the Union during the review investigation period that could be used as a reliable basis for calculating undercutting.
- (157) As an alternative, the Commission determined the price undercutting during the review investigation period by comparing:
- (1) the weighted average sales prices of the sampled Union producers charged to unrelated customers on the Union market, adjusted to an ex-works level (771 EUR/tonne); and
 - (2) the average export price of US producers to third countries, duly adjusted for transport cost to the Union and EU customs duty (721 EUR/tonne – see recital (144)).

- (158) The result of the comparison was a price undercutting of 6,4 %.

5.3.3. Imports from other third countries

- (159) During the RIP, imports from third countries amounted to 3 750 000 tonnes or approximately 22 % of the overall Union consumption. The main sources of imports of biodiesel other than the US were Argentina (24 % of EU imports), Malaysia (18 %), Singapore (13 %) and Indonesia (5 %).

⁽⁴³⁾ The import volume is based on EU-27 data, excluding data related to the United Kingdom.

- (160) The (aggregated) volume of imports as well as the market share and price trends for imports of biodiesel from other third countries developed as follows:

Table 4

Imports from third countries ⁽⁴⁴⁾

Country		2017	2018	2019	Review Investigation period
Argentina	Volume (tonnes)	355 782	1 467 325	873 325	905 781
	<i>Index</i>	100	412	245	255
	Market share	3 %	10 %	6 %	5 %
	Average price EUR/tonne	635	620	707	728
	<i>Index</i>	100	98	111	115
Malaysia	Volume (tonnes)	335 769	388 615	731 679	679 860
	<i>Index</i>	100	116	218	202
	Market share	2 %	3 %	5 %	4 %
	Average price EUR/tonne	952	813	669	730
	<i>Index</i>	100	85	70	77
Indonesia	Volume (tonnes)	24 984	777 992	743 456	195 858
	<i>Index</i>	100	3 114	2 976	784
	Market share	0 %	5 %	5 %	1 %
	Average price EUR/tonne	803	671	636	665
	<i>Index</i>	100	84	79	83
Other third countries	Volume (tonnes)	822 027	820 093	1 450 938	1 983 471
	<i>Index</i>	100	100	177	241
	Market share	6 %	5 %	9 %	12 %
	Average price EUR/tonne	662	723	829	874
	<i>Index</i>	100	109	125	132
Total of all third countries except the US	Volume (tonnes)	1 538 562	3 454 050	3 799 448	3 765 041
	<i>Index</i>	100	224	247	245
	Market share	11 %	22 %	24 %	22 %
	Average price EUR/tonne	721	678	732	802
	<i>Index</i>	100	94	102	111

Source: Comext, EU industry sales data for the calculation of the market share

- (161) Duties on imports from Argentina and Indonesia – two major biodiesel exporting countries – were removed in 2018. Consequently, imports from third countries increased in 2018 and stayed at a level of around 3,8 million tonnes in 2019 and during the RIP. Overall, imports from third countries except the US increased by 145 % during the period considered. In addition, their market share increased from 11 % to 22 % during the period considered.

⁽⁴⁴⁾ Imports from third countries are based on EU-27 data, excluding data related to the United Kingdom as a Member State but including data related to the United Kingdom as a third country.

- (162) As far as prices are concerned, the situation is different from one country to another.
- (163) Regarding Argentina, the main source of imports, in February 2019, the Commission imposed definitive anti-subsidy measures on imports of biodiesel from this country, and, in parallel, adopted a decision accepting sustainable price commitments (known as 'undertakings') from eight Argentine producers and the Argentinian Chamber of Biofuels (CARBIO). This led to a significant increase in prices for year 2019 (by 14 % in comparison with 2018) and the RIP (by 17 % in comparison with 2018).
- (164) For Indonesia and Malaysia, prices were on a decreasing trend. At the same time, for the other third countries, they were significantly increasing. Overall, the average sales prices of imports from third countries other than the USA increased during the period considered by 11 % during the period considered. This trend is consistent with the trend observed for imports from the countries concerned in Table 3 above. However, the price trend is different in comparison with the sales prices of the Union industry on the Union market in Table 8 below. The prices of the sampled Union producers were on the decrease, in line with the decrease of the production costs. The consequence is that the price gap between third countries exporters and the sampled Union producers reduced, increasing the competitiveness of the Union industry.

