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Contents



(1) Text with EEA relevance.

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

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**Corrigenda**



([1]) Text with EEA relevance.

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*(Legislative acts)*

# REGULATIONS

## REGULATION (EU) 2019/2088 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

## of 27 November 2019

## on sustainability-related disclosures in the financial services sector

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Acting in accordance with the ordinary legislative procedure ([2]),

Whereas:

(1) On 25 September 2015, the UN General Assembly adopted a new global sustainable development framework: the 2030 Agenda for Sustainable Development (the '2030 Agenda'), which has at its core the Sustainable Development Goals (SDGs). The Commission Communication of 22 November 2016 on the next steps for a sustainable European future links the SDGs to the Union policy framework to ensure that all Union actions and policy initiatives, both within the Union and globally, take the SDGs on board at the outset. In its conclusions of 20 June 2017, the Council confirmed the commitment of the Union and its Member States to the implementation of the 2030 Agenda in a full, coherent, comprehensive, integrated and effective manner, and in close cooperation with partners and other stakeholders.

(2) The transition to a low-carbon, more sustainable, resource-efficient and circular economy in line with the SDGs is key to ensuring long-term competitiveness of the economy of the Union. The Paris Agreement adopted under the United Nations Framework Convention on Climate Change (the 'Paris Agreement'), which was approved by the Union on 5 October 2016 ([3]) and which entered into force on 4 November 2016, seeks to strengthen the response to climate change by, inter alia, making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

(3) In order to reach the objectives of the Paris Agreement and significantly reduce the risks and impacts of climate change, the global target is to hold the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1,5 °C above pre-industrial levels.

([1]) OJ C 62, 15.2.2019, p. 97.

([2]) Position of the European Parliament of 18 April 2019 (not yet published in the Official Journal) and decision of the Council of 8 November 2019.

([3]) Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (OJ L 282, 19.10.2016, p. 1).

(4) Directives 2009/65/EC ([4]), 2009/138/EC ([5]), 2011/61/EU ([6]), 2013/36/EU ([7]), 2014/65/EU ([8]), (EU) 2016/97 ([9]), (EU) 2016/2341 ([10]) of the European Parliament and of the Council, and Regulations (EU) No 345/2013 ([11]), (EU) No 346/2013 ([12]), (EU) 2015/760 ([13]) and (EU) 2019/1238 ([14]) of the European Parliament and of the Council share the common objective of facilitating the uptake and pursuit of the activities of undertakings for collective investment in transferable securities (UCITS), credit institutions, alternative investment fund managers (AIFMs) which manage or market alternative investment funds, including European long-term investment funds (ELTIFs), insurance undertakings, investment firms, insurance intermediaries, institutions for occupational retirement provision (IORPs), managers of qualifying venture capital funds (EuVECA managers), managers of qualifying social entrepreneurship funds (EuSEF managers) and providers of pan-European personal pension products (PEPPs). Those Directives and Regulations ensure the more uniform protection of end investors and make it easier for them to benefit from a wide range of financial products, while at the same time providing rules that enable end investors to make informed investment decisions.

(5) Disclosures to end investors on the integration of sustainability risks, on the consideration of adverse sustainability impacts, on sustainable investment objectives, or on the promotion of environmental or social characteristics, in investment decision-making and in advisory processes, are insufficiently developed because such disclosures are not yet subject to harmonised requirements.

(6) The exemption from this Regulation for financial advisers which employ fewer than three persons should be without prejudice to the application of the provisions of national law transposing Directives 2014/65/EU and (EU) 2016/97, in particular the rules on investment and insurance advice. Therefore, although such advisers are not required to provide information in accordance with this Regulation, they are required to consider and factor in sustainability risks in their advisory processes.

(7) Entities covered by this Regulation, depending on the nature of their activities, should comply with the rules on financial market participants where they manufacture financial products and should comply with the rules on financial advisers where they provide investment advice or insurance advice. Therefore, where such entities carry out activities of both financial market participants and financial advisers concurrently, such entities should be deemed to be financial market participants where they act in the capacity of manufacturers of financial products, including portfolio management, and should be deemed to be financial advisers where they provide investment or insurance advice.

(8) As the Union is increasingly faced with the catastrophic and unpredictable consequences of climate change, resource depletion and other sustainability-related issues, urgent action is needed to mobilise capital not only through public policies but also by the financial services sector. Therefore, financial market participants and financial advisers should be required to disclose specific information regarding their approaches to the integration of sustainability risks and the consideration of adverse sustainability impacts.

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([4]) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

([5]) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

([6]) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (OJ L 174, 1.7.2011, p. 1).

([7]) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

([8]) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

([9]) Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19).

([10]) Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37).

([11]) Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

([12]) Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

([13]) Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p.98).

([14]) Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a Pan-European Personal Pension Product (PEPP) (OJ L 198, 25.7.2019, p. 1).

(9) In the absence of harmonised Union rules on sustainability-related disclosures to end investors, it is likely that diverging measures will continue to be adopted at national level and different approaches in different financial services sectors might persist. Such divergent measures and approaches would continue to cause significant distortions of competition because of significant differences in disclosure standards. In addition, the parallel development of market-based practices that are based on commercially-driven priorities that produce divergent results currently causes further market fragmentation and might even further exacerbate inefficiencies in the functioning of the internal market in the future. Divergent disclosure standards and market-based practices make it very difficult to compare different financial products, create an uneven playing field for such products and for distribution channels, and erect additional barriers within the internal market. Such divergences could also be confusing for end investors and could distort their investment decisions. In ensuring compliance with the Paris Agreement, there is a risk that Member States adopt divergent national measures which could create obstacles to the smooth functioning of the internal market and be detrimental to financial market participants and financial advisers. Furthermore, the lack of harmonised rules relating to transparency makes it difficult for end investors to effectively compare different financial products in different Member States with respect to their environmental, social and governance risks and sustainable investment objectives. It is therefore necessary to address existing obstacles to the functioning of the internal market and to enhance the comparability of financial products in order to avoid likely future obstacles.