5.4. Economic situation of the Union industry

5.4.1. General remarks

- (165) The assessment of the economic situation of the Union industry included an evaluation of all economic indicators having a bearing on the state of the Union industry during the period considered.
- (166) As mentioned in recital (17), sampling was used for the assessment of the economic situation of the Union industry.
- (167) For the injury determination, the Commission distinguished between macroeconomic and microeconomic injury indicators. It evaluated the macroeconomic indicators on the basis of data provided by the EU industry and other sector-specific macroeconomic data such as the FAO-OECD. It evaluated the microeconomic indicators on the basis of data contained in the questionnaire replies from the sampled Union producers. Both sets of data were found to be representative of the economic situation of the Union industry.
- (168) The macroeconomic indicators are: production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, magnitude of the subsidy margin, and recovery from past subsidisation.
- (169) The microeconomic indicators are: average unit prices, unit cost, labour costs, inventories, profitability, cash flow, investments, return on investments, and ability to raise capital.

5.4.2. Macroeconomic indicators ⁽⁴⁵⁾

5.4.2.1. Production, production capacity and capacity utilisation

⁽⁴⁵⁾ The macroeconomic data was based on EU-27 excluding data from the UK.

- (170) The total Union production, production capacity and capacity utilisation developed over the period considered as follows:

Table 5

Production, production capacity and capacity utilisation

	2017	2018	2019	Review Investigation period
Production volume (tonnes)	12 639 715	13 166 083	13 931 438	13 984 220
<i>Index</i>	100	104	110	111
Production capacity (tonnes)	16 047 231	16 707 893	16 862 595	17 529 047
<i>Index</i>	100	104	105	109
Capacity utilisation	79 %	79 %	83 %	80 %
<i>Index</i>	100	104	105	101

Source: Information provided by the applicant and the sampled Union producers.

- (171) Union production increased from 12,6 million tonnes in 2017 to 14,0 million tonnes during the RIP, that is an increase by 11 % during the period considered. In a situation of consumption increase by 22 % over the period considered, the Union industry responded positively by increasing its production.
- (172) At the same time the production capacity increased by 9 % during the period considered and reached 17,5 million tonnes during the RIP. The Union industry is developing its capacity to respond to an increasing demand. According to a report ⁽⁴⁶⁾, this capacity expansion concerns mainly Hydrotreated Vegetable Oil (HVO) production.
- (173) As a result of the simultaneous increase of the production and the production capacity, the capacity utilisation was stable during the period considered, at around 80 %

5.4.2.2. Sales volume and market share

- (174) The Union industry's sales volume and market share developed over the period considered as follows:

Table 6

Sales volume and market share

	2017	2018	2019	Review Investigation period
Sales volume on the Union market (tonnes)	12 305 049	11 988 560	11 962 754	13 190 560
<i>Index</i>	100	97	97	107
Market share	89 %	78 %	76 %	78 %
<i>Index</i>	100	87	85	88

Source: Information provided by the applicant and the sampled Union producers

- (175) The Union industry increased their sales on the Union market from 12,3 million tonnes in 2017 to 13,2 million tonnes during the RIP (+7 %).
- (176) Since the consumption in the Union increased by 22 %, because of the lower increase in the actual sales volume, the market share of the Union industry decreased, from around 89 % in 2017 to 78 % during the RIP. This decrease of market share is linked to the increase of imports from third countries especially from 2018 onwards (recital (161)).

⁽⁴⁶⁾ USDA, Biofuels Annual report (GAIN report), 29 June 2020.

5.4.2.3. Growth

- (177) A number of indicators (production, production capacity, sales, employment) demonstrate a positive growth of the Union industry during the period. Yet, this growth is moderate as compared to the development of the consumption of biodiesel during the same period. In fact, the market share of the Union industry actually decreased during the reference period.

5.4.2.4. Employment and productivity

- (178) Employment and productivity developed over the period considered as follows:

Table 7

Employment and productivity

	2017	2018	2019	Review Investigation period
Number of employees	2 643	3 126	3 527	3 909
Index	100	118	133	148
Productivity (tonne/employee)	4 782	4 211	3 950	3 577
Index	100	88	83	75

Source: Information provided by the applicant and the sampled Union producers

- (179) During the period considered, employment grew from 2 643 to 3 909, an increase of 48 %.

- (180) As production grew to a lesser extent (+11 %), this materialised in a decrease in productivity (-25 %).