(10) This Regulation aims to reduce information asymmetries in principal-agent relationships with regard to the integration of sustainability risks, the consideration of adverse sustainability impacts, the promotion of environmental or social characteristics, and sustainable investment, by requiring financial market participants and financial advisers to make pre-contractual and ongoing disclosures to end investors when they act as agents of those end investors (principals).

(11) This Regulation supplements the disclosure requirements laid down in Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU, (EU) 2016/97, (EU) 2016/2341, and Regulations (EU) No 345/2013, (EU) No 346/2013, (EU) 2015/760 and (EU) 2019/1238 as well as in national law governing personal and individual pension products. To ensure the orderly and effective monitoring of compliance with this Regulation, Member States should rely on the competent authorities already designated under those rules.

(12) This Regulation maintains the requirements for financial market participants and financial advisers to act in the best interest of end investors, including but not limited to, the requirement of conducting adequate due diligence prior to making investments, provided for in Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/65/EU, (EU) 2016/97, (EU) 2016/2341, and Regulations (EU) No 345/2013 and (EU) No 346/2013, as well as in national law governing personal and individual pension products. In order to comply with their duties under those rules, financial market participants and financial advisers should integrate in their processes, including in their due diligence processes, and should assess on a continuous basis not only all relevant financial risks but also including all relevant sustainability risks that might have a relevant material negative impact on the financial return of an investment or advice. Therefore, financial market participants and financial advisers should specify in their policies how they integrate those risks and publish those policies.

(13) This Regulation requires financial market participants and financial advisers which provide investment advice or insurance advice with regard to insurance-based investment products (IBIPs), regardless of the design of the financial product and the target market, to publish written policies on the integration of sustainability risks and ensure the transparency of such integration.

(14) A sustainability risk means an environmental, social or governance event or condition that, if it occurs, could cause a negative material impact on the value of the investment, as specified in sectoral legislation, in particular in Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/65/EU, (EU) 2016/97, (EU) 2016/2341, or delegated acts and regulatory technical standards adopted pursuant to them.

(15) This Regulation should be without prejudice to the rules on the risk integration under Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, (EU) 2016/97, (EU) 2016/2341, and Regulations (EU) No 345/2013 and (EU) No 346/2013 and as well as under national law governing personal and individual pension products, including but not limited to the relevant applicable proportionality criteria such as size, internal organisation and the nature,

scope and complexity of the activities in question. This Regulation seeks to achieve more transparency regarding how financial market participants and financial advisers integrate sustainability risks into their investment decisions and investment or insurance advice. Where the sustainability risk assessment leads to the conclusion that there are no sustainability risks deemed to be relevant to the financial product, the reasons therefor should be explained. Where the assessment leads to the conclusion that those risks are relevant, the extent to which those sustainability risks might impact the performance of the financial product should be disclosed either in qualitative or quantitative terms. The sustainability risk assessments and related pre-contractual disclosures by financial market participants should feed into pre-contractual disclosures by financial advisers. Financial advisers should disclose how they take sustainability risks into account in the selection process of the financial product that is presented to the end investors before providing the advice, regardless of the sustainability preferences of the end investors. This should be without prejudice to the application of provisions of national law transposing Directives 2014/65/EU and (EU) 2016/97, in particular the obligations on financial market participants and financial advisers as regards product governance, assessments of suitability and appropriateness, and the demands-and-needs test.

(16) Investment decisions and advice might cause, contribute to or be directly linked to effects on sustainability factors that are negative, material or likely to be material.

(17) To ensure the coherent and consistent application of this Regulation, it is necessary to lay down a harmonised definition of 'sustainable investment' which provides that the investee companies follow good governance practices and the precautionary principle of 'do no significant harm' is ensured, so that neither the environmental nor the social objective is significantly harmed.

(18) Where financial market participants, taking due account of their size, the nature and scale of their activities and the types of financial products they make available, consider principal adverse impacts, whether material or likely to be material, of investment decisions on sustainability factors, they should integrate in their processes, including in their due diligence processes, the procedures for considering the principal adverse impacts alongside the relevant financial risks and relevant sustainability risks. The information on such procedures might describe how financial market participants discharge their sustainability-related stewardship responsibilities or other shareholder engagements. Financial market participants should include on their websites information on those procedures and descriptions of the principal adverse impacts. In that respect, the Joint Committee of the European Banking Authority established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council ([15]) (EBA), the European Insurance and Occupational Pensions Authority established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council ([16]) (EIOPA) and the European Securities and Markets Authority established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council ([17]) (ESMA) (the 'Joint Committee'), and financial market participants and financial advisers should consider the due diligence guidance for responsible business conduct developed by the Organisation for Economic Co-operation and Development (OECD) and the United Nations-supported Principles for Responsible Investment.

(19) The consideration of sustainability factors in the investment decision-making and advisory processes can realise benefits beyond financial markets. It can increase the resilience of the real economy and the stability of the financial system. In so doing, it can ultimately impact on the risk-return of financial products. It is therefore essential that financial market participants and financial advisers provide the information necessary to enable end investors to make informed investment decisions.

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([15]) Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

([16]) Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

([17]) Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

(20) Financial market participants which consider the principal adverse impacts of investment decisions on sustainability factors should disclose in the pre-contractual information for each financial product, concisely in qualitative or quantitative terms, how such impacts are considered as well as a statement that information on the principal adverse impacts on sustainability factors is available in the ongoing reporting. Principal adverse impacts should be understood as those impacts of investment decisions and advice that result in negative effects on sustainability factors.