5.4.2.5. Magnitude of the amount of subsidisation and recovery from subsidisation

- (181) As explained in recital (155), imports from biodiesel virtually ceased after the imposition of countervailing measures and there were virtually no subsidised imports from the USA during the review investigation period. Therefore, the magnitude of subsidisation could not be assessed on actual data, so it was estimated as still significant above *de minimis*. The investigation therefore focused on the likelihood of a recurrence of subsidisation should the countervailing measures be repealed.
- (182) In the previous expiry review the Union industry showed signs of recovery from the effects of past subsidisation. During the period considered of the current expiry review investigation, the recovery process continued as demonstrated by a favourable trend for the Union industry of the main injury indicators.

5.4.3. Microeconomic indicators ⁽⁴⁷⁾

5.4.3.1. Prices and factors affecting prices

- (183) The weighted average unit sales prices of the sampled Union producers to unrelated customers in the Union developed over the period considered as follows:

⁽⁴⁷⁾ Microeconomic indicators are based on EU-28 data, including the United Kingdom. Based on the low volume of sales of the sampled Union producers in the United Kingdom (approx. 1,1 % of the average EU sales of those producers in the RIP), the impact of transactions concerning the United Kingdom would appear to be minimal on the injury findings, and the conclusions on material injury would therefore not have been altered when using EU-27 data.

Table 8

Sales prices in the Union

	2017	2018	2019	Review Investigation period
Average unit sales price in the Union on the total market (EUR/tonne)	834	801	771	771
<i>Index</i>	100	96	92	92
Average price of vegetable oils (index)	100	86	81	86
Unit cost of production (EUR/tonne)	828	778	760	755
<i>Index</i>	100	94	92	91

Source: Sampled companies, FAO for the vegetable oil price index

- (184) During the period considered the cost of production decreased by 9 % (from 828 EUR/tonne to 755 EUR/tonne). This is partly due to the decrease in the price of vegetable oils which was on the decrease over the period. While not all biofuel is made of vegetable oils, the price of vegetable oils is a good proxy for the price of the main input for the production of biodiesel.
- (185) The average sales price decreased by 8 %, from 834 EUR/tonne in 2017 to 771 EUR/tonne during the RIP. This can be linked to the decrease observed in the price of production (see recitals (183) and (184)).

5.4.3.2. Labour costs

- (186) The average labour costs of the sampled Union producers developed over the period considered as follows:

Table 9

Average labour costs per employee

	2017	2018	2019	Review Investigation period
Average labour costs per employee (EUR)	63 785	70 533	72 306	72 533
<i>Index</i>	100	111	113	114

Source: Sampled companies

- (187) The average labour cost in the sampled companies increased by 14 % over the RIP. The impact of this variation is rather small given that labour cost represent only about 3 % of the total cost of manufacturing.

5.4.3.3. Inventories

- (188) Stock levels of the sampled Union producers developed over the period considered as follows:

Table 10

Inventories

	2017	2018	2019	Review Investigation period
Closing stocks (tonnes)	99 868	126 345	124 567	114 216
<i>Index</i>	100	127	125	114
Closing stocks as a percentage of production	0,8 %	1,0 %	0,9 %	0,8 %
<i>Index</i>	100	121	113	103

Source: Sampled companies

- (189) The level of inventory was stable around 1 % of the production. This is a very low ratio indicating that the industry is able to work on demand and in just-in-time and limit the inventory. This is also necessary to avoid biodiesel degradation.

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

- (190) Profitability, cash flow, investments and return on investments of the sampled Union producers developed over the period considered as follows:

Table 11

Profitability, cash flow, investments and return on investments

	2017	2018	2019	Review Investigation period
Profitability of sales in the Union to unrelated customers (% of sales turnover)	0,96 %	2,13 %	1,78 %	2,84 %
<i>Index</i>	100	223	186	297
Cash flow (EUR)	45 139 254	10 723 312	54 431 877	58 021 678
<i>Index</i>	100	24	121	129
Investments (EUR)	40 430 425	20 634 073	34 169 705	17 028 015
<i>Index</i>	100	51	85	42
Return on investments	22 %	29 %	25 %	44 %
<i>Index</i>	100	128	112	198

Source: Sampled companies

- (191) The Commission established the profitability of the sampled Union producers by expressing the pre-tax net profit of the sales of the like product to unrelated customers in the Union as a percentage of the turnover of those sales. The profitability remained at a low level. Yet it shows a slightly positive trend over the period considered increasing from 1 % to 3 %. This was linked to the decreasing cost of production for the sampled companies (-9 %). Behind this average, there is however a great disparity among the sampled Union producers with some companies not making any profit at all.