(21) Sustainable products with various degrees of ambition have been developed to date. Therefore, for the purposes of pre-contractual disclosures and disclosures in periodical reports, it is necessary to distinguish between the requirements for financial products which promote environmental or social characteristics and those for financial products which have as an objective a positive impact on the environment and society. As a consequence, as regards the financial products with environmental or social characteristics, financial market participants should disclose whether and how the designated index, sustainability index or mainstream index, is aligned with those characteristics and where no benchmark is used, information on how the sustainability characteristics of the financial products are met. As regards financial products which have as an objective a positive impact on the environment and society, financial market participants should disclose which sustainable benchmark they use to measure the sustainable performance and where no benchmark is used, explain how the sustainable objective is met. Those disclosures by means of periodic reports should be carried out annually.

(22) This Regulation is without prejudice to the rules on remuneration or the assessment of the performance of staff of financial market participants and financial advisers under Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/65/EU, (EU) 2016/97, (EU) 2016/2341, and Regulations (EU) No 345/2013 and (EU) No 346/2013, or to implementing acts and national law governing personal and individual pension products, including but not limited to the relevant applicable proportionality criteria such as size, internal organisation and the nature, scope and complexity of the activities in question. It is, however, appropriate to achieve more transparency, in qualitative or quantitative terms, on the remuneration policies of financial market participants and financial advisers, with respect to their investment or insurance advice, that promote sound and effective risk management with respect to sustainability risks whereas the structure of remuneration does not encourage excessive risk-taking with respect to sustainability risks and is linked to risk-adjusted performance.

(23) To enhance transparency and inform end investors, access to information on how financial market participants and financial advisers integrate relevant sustainability risks, whether material or likely to be material, in their investment decision making processes, including the organisational, risk management and governance aspects of such processes, and in their advisory processes, respectively, should be regulated by requiring those entities to maintain concise information about those policies on their websites.

(24) The current disclosure requirements set out in Union law do not require the disclosure of all the information necessary to properly inform end investors about the sustainability-related impact of their investments in financial products with environmental or social characteristics or financial products which pursue sustainability objectives. Therefore, it is appropriate to set out more specific and standardised disclosure requirements with regard to such investments. For instance, the overall sustainability-related impact of financial products should be reported regularly by means of indicators relevant for measuring the chosen sustainable investment objective. Where an appropriate index has been designated as a reference benchmark, that information should also be provided for the designated index as well as for a broad market index to allow for comparison. Where EuSEF managers make available information on the positive social impact that is the objective of a given fund, on the overall social outcome achieved and on the related methods used in accordance with Regulation (EU) No 346/2013, they might, where appropriate, use such information for the purposes of the disclosures under this Regulation.

(25) Directive 2013/34/EU of the European Parliament and of the Council ([18]) imposes transparency obligations as regards environmental, social and corporate governance matters in non-financial reporting. However, the form and presentation required by that Directive is not, always suitable for direct use by financial market participants and financial advisers when dealing with end investors. Financial market participants and financial advisers should have the option to use information in management reports and non-financial statements for the purposes of this Regulation in accordance with that Directive, where appropriate.

([18]) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

(26) To ensure the reliability of information published on the websites of financial market participants and financial advisers, such information should be kept up to date, and any revisions or changes to such information should be clearly explained.

(27) Even though this Regulation does not cover national social security schemes covered by Regulations (EC) No 883/2004 and (EC) No 987/2009, in view of the fact that Member States increasingly open up parts of the management of compulsory pension schemes within their social security systems to financial market participants or other entities under private law, and as such schemes are exposed to sustainability risks and might consider adverse sustainability impacts, promote environmental or social characteristics or pursue sustainable investment, Member States should have the option to apply this Regulation with regard to such schemes in order to mitigate information asymmetries.

(28) This Regulation should not prevent a Member State from adopting or maintaining in force more stringent provisions on the publication of climate change adaptation policies and on additional disclosures to end investors regarding sustainability risks provided that the affected financial market participants and financial advisers, have their head offices in its territory. However, such provisions should not impede the effective application of this Regulation or the achievement of its objectives.

(29) Under Directive (EU) 2016/2341, IORPs are already required to apply governance and risk-management rules to their investment decisions and risk assessments in order to ensure continuity and regularity. Investment decisions and the assessment of relevant risks, including environmental, social and governance risks, should be made in such a manner as to ensure compliance with the interests of members and beneficiaries of IORPs. EIOPA should issue guidelines specifying how investment decisions and risk assessments by IORPs are to take into account environmental, social and governance risks under that Directive.

(30) EBA, EIOPA and ESMA (collectively, the 'ESAs') should be mandated, through the Joint Committee, to develop draft regulatory technical standards to further specify the content, methodologies and presentation of information in relation to sustainability indicators with regard to climate and other environment-related adverse impacts, to social and employee matters, to respect for human rights, and to anti-corruption and anti-bribery matters, as well as to specify the presentation and content of the information with regard to the promotion of environmental or social characteristics and sustainable investment objectives to be disclosed in pre-contractual documents, annual reports and on websites of financial market participants in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010. The Commission should be empowered to adopt those regulatory technical standards by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union (TFEU) and in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

(31) The ESAs should be mandated, through the Joint Committee, to develop draft implementing technical standards to determine the standard presentation of information on the promotion of environmental or social characteristics and sustainable investments in marketing communications. The Commission should be empowered to adopt those implementing technical standards by means of an implementing act pursuant to Article 291 TFEU and in accordance with Article 15 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

(32) Since annual reports in principle summarise business results for complete calendar years, the provisions of this Regulation regarding the transparency requirements for such reports should not apply until 1 January 2022.

(33) The disclosure rules contained in this Regulation should supplement the provisions of Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU, (EU) 2016/97 and (EU) 2016/2341, and Regulations (EU) No 345/2013, (EU) No 346/2013, (EU) 2015/760 and (EU) 2019/1238.

(34) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of the Fundamental Rights of the European Union.