- (192) The net cash flow is the ability of the Union producers to self-finance their activities. The trend in net cash flow developed positively toward the end of the period considered (in 2019 and first half of 2020), but year 2018 saw a sharp drop in cash flow. The drop in 2018 is impacted mainly by the specific situation of only one of the sampled companies which has a special business model while for the other two sampled companies the trend was rather stable.
- (193) Investments in the sampled companies does not present a clear trend over the period considered. Investment from one or the other sampled company or the absence thereof can bring the level of investments up and down from one year to the other. Investments represented about 1-2 % of turnover during the period considered, which is limited.
- (194) The return on investments (ROI) is the profit in percentage of the net book value of investments. It developed positively over the period considered and remained high in the RIP. This high ROI is however mainly linked to low net book value of investments, rather than high profit.

5.4.4. Conclusion on injury

- (195) During the period considered, in the context of almost non-existent imports from the USA, the volumes of imports from third countries increased significantly (by 145 %), but their price level increased as well (by 11 %). At the same time the prices of the Union industry decreased (by 8 %), in line with a decrease in the production costs (by 9 %). Consequently, the price gap between third countries exporters and the sampled Union producers reduced, thereby increasing the competitiveness of the Union industry.
- (196) Overall, the injury indicators depict a positive trend during the period considered, in particular with regard to production (+11 %), production capacity (+9 %) and sales (+7 %) and show that the Union biodiesel industry is slowly recovering from past injury. The analysis of the injury indicators demonstrates that the Union industry is currently not suffering from material injury. However, some indicators, in particular a low profitability ($\leq 3\%$) indicate that it is nevertheless still in a fragile economic situation.
- (197) On the basis of the above, the Commission concluded that the Union industry did not suffer material injury within the meaning of Article 8(4) of the basic Regulation during the review investigation period.

6. LIKELIHOOD OF RECURRENCE OF INJURY

- (198) The Commission assessed, in accordance with Article 18(2) of the basic Regulation, whether there would be a likelihood of recurrence of injury originally caused by the subsidized imports from the US if the measures were allowed to lapse.
- (199) In this regard, the Commission examined the production capacity and spare capacity in the US, the likely price levels of imports from the US in the absence of countervailing measures, and their impact on the Union industry including undercutting without countervailing measures

6.1. Production capacity and spare capacity in the US

- (200) As described in Section 4.5.1 above, the quantities that could be exported by US biodiesel producers are significant compared to the size of the Union market. Indeed, the spare capacities represent 18 % of the Union consumption during the RIP. Consequently, the Commission concluded that the spare capacities available are significant.

6.2. The likely price levels of imports from the US in the absence of countervailing measures

- (201) As described in Section 4.5.3 above, based on the current pricing behaviour on third countries export markets, the US producers exported to their main third markets at prices lower than the domestic prices in the US. In addition, as indicated in recitals (157)-(158) above, those prices are also on average undercutting the Union industry prices on the Union market by 6,4 %. Therefore, taking into account the price level of exports from the USA to other third markets, exporting to the Union is potentially much more attractive for the US exporters. In addition, as indicated in Section 4.5.3 above the Union market is very attractive as it is the biggest in the world and there are significant Union and national incentives for biodiesel consumption.

6.3. Likely impact on the Union industry

- (202) Therefore, if measures were allowed to lapse, significant volumes of subsidised biodiesel from the USA would exert a very strong downward pressure on Union prices and have a significant impact on the Union industry's economic situation. As a result, it is likely that Union industry production and sales volumes would decrease and the small profits currently achieved by the industry would turn into losses.

- (203) The Commission further assessed the possible impact of the imports by modelling two possible scenarios should the measures be allowed to lapse, namely (1) a surge of imports from the US; and (2) a drop of prices in the EU due to increased competition, all other things being equal.
- (204) In the first scenario, the Commission modelled two possible levels of US imports. The first option entailed that imports from the US would come at their historical volumes (during the initial IP ⁽⁴⁸⁾), that is 1,1 million tonnes. As a result of the increase in imports from the US and the consequent decrease in sales of the EU industry, the profitability of the EU industry would fall by 0,14 % point, that is from +2,84 % to +2,70 %. The second option took into account the very significant increase in the size of the EU market from 6,6 million tonnes during the initial IP to 17 million tonnes during the RIP (+158 %). In that context, the Commission modelled a surge of imports corresponding to the same market share for the US of 17,2 % as during the initial investigation period. The result was that the profitability of the Union industry would fall by 0,41 % point from +2,84 % to +2,43 %. In both cases, the impact of a surge of US imports, at constant prices, can be described as rather moderate. This is linked to the high share of the variable costs in the biodiesel industry.
- (205) In the second scenario, the effect of a price decrease was found to be potentially highly damaging. In case of a decrease of Union prices to the level of US exports prices to third country (721 EUR/tonne), the profit would drop from +2,84 % to -3,88 %. In case of a decrease of Union prices by 10 %, that is from 771 EUR/tonne to 694 EUR/tonne, the profit would be reduced from +2,84 % to -7,94 %. In any case, any price decrease higher than -2,9 % would zero the Union industry profit.
- (206) In reality, if measures were allowed to lapse, it is very likely that a combination of the two scenarios above would occur on the market. In particular, significant volumes of biodiesel originating in the USA could be expected to enter the Union market and at lower prices than the Union industry. As a result, the market share of the Union industry would shrink as well as their prices. This would result in significant losses to the Union industry.