(35) Since the objectives of this Regulation, namely to strengthen protection for end investors and improve disclosures to them, including in cases of cross-border purchases by end investors, cannot be sufficiently achieved by the Member States but can rather, by reason of the need to lay down uniform disclosure requirements, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

*Article 1*

**Subject matter**

This Regulation lays down harmonised rules for financial market participants and financial advisers on transparency with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with respect to financial products.

*Article 2*

**Definitions**

For the purposes of this Regulation, the following definitions apply:

(1) 'financial market participant' means:

(a) an insurance undertaking which makes available an insurance-based investment product (IBIP);

(b) an investment firm which provides portfolio management;

(c) an institution for occupational retirement provision (IORP);

(d) a manufacturer of a pension product;

(e) an alternative investment fund manager (AIFM);

(f) a pan-European personal pension product (PEPP) provider;

(g) a manager of a qualifying venture capital fund registered in accordance with Article 14 of Regulation (EU) No 345/2013;

(h) a manager of a qualifying social entrepreneurship fund registered in accordance with Article 15 of Regulation (EU) No 346/2013;

(i) a management company of an undertaking for collective investment in transferable securities (UCITS management company); or

(j) a credit institution which provides portfolio management;

(2) 'insurance undertaking' means an insurance undertaking authorised in accordance with Article 18 of Directive 2009/138/EC;

(3) 'insurance-based investment product' or 'IBIP' means:

(a) an insurance-based investment product as defined in point (2) of Article 4 of Regulation (EU) No 1286/2014 of the European Parliament and of the Council ([19]); or

(b) an insurance product which is made available to a professional investor and which offers a maturity or surrender value that is wholly or partially exposed, directly or indirectly, to market fluctuations;

(4) 'alternative investment fund manager' or 'AIFM' means an AIFM as defined in point (b) of Article 4(1) of Directive 2011/61/EU;

(5) 'investment firm' means an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU;

(6) 'portfolio management' means portfolio management as defined in in point (8) of Article 4(1) of Directive 2014/65/EU;

(7) 'institution for occupational retirement provision' or 'IORP' means an institution for occupational retirement provision authorised or registered in accordance with Article 9 of Directive (EU) 2016/2341 except an institution in respect of which a Member State has chosen to apply Article 5 of that Directive or an institution that operates pension schemes which together have less than 15 members in total;

([19]) Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, p. 1).

(8) 'pension product' means:

(a) a pension product as referred to in point (e) of Article 2(2) of Regulation (EU) No 1286/2014; or

(b) an individual pension product as referred to in point (g) of Article 2(2) of Regulation (EU) No 1286/2014;

(9) 'pan-European Personal Pension Product' or 'PEPP' means a product as referred to in point (2) of Article 2 of Regulation (EU) 2019/1238;

(10) 'UCITS management company' means:

(a) a management company as defined in point (b) of Article 2(1) of Directive 2009/65/EC; or

(b) an investment company authorised in accordance with Directive 2009/65/EC which has not designated a management company authorised under that Directive for its management;

(11) 'financial adviser' means:

(a) an insurance intermediary which provides insurance advice with regard to IBIPs;

(b) an insurance undertaking which provides insurance advice with regard to IBIPs;

(c) a credit institution which provides investment advice;

(d) an investment firm which provides investment advice;

(e) an AIFM which provides investment advice in accordance with point (b)(i) of Article 6(4) of Directive 2011/61/EU; or

(f) a UCITS management company which provides investment advice in accordance with point (b)(i) of Article 6(3) of Directive 2009/65/EC;

(12) 'financial product' means:

(a) a portfolio managed in accordance with point (6) of this Article;

(b) an alternative investment fund (AIF);

(c) an IBIP;

(d) a pension product;

(e) a pension scheme;

(f) a UCITS; or

(g) a PEPP;

(13) 'alternative investment funds' or 'AIFs' means AIFs as defined in point (a) of Article 4(1) of Directive 2011/61/EU;

(14) 'pension scheme' means a pension scheme as defined in point (2) of Article 6 of Directive (EU) 2016/2341;

(15) 'undertaking for collective investment in transferable securities' or 'UCITS' means an undertaking authorised in accordance with Article 5 of Directive 2009/65/EC;

(16) 'investment advice' means investment advice as defined in point (4) of Article 4(1) of Directive 2014/65/EU;

(17) 'sustainable investment' means an investment in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance;

(18) 'professional investor' means a client who meets the criteria laid down in Annex II to Directive 2014/65/EU;

(19) 'retail investor' means an investor who is not a professional investor;

(20) 'insurance intermediary' means an insurance intermediary as defined in point (3) of Article 2(1) of Directive (EU) 2016/97;

(21) 'insurance advice' means advice as defined in point (15) of Article 2(1) of Directive (EU) 2016/97;

(22) 'sustainability risk' means an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment;

(23) 'European long-term investment fund' or 'ELTIF' means a fund authorised in accordance with Article 6 of Regulation (EU) 2015/760;

(24) 'sustainability factors' mean environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.

*Article 3*

**Transparency of sustainability risk policies**

1. Financial market participants shall publish on their websites information about their policies on the integration of sustainability risks in their investment decision-making process.

2. Financial advisers shall publish on their websites information about their policies on the integration of sustainability risks in their investment advice or insurance advice.

*Article 4*

**Transparency of adverse sustainability impacts at entity level**

1. Financial market participants shall publish and maintain on their websites:

(a) where they consider principal adverse impacts of investment decisions on sustainability factors, a statement on due diligence policies with respect to those impacts, taking due account of their size, the nature and scale of their activities and the types of financial products they make available; or

(b) where they do not consider adverse impacts of investment decisions on sustainability factors, clear reasons for why they do not do so, including, where relevant, information as to whether and when they intend to consider such adverse impacts.

2. Financial market participants shall include in the information provided in accordance with point (a) of paragraph 1 at least the following:

(a) information about their policies on the identification and prioritisation of principal adverse sustainability impacts and indicators;

(b) a description of the principal adverse sustainability impacts and of any actions in relation thereto taken or, where relevant, planned;

(c) brief summaries of engagement policies in accordance with Article 3g of Directive 2007/36/EC, where applicable;

(d) a reference to their adherence to responsible business conduct codes and internationally recognised standards for due diligence and reporting and, where relevant, the degree of their alignment with the objectives of the Paris Agreement.

3. By way of derogation from paragraph 1, from 30 June 2021, financial market participants exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year shall publish and maintain on their websites a statement on their due diligence policies with respect to the principal adverse impacts of investment decisions on sustainability factors. That statement shall at least include the information referred to in paragraph 2.

4. By way of derogation from paragraph 1 of this Article, from 30 June 2021, financial market participants which are parent undertakings of a large group as referred to in Article 3(7) of Directive 2013/34/EU exceeding on the balance sheet date of the group, on a consolidated basis, the criterion of the average number of 500 employees during the financial year shall publish and maintain on their websites a statement on their due diligence policies with respect to the principal adverse impacts of investment decisions on sustainability factors. That statement shall at least include the information referred to in of paragraph 2.

5. Financial advisers shall publish and maintain on their websites:

(a) information as to whether, taking due account of their size, the nature and scale of their activities and the types of financial products they advise on, they consider in their investment advice or insurance advice the principal adverse impacts on sustainability factors; or

(b) information as to why they do not to consider adverse impacts of investment decisions on sustainability factors in their investment advice or insurance advice, and, where relevant, including information as to whether and when they intend to consider such adverse impacts.

6. By 30 December 2020, the ESAs shall develop, through the Joint Committee, draft regulatory technical standards in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 on the content, methodologies and presentation of information referred to in paragraphs 1 to 5 of this Article in respect of the sustainability indicators in relation to adverse impacts on the climate and other environment-related adverse impacts.

The ESAs shall, where relevant, seek input from the European Environment Agency and the Joint Research Centre of the European Commission.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

7. By 30 December 2021, the ESAs shall develop, through the Joint Committee, draft regulatory technical standards in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 on the content, methodologies and presentation of information referred to in paragraphs 1 to 5 of this Article in respect of sustainability indicators in relation to adverse impacts in the field of social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

*Article 5*

**Transparency of remuneration policies in relation to the integration of sustainability risks**

1. Financial market participants and financial advisers shall include in their remuneration policies information on how those policies are consistent with the integration of sustainability risks, and shall publish that information on their websites.

2. The information referred to in paragraph 1 shall be included in remuneration policies that financial market participants and financial advisers are required to establish and maintain in accordance with sectoral legislation, in particular Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/65/EU, (EU) 2016/97 and (EU) 2016/2341.

*Article 6*

**Transparency of the integration of sustainability risks**

1. Financial market participants shall include descriptions of the following in pre-contractual disclosures:

(a) the manner in which sustainability risks are integrated into their investment decisions; and

(b) the results of the assessment of the likely impacts of sustainability risks on the returns of the financial products they make available.

Where financial market participants deem sustainability risks not to be relevant, the descriptions referred to in the first subparagraph shall include a clear and concise explanation of the reasons therefor.

2. Financial advisers shall include descriptions of the following in pre-contractual disclosures:

(a) the manner in which sustainability risks are integrated into their investment or insurance advice; and

(b) the result of the assessment of the likely impacts of sustainability risks on the returns of the financial products they advise on.

Where financial advisers deem sustainability risks not to be relevant, the descriptions referred to in the first subparagraph shall include a clear and concise explanation of the reasons therefor.

3. The information referred to in paragraphs 1 and 2 of this Article shall be disclosed in the following manner:

(a) for AIFMs, in the disclosures to investors referred to in Article 23(1) of Directive 2011/61/EU;

(b) for insurance undertakings, in the provision of information referred to in Article 185(2) of Directive 2009/138/EC or, where relevant, in accordance with Article 29(1) of Directive (EU) 2016/97;

(c) for IORPs, in the provision of information referred to in Article 41 of Directive (EU) 2016/2341;

(d) for managers of qualifying venture capital funds, in the provision of information referred to in Article 13(1) of Regulation (EU) No 345/2013;

(e) for managers of qualifying social entrepreneurship funds, in the provision of information referred to in Article 14(1) of Regulation (EU) No 346/2013;

(f) for manufacturers of pension products, in writing in good time before a retail investor is bound by a contract relating to a pension product;

(g) for UCITS management companies, in the prospectus referred to in Article 69 of Directive 2009/65/EC;

(h) for investment firms which provide portfolio management or provide investment advice, in accordance with Article 24 (4) of Directive 2014/65/EU;

(i) for credit institutions which provide portfolio management or provide investment advice, in accordance with Article 24(4) of Directive 2014/65/EU;

(j) for insurance intermediaries and insurance undertakings which provide insurance advice with regard to IBIPs and for insurance intermediaries which provide insurance advice with regard to pension products exposed to market fluctuations, in accordance with Article 29(1) of Directive (EU) 2016/97;

(k) for AIFMs of ELTIFs, in the prospectus referred to in Article 23 of Regulation (EU) 2015/760;

(l) for PEPP providers, in the PEPP key information document referred to in Article 26 of Regulation (EU) 2019/1238.

*Article 7*

**Transparency of adverse sustainability impacts at financial product level**

1. By 30 December 2022, for each financial product where a financial market participant applies point (a) of Article 4 (1) or Article 4(3) or (4), the disclosures referred to in Article 6(3) shall include the following:

(a) a clear and reasoned explanation of whether, and, if so, how a financial product considers principal adverse impacts on sustainability factors;

(b) a statement that information on principal adverse impacts on sustainability factors is available in the information to be disclosed pursuant to Article 11(2).