6.4. Conclusion on likelihood of recurrence of injury

- (207) On this basis, and noting the current fragile situation of the Union industry, the Commission concluded that the absence of measures would in all likelihood result in a significant increase of subsidised imports from the USA at injurious prices and material injury would be likely to recur.

7. UNION INTEREST

- (208) In accordance with Article 31 of the basic Regulation, the Commission examined whether maintaining the existing countervailing measures would be against the interest of the Union as whole. The determination of the Union interest was based on an appreciation of all the various interests involved, including those of the Union industry, importers and users.

7.1. Interest of the Union industry

- (209) If existing measures were allowed to lapse, the Union industry will most certainly be faced with increased unfair competition from the US biodiesel producers most likely putting an abrupt halt to the on-going recovery of the Union industry.

- (210) The Commission concluded that the continuation of the measures would be in the interest of the Union industry.

⁽⁴⁸⁾ 1 April 2007 to 31 March 2008.

7.2. Interest of unrelated importers

- (211) No importer opposed the prolongation of the measures.
- (212) Shell Trading Rotterdam argued that the measures, by limiting the supply of the Union market, lead to increased prices. It also noted the availability of the biodiesel from other markets.
- (213) The measures do not seem to affect significantly the importers as alternative sources of supplies are available. This is evidenced by the significant market share of imports from third countries.
- (214) The Commission therefore concluded that the continuation of the measures would not be detrimental to the interest of the importers.

7.3. Interest of users

- (215) The participation of users in the investigation was limited.
- (216) Two users, Preem, the largest fuel company in Sweden, and Valero Energy Ltd Ireland claimed that the prolongation of the measures will be a direct hindrance for the green development of the transport sector in Europe. Preem and Valero Energy Ltd Ireland requested specifically that HVO should be excluded from the current product scope as they expect a shortage of HVO in the coming years. Valero Energy Ltd Ireland specifically referred to the EU renewable energy targets for transport for 2030, claiming that those targets would not be met given current EU production.
- (217) The Commission observed that Union producers have enough capacity to satisfy the current demand and even spare capacity to satisfy future increase and exports if need be. Furthermore, it was too early to assess with confidence whether shortages are likely to materialise in 2030, given, in particular, recent expansions in EU capacity. This said, the Commission may be in a better position to assess the situation in case it is asked to conduct an expiry review in five years' time. Consequently, this claim was dismissed.
- (218) There are no indications that the existing measures in force have affected negatively the Union users of biodiesel, and notably there is no evidence that existing measures had an adverse impact on their profitability.
- (219) The Commission therefore concluded that the continuation of the measures would not be detrimental to the interest of the users.

7.4. Conclusion on Union interest

- (220) On the basis of the above, the Commission concluded that there were no compelling reasons of the Union interest against the maintenance of the existing measures on imports of biodiesel originating in the USA.

8. COUNTERVAILING MEASURES

- (221) In view of the conclusions reached with regard to the likelihood of continuation or recurrence of subsidisation and injury, it follows that, in accordance with Article 18(1) of the basic Regulation, the countervailing duties applicable to imports of biodiesel originating in the USA, imposed by Regulation (EU) 2015/1519 as amended by Regulation (EU) 2016/675 ⁽⁴⁹⁾ should be maintained for an additional period of five years.
- (222) As outlined in recital (2) above, the countervailing duties in force on imports of biodiesel from the USA were extended to cover also imports of the same product consigned from Canada, whether declared as originating in Canada or not, and to imports of biodiesel in a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the USA.