Where information in Article 11(2) includes quantifications of principal adverse impacts on sustainability factors, that information may rely on the provisions of the regulatory technical standards adopted pursuant to Article 4(6) and (7).

2. Where a financial market participant applies point (b) of Article 4(1), the disclosures referred to in Article 6(3) shall include for each financial product a statement that the financial market participant does not consider the adverse impacts of investment decisions on sustainability factors and the reasons therefor.

*Article 8*

**Transparency of the promotion of environmental or social characteristics in pre-contractual disclosures**

1. Where a financial product promotes, among other characteristics, environmental or social characteristics, or a combination of those characteristics, provided that the companies in which the investments are made follow good governance practices, the information to be disclosed pursuant to Article 6(1) and (3) shall include the following:

(a) information on how those characteristics are met;

(b) if an index has been designated as a reference benchmark, information on whether and how this index is consistent with those characteristics.

2. Financial market participants shall include in the information to be disclosed pursuant to Article 6(1) and (3) an indication of where the methodology used for the calculation of the index referred to in paragraph 1 of this Article is to be found.

3. The ESAs shall, through the Joint Committee, develop draft regulatory technical standards to specify the details of the presentation and content of the information to be disclosed pursuant to this Article.

When developing the draft regulatory technical standards referred to in the first subparagraph, the ESAs shall take into account the various types of financial products, their characteristics and the differences between them, as well as the objective that disclosures are to be accurate, fair, clear, not misleading, simple and concise.

The ESAs shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 30 December 2020.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

*Article 9*

**Transparency of sustainable investments in pre-contractual disclosures**

1. Where a financial product has sustainable investment as its objective and an index has been designated as a reference benchmark, the information to be disclosed pursuant to Article 6(1) and (3) shall be accompanied by the following:

(a) information on how the designated index is aligned with that objective;

(b) an explanation as to why and how the designated index aligned with that objective differs from a broad market index.

2. Where a financial product has sustainable investment as its objective and no index has been designated as a reference benchmark, the information to be disclosed pursuant to Article 6(1) and (3) shall include an explanation on how that objective is to be attained.

3. Where a financial product has a reduction in carbon emissions as its objective, the information to be disclosed pursuant to Article 6(1) and (3) shall include the objective of low carbon emission exposure in view of achieving the long-term global warming objectives of the Paris Agreement.

By way of derogation from paragraph 2 of this Article, where no EU Climate Transition Benchmark or EU Paris-aligned Benchmark in accordance with Regulation (EU) 2016/1011 of the European Parliament and of the Council ([20]) is available, the information referred to in Article 6 shall include a detailed explanation of how the continued effort of attaining the objective of reducing carbon emissions is ensured in view of achieving the long-term global warming objectives of the Paris Agreement.

4. Financial market participants shall include in the information to be disclosed pursuant to Article 6(1) and (3) an indication of where the methodology used for the calculation of the indices referred to in paragraph 1 of this Article and the benchmarks referred to in the second subparagraph of paragraph 3 of this Article are to be found.

5. The ESAs shall, through the Joint Committee, develop draft regulatory technical standards to specify the details of the presentation and content of the information to be disclosed pursuant to this Article.

When developing the draft regulatory technical standards referred to in the first subparagraph of this paragraph, the ESAs shall take into account the various types of financial products, their objectives as referred to in paragraphs 1, 2 and 3 and the differences between them as well as the objective that disclosures are to be accurate, fair, clear, not misleading, simple and concise.

([20]) Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1).

The ESAs shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 30 December 2020.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

*Article 10*

**Transparency of the promotion of environmental or social characteristics and of sustainable investments on websites**

1. Financial market participants shall publish and maintain on their websites the following information for each financial product referred to in Article 8(1) and Article 9(1), (2) and (3):

(a) a description of the environmental or social characteristics or the sustainable investment objective;

(b) information on the methodologies used to assess, measure and monitor the environmental or social characteristics or the impact of the sustainable investments selected for the financial product, including its data sources, screening criteria for the underlying assets and the relevant sustainability indicators used to measure the environmental or social characteristics or the overall sustainable impact of the financial product;

(c) the information referred to in Articles 8 and 9;

(d) the information referred to in Article 11.

The information to be disclosed pursuant to the first subparagraph shall be clear, succinct and understandable to investors. It shall be published in a way that is accurate, fair, clear, not misleading, simple and concise and in a prominent easily accessible area of the website.

2. The ESAs shall, through the Joint Committee, develop draft regulatory technical standards to specify the details of the content of the information referred to in points (a) and (b) of the first subparagraph of paragraph 1, and the presentation requirements referred to in the second subparagraph of that paragraph.

When developing the draft regulatory technical standards referred to in the first subparagraph of this paragraph, the ESAs shall take into account the various types of financial products, their characteristics and objectives as referred to in paragraph 1 and the differences between them. The ESAs shall update the regulatory technical standards in the light of regulatory and technological developments.

The ESAs shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 30 December 2020.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

*Article 11*

**Transparency of the promotion of environmental or social characteristics and of sustainable investments in periodic reports**

1. Where financial market participants make available a financial product as referred to in Article 8(1) or in Article 9(1), (2) or (3), they shall include a description of the following in periodic reports:

(a) for a financial product as referred to in Article 8(1), the extent to which environmental or social characteristics are met;

(b) for a financial product as referred to in Article 9(1), (2) or (3):

  (i) the overall sustainability-related impact of the financial product by means of relevant sustainability indicators; or

  (ii) where an index has been designated as a reference benchmark, a comparison between the overall sustainability-related impact of the financial product with the impacts of the designated index and of a broad market index through sustainability indicators.

2. The information referred to in paragraph 1 of this Article shall be disclosed in the following manner:

(a) for AIFMs, in the annual report referred to in Article 22 of Directive 2011/61/EU;

(b) for insurance undertakings, annually in writing in accordance with Article 185(6) of Directive 2009/138/EC;

(c) for IORPs, in the annual report referred to in Article 29 of Directive (EU) 2016/2341;

(d) for managers of qualifying venture capital funds, in the annual report referred to in Article 12 of Regulation (EU) No 345/2013;

(e) for managers of qualifying social entrepreneurship funds, in the annual report referred to in Article 13 of Regulation (EU) No 346/2013;

(f) for manufacturers of pension products, in writing in the annual report or in a report in accordance with national law;

(g) for UCITS management companies, in the annual report referred to in Article 69 of Directive 2009/65/EC;

(h) for investment firms which provide portfolio management, in a periodic report as referred to in Article 25(6) of Directive 2014/65/EU;

(i) for credit institutions which provide portfolio management, in a periodic report as referred to in Article 25(6) of Directive 2014/65/EU;

(j) for PEPP providers, in the PEPP Benefit Statement referred to in Article 36 of Regulation (EU) 2019/1238.

3. For the purposes of paragraph 1 of this Article, financial market participants may use the information in management reports in accordance with Article 19 of Directive 2013/34/EU or the information in non-financial statements in accordance with Article 19a of that Directive where appropriate.

4. The ESAs shall, through the Joint Committee, develop draft regulatory technical standards to specify the details of the content and presentation of information referred to in paragraph 1.

When developing the draft regulatory technical standards referred to in the first subparagraph, the ESAs shall take into account the various types of financial products, their characteristics and objectives and the differences between them. The ESAs shall update the regulatory technical standards in the light of regulatory and technological developments.

The ESAs shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 30 December 2020.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

*Article 12*

**Review of disclosures**

1. Financial market participants shall ensure that any information published in accordance with Article 3, 5 or 10 is kept up to date. Where a financial market participant amends such information, a clear explanation of such amendment shall be published on the same website.

2. Paragraph 1 shall apply *mutatis mutandis* to financial advisers with regard to any information published in accordance with Articles 3 and 5.

*Article 13*

**Marketing communications**

1. Without prejudice to stricter sectoral legislation, in particular Directives 2009/65/EC, 2014/65/EU and (EU) 2016/97 and Regulation (EU) No 1286/2014, financial market participants and financial advisers shall ensure that their marketing communications do not contradict the information disclosed pursuant to this Regulation.

2. The ESAs may develop, through the Joint Committee, draft implementing technical standards to determine the standard presentation of information on the promotion of environmental or social characteristics and sustainable investments.

Power is delegated to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

*Article 14*

**Competent authorities**

1. Member States shall ensure that the competent authorities designated in accordance with sectoral legislation, in particular the sectoral legislation referred to in Article 6(3) of this Regulation, and in accordance with Directive 2013/36/EU, monitor the compliance of financial market participants and financial advisers with the requirements of this Regulation. The competent authorities shall have all the supervisory and investigatory powers that are necessary for the exercise of their functions under this Regulation.

2. For the purposes of this Regulation, the competent authorities shall cooperate with each other and shall provide each other, without undue delay, with such information as is relevant for the purposes of carrying out their duties under this Regulation.

*Article 15*

**Transparency by IORPs and insurance intermediaries**

1. IORPs shall publish and maintain the information referred to in Articles 3 to 7 and the first subparagraph of Article 10(1), of this Regulation in accordance with point (f) of Article 36(2) of Directive (EU) 2016/2341.

2. Insurance intermediaries shall communicate the information referred to in Article 3, Article 4(5), Article 5, Article 6 and the first subparagraph of Article 10(1), of this Regulation in accordance with Article 23 of Directive (EU) 2016/97.

*Article 16*

**Pension products covered by Regulations (EC) No 883/2004 and (EC) No 987/2009**

1. Member States may decide to apply this Regulation to manufacturers of pension products operating national social security schemes which are covered by Regulations (EC) No 883/2004 and (EC) No 987/2009. In such cases, manufacturers of pension products as referred to in point (1)(d) of Article 2 of this Regulation shall include manufacturers of pension products operating national social security schemes and of pension products referred to in point (8) of Article 2 of this Regulation. In such case, the definition of pension product in point (8) of Article 2 of this Regulation shall be deemed to include the pension products referred to in the first sentence.

2. Member States shall notify the Commission and the ESAs of any decision taken pursuant to paragraph 1.

*Article 17*

**Exemptions**

1. This Regulation shall neither apply to insurance intermediaries which provide insurance advice with regard to IBIPs nor to investment firms which provide investment advice that are enterprises irrespective of their legal form, including natural persons and self-employed persons, provided that they employ fewer than three persons.

2. Member States may decide to apply this Regulation to insurance intermediaries which provide insurance advice with regard to IBIPs or investment firms which provide investment advice as referred to in paragraph 1.

3. Member States shall notify the Commission and the ESAs of any decision taken pursuant to paragraph 2.

*Article 18*

**Report**

The ESAs shall take stock of the extent of voluntary disclosures in accordance with point (a) of Article 4(1) and point (a) of Article 7(1). By 10 September 2022 and every year thereafter, the ESAs shall submit a report to the Commission on best practices and make recommendations towards voluntary reporting standards. That annual report shall consider the implications of due diligence practices on disclosures under this Regulation and shall provide guidance on this matter. That report shall be made public and be transmitted to the European Parliament and to the Council.

*Article 19*

**Evaluation**

1. By 30 December 2022, the Commission shall evaluate the application of this Regulation and shall in particular consider:

(a) whether the reference to the average number of employees in Article 4(3) and (4) should be maintained, replaced or accompanied by other criteria, and shall consider the benefits and proportionality of the related administrative burden;

(b) whether the functioning of this Regulation is inhibited by the lack of data or their suboptimal quality, including indicators on adverse impacts on sustainability factors by investee companies.