⁽⁴⁹⁾ Commission Implementing Regulation (EU) 2016/675 of 29 April 2016 amending Implementing Regulation (EU) 2015/1519 imposing definitive countervailing duties on imports of biodiesel originating in the United States of America following an expiry review pursuant to Article 18 of Council Regulation (EC) No 597/2009 (OJ L 116, 30.4.2016, p. 27).

- (223) The countervailing duties to be maintained shall continue to be extended to imports of biodiesel consigned from Canada, whether declared as originating in Canada or not as well as to biodiesel in a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the USA.
- (224) The exporting producers from Canada that were exempted from the measures, as extended by Regulation (EU) 2015/1519 as amended by Regulation (EU) 2016/675, shall also be exempted from the measures imposed by this Regulation.
- (225) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 15(1) of Regulation (EU) 2016/1036 ⁽⁵⁰⁾.
- (226) In view of Article 109 of Regulation (EU, Euratom) 2018/1046 ⁽⁵¹⁾, when an amount is to be reimbursed following a judgment of the Court of Justice of the European Union, the interest to be paid should be the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the *Official Journal of the European Union* on the first calendar day of each month,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive countervailing duty is 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, originating in the USA, currently falling under CN codes ex 1516 20 98 (TARIC code 1516 20 98 29), ex 1518 00 91 (TARIC code 1518 00 91 29), ex 1518 00 99 (TARIC code 1518 00 99 29), ex 2710 19 43 (TARIC code 2710 19 43 29), ex 2710 19 46 (TARIC code 2710 19 46 29), ex 2710 19 47 (TARIC code 2710 19 47 29), ex 2710 20 11 (TARIC code 2710 20 11 29), ex 2710 20 16 (TARIC code 2710 20 16 29), ex 3824 99 92 (TARIC code 3824 99 92 12), ex 3826 00 10 (TARIC codes 3826 00 10 29, 3826 00 10 59, 3826 00 10 99) and ex 3826 00 90 (TARIC code 3826 00 90 19).

2. The rates of the definitive countervailing duty applicable to the, net free-at Union frontier price, before duty, of the product described in paragraph 1, and manufactured by the companies listed below, shall be a fixed amount as follows:

Company	Countervailing duty rate EUR per tonne net	TARIC additional code
Archer Daniels Midland Company, Decatur	237,0	A933
Cargill Inc., Wayzata	213,8	A934
Green Earth Fuels of Houston LLC, Houston	213,4	A935
Imperium Renewables Inc., Seattle	216,8	A936
Peter Cremer North America LP, Cincinnati	211,2	A937
Vinmar Overseas Limited, Houston	211,2	A938
World Energy Alternatives LLC, Boston	211,2	A939
Companies listed in Annex I	219,4	See Annex I
All other companies	237,0	A999

⁽⁵⁰⁾ 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 (OJ L 176, 30.6.2016, p. 21).

⁽⁵¹⁾ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

The countervailing 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 application of the individual duty rate specified for the companies listed in paragraph 2 shall be conditional upon presentation to the customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in Annex II. If no such invoice is presented, the duty rate applicable to 'all other companies' shall apply.

Article 2

1. The definitive countervailing duty applicable to 'all other companies' as set out in Article 1, paragraph 2, is extended to 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, consigned from Canada, whether declared as originating in Canada or not, currently falling under CN codes ex 1516 20 98 (TARIC code 1516 20 98 21), ex 1518 00 91 (TARIC code 1518 00 91 21), ex 1518 00 99 (TARIC code 1518 00 99 21), ex 2710 19 43 (TARIC code 2710 19 43 21), ex 2710 19 46 (TARIC code 2710 19 46 21), ex 2710 19 47 (TARIC code 2710 19 47 21), ex 2710 20 11 (TARIC code 2710 20 11 21), ex 2710 20 16 (TARIC code 2710 20 16 21), ex 3824 99 92 (TARIC code 3824 99 92 10), ex 3826 00 10 (TARIC codes 3826 00 10 20, 3826 00 10 50, 3826 00 10 89) and ex 3826 00 90 (TARIC code 3826 00 90 11), with the exception of those produced by the companies listed below:

Country	Company	TARIC additional code
Canada	BIOX Corporation, Oakville, Ontario, Canada	B107
Canada	DSM Nutritional Products Canada Inc., Dartmouth, Nova Scotia, Canada	C114
Canada	Rothsay Biodiesel, Guelph, Ontario, Canada	B108

The duty to be extended shall be the one established for 'all other companies' in Article 1(2), which is a definitive countervailing duty of EUR 237 per tonne net.

The countervailing 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 gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

2. The application of exemptions granted to the companies listed in paragraph 1 or authorised by the Commission in accordance with Article 4(2) shall be conditional upon presentation to the customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in Annex II. If no such invoice is presented, the countervailing duty as imposed by paragraph 1 shall apply.

Article 3

1. The definitive countervailing duty as set out in Article 1, paragraph 2, is hereby extended to 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 a blend containing by weight 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, originating in the United States of America, and currently falling under CN codes ex 1516 20 98 (TARIC code 1516 20 98 30), ex 1518 00 91 (TARIC code 1518 00 91 30), ex 1518 00 99 (TARIC code 1518 00 99 30), ex 2710 19 43 (TARIC code 2710 19 43 30), ex 2710 19 46 (TARIC code 2710 19 46 30), ex 2710 19 47 (TARIC code 2710 19 47 30), ex 2710 20 11 (TARIC code 2710 20 11 30), ex 2710 20 16 (TARIC code 2710 20 16 30), ex 3824 99 92 (TARIC code 3824 99 92 20) and ex 3826 00 90 (TARIC code 3826 00 90 30).

The countervailing 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).

2. The application of the individual duty rate specified for the companies listed in Article 1, paragraph 2, shall be conditional upon presentation to the customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in Annex III. If no such invoice is presented, the duty rate applicable under Article 1(2) to 'all other companies' shall apply.

Article 4

1. Requests for exemption from the duty extended by Article 2(1) and Article 3(1) shall be made in writing in one of the official languages of the European Union and must be signed by a person authorised to represent the entity requesting the exemption. The request must be sent to the following address:

European Commission
Directorate-General for Trade
Directorate G
Office: Rue de la loi 170, CHAR 04/034
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

Email: TRADE-TDI-INFORMATION@ec.europa.eu

2. In accordance with Article 23(6) of Regulation (EU) 2016/1037, the Commission, after consulting the Advisory Committee, may authorise, by decision, the exemption of imports from companies which do not circumvent the countervailing measures imposed by Article 1, from the duty extended by Article 2(1) and Article 3(1).

Article 5

In cases where goods have been damaged before entry into free circulation and, therefore, the price actually paid or payable is apportioned for the determination of the customs value pursuant to Article 131(2) of Commission Implementing Regulation (EU) 2015/2447 ⁽⁵²⁾, the amount of countervailing duty laid down in Articles 1, 2 and 3 shall be reduced by a percentage which corresponds to the apportioning of the price actually paid or payable.

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

Article 6

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, 29 July 2021.

For the Commission
The President
Ursula VON DER LEYEN

⁽⁵²⁾ Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ L 343, 29.12.2015, p. 558).

ANNEX I

Company Name	City	TARIC additional code
AC & S Inc.	Nitro	A941
Alabama Clean Fuels Coalition Inc.	Birmingham	A940
American Made Fuels, Inc.	Canton	A940
Arkansas SoyEnergy Group	DeWitt	A940
Arlington Energy, LLC	Mansfield	A940
Athens Biodiesel, LLC	Athens	A940
Beacon Energy	Cleburne	A940
Biodiesel of Texas, Inc.	Denton	A940
BioDiesel One Ltd	Southington	A940
BioPur Inc.	Bethlehem	A941
Buffalo Biodiesel, Inc	Tonawanda	A940
BullDog BioDiesel	Ellenwood	A940
Carbon Neutral Solutions, LLC	Mauldin	A940
Central Iowa Energy LLC	Newton	A940
Chesapeake Custom Chemical Corp.	Ridgeway	A940
Community Fuels	Stockton	A940
Delta BioFuels Inc.	Natchez	A940
Diamond Biofuels	Mazon	A940
Direct Fuels	Euless	A940
Eagle Creek Fuel Services, LLC	Baltimore	A940
Earl Fisher Bio Fuels	Chester	A940
East Fork Biodiesel LLC	Algona	A940
ECO Solutions, LLC	Chatsworth	A940
Ecogy Biofuels LLC	Tulsa	A940
ED&F Man Biofuels Inc.	New Orleans	A940
Freedom Biofuels Inc.	Madison	A940
Freedom Fuels LLC	Mason City	A941
Fuel & Lube, LLC	Richmond	A940
Fuel Bio	Elizabeth	A940
FUMPA Bio Fuels	Redwood Falls	A940
Galveston Bay Biodiesel LP (BioSelect Fuels)	Houston	A940
GeoGreen Fuels LLC	Houston	A940
Georgia Biofuels Corp.	Loganville	A940
Green River Biodiesel, Inc.	Moundville	A940

Griffin Industries Inc.	Cold Spring	A940
High Plains Bioenergy	Guymon	A940
Huish Detergents Inc.	Salt Lake City	A940
Incobrasa Industries Ltd.	Gilman	A940
Independence Renewable Energy Corp.	Perdue Hill	A940
Indiana Flex Fuels	LaPorte	A940
Innovation Fuels Inc.	Newark	A940
Integrity Biofuels	Morristown	A941
Iowa Renewable Energy LLC	Washington	A940
Johann Haltermann Ltd.	Houston	A940
Lake Erie Biofuels LLC	Erie	A940
Leland Organic Corporation	Leland	A940
Louis Dreyfus Agricultural Industries LLC	Claypool	A940
Louis Dreyfus Claypool Holdings LLC	Claypool	A940
Middle Georgia Biofuels	East Dublin	A940
Middletown Biofuels LLC	Blairsville	A940
Musket Corporation	Oklahoma City	A940
Natural Biodiesel Plant LLC	Hayti	A941
New Fuel Company	Dallas	A940
North Mississippi Biodiesel	New Albany	A940
Northern Biodiesel, Inc.	Ontario	A940
Northwest Missouri Biofuels, LLC	St. Joseph	A940
Nova Biofuels Clinton County LLC	Clinton	A940
Nova Biosource	Senaca	A940
Organic Fuels Ltd.	Houston	A940
Owensboro Grain Company LLC	Owensboro	A940
Paseo Cargill Energy, LLC	Kansas City	A940
Peach State Labs Inc.	Rome	A940
Perihelion Global, Inc.	Opp	A940
Philadelphia Fry-O-Diesel Inc.	Philadelphia	A940
Piedmont Biofuels Industrial LLC	Pittsboro	A941
Pinnacle Biofuels, Inc.	Crossett	A940
PK Biodiesel	Woodstock	A940
Pleasant Valley Biofuels, LLC	American Falls	A940
Prairie Pride	Deerfield	A941

RBF Port Neches LLC	Houston	A940
Red Birch Energy, Inc.	Bassett	A940
Red River Biodiesel Ltd.	New Boston	A940
REG Ralston LLC	Ralston	A940
Renewable Energy Products, LLC	Santa Fe Springs	A940
Riksch BioFuels LLC	Crawfordsville	A940
Safe Renewable Corp.	Conroe	A940
Sanimax Energy Inc.	DeForest	A940
Seminole Biodiesel	Bainbridge	A940
Southeast BioDiesel LLC	Charlotte	A941
Soy Solutions	Milford	A940
SoyMor Biodiesel LLC	Albert Lea	A940
Stepan Company	Northfield	A941
Sunshine BioFuels, LLC	Camilla	A940
TPA Inc.	Warren	A940
Trafigura AG	Stamford	A940
U.S. Biofuels Inc.	Rome	A940
United Oil Company	Pittsburgh	A940
Valco Bioenergy	Harlingen	A940
Vanguard Synfuels, LLC	Pollock	A940
Vitol Inc.	Houston	A940
Walsh Bio Diesel, LLC	Mauston	A940
Western Dubque Biodiesel LLC	Farley	A940
Western Iowa Energy LLC	Wall Lake	A940
Western Petroleum Company	Eden Prairie	A940
Yokaya Biofuels Inc.	Ukiah	A941

ANNEX II

A declaration signed by an official of the entity issuing the commercial invoice, in the following format, must appear on the valid commercial invoice referred to in Article 1(3) or Article 2(2):

- The name and function of the official of the entity issuing the commercial invoice.
- The following declaration: 'I, the undersigned, certify that the (volume) 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 sold for export to the European Union covered by this invoice was manufactured by [*company name and address (TARIC additional code)*] in [*country/ies concerned*]. I declare that the information provided in this invoice is complete and correct.'

ANNEX III

A declaration signed by an official of the entity issuing the commercial invoice, in the following format, must appear on the valid commercial invoice referred to in Article 3(2):

- The name and function of the official of the entity issuing the commercial invoice.
 - The following declaration: 'I, the undersigned, certify that the (volume) 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 20 % or less of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin sold for export to the European Union covered by this invoice was manufactured by [company name and address] [TARIC additional code] in the United States of America. I declare that the information provided in this invoice is complete and correct.'
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