2. The evaluation referred to in paragraph 1 shall be accompanied, if appropriate, by a legislative proposal.

*Article 20*

**Entry into force and application**

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

2. This Regulation shall apply from 10 March 2021.

3. By way of derogation from paragraph 2 of this Article, Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2), Article 11(4), and Article 13(2) shall apply from 29 December 2019 and Article 11(1) to (3) shall apply from 1 January 2022.

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

Done at Strasbourg, 27 November 2019.

| *For the European Parliament* | *For the Council* |
|---|---|
| *The President* | *The President* |
| D. M. SASSOLI | T. TUPPURAINEN |

# REGULATION (EU) 2019/2089 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

## of 27 November 2019

## amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Acting in accordance with the ordinary legislative procedure ([2]),

Whereas:

(1) On 25 September 2015, the UN General Assembly adopted a new global sustainable development framework: the 2030 Agenda for Sustainable Development (the '2030 Agenda'), which has at its core the Sustainable Development Goals (SDGs). The Commission Communication of 22 November 2016 on the next steps for a sustainable European future links the SDGs to the Union policy framework to ensure that all Union actions and policy initiatives, both within the Union and globally, take the SDGs on board at the outset. In its conclusions of 20 June 2017, the Council confirmed the commitment of the Union and its Member States to the implementation of the 2030 Agenda in a full, coherent, comprehensive, integrated and effective manner and in close cooperation with partners and other stakeholders.

(2) The Paris Agreement adopted under the United Nations Framework Convention on Climate Change (the 'Paris Agreement'), which was approved by the Union on 5 October 2016 ([3]) and which entered into force on 4 November 2016, seeks to strengthen the response to climate change by, inter alia, making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

(3) In order to reach the objectives of the Paris Agreement and significantly reduce the risks and impacts of climate change, the global target is to hold the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1,5 °C above pre-industrial levels.

(4) On 8 October 2018, the Intergovernmental Panel on Climate Change (IPCC) published the Special Report on Global Warming of 1,5 °C, which stated that limiting global warming to 1,5 °C would require rapid, far-reaching and unprecedented changes to all aspects of society, and that limiting global warming to 1,5 °C as compared to 2 °C could go hand in hand with ensuring a more sustainable and equitable society.

(5) Sustainability and the transition to a low-carbon, climate resilient, more resource-efficient and circular economy are crucial to ensuring the long-term competitiveness of the Union economy. Sustainability has long been central to the Union project, and the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) reflect its social and environmental dimensions. There is a limited window in which to transform the culture in the financial sector towards sustainability to ensure that the global average temperature rise stays well below 2 °C. It is therefore essential that new infrastructure investments are sustainable in the long term.

([1]) OJ C 62, 15.2.2019, p. 103.

([2]) Position of the European Parliament of 26 March 2019 (not yet published in the Official Journal) and decision of the Council of 8 November 2019.

([3]) Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (OJ L 282, 19.10.2016, p. 1).

(6) In its Communication of 8 March 2018, the Commission published its action plan on financing sustainable growth, launching an ambitious and comprehensive strategy on sustainable finance. One of the objectives of that action plan is to reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth. A greater focus on limiting the impact of climate change is critical, as disasters triggered by unpredictable weather conditions have increased dramatically.

(7) Decision No 1386/2013/EU of the European Parliament and of the Council ([4]) called for an increase in private sector funding for environmental and climate-related expenditure, notably through the creation of incentives and methodologies that stimulate companies to measure the environmental costs of their business and the profits derived from using environmental services.

(8) Achieving the SDGs in the Union requires channelling capital flows towards sustainable investments. It is important to fully exploit the potential of the internal market to achieve those goals. In that context, it is crucial to remove obstacles to the efficient movement of capital into sustainable investments in the internal market and to prevent new obstacles from emerging.

(9) Regulation (EU) 2016/1011 of the European Parliament and of the Council ([5]) establishes uniform rules for benchmarks in the Union and caters for different types of benchmarks. An increasing number of investors pursue low-carbon investment strategies and use low-carbon benchmarks to measure the performance of investment portfolios. The establishment of EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks, underpinned by a methodology linked to the commitments laid down in the Paris Agreement regarding carbon emissions, would contribute to increasing transparency and would help prevent greenwashing.

(10) A wide variety of indices are currently grouped together as low-carbon indices. Those low-carbon indices are used as benchmarks for investment portfolios and products that are sold across borders. The quality and integrity of low-carbon benchmarks affect the effective functioning of the internal market in a wide variety of individual and collective investment portfolios. Many low-carbon indices that are used to measure the performance of investment portfolios, in particular for segregated investment accounts and collective investment schemes, are provided in one Member State but used by portfolio and asset managers in other Member States. In addition, portfolio and asset managers often hedge their carbon exposure risks by using benchmarks produced in other Member States.

(11) Different categories of low-carbon indices with various degrees of ambition have emerged in the market. While some benchmarks aim to lower the carbon footprint of a standard investment portfolio, others aim to select only components that contribute to attaining the 2 °C objective set out in the Paris Agreement. Despite differences in objectives and strategies, many of those benchmarks are commonly promoted as low-carbon benchmarks.

(12) Divergent approaches to benchmark methodologies result in the fragmentation of the internal market because it is not clear to users of benchmarks whether a particular low-carbon index is a benchmark aligned to the objectives of the Paris Agreement or merely a benchmark that aims to lower the carbon footprint of a standard investment portfolio. To address potentially illegitimate claims by administrators about the low-carbon nature of their benchmarks, Member States are likely to adopt their own rules to protect investors from confusion and ambiguity about the aims and level of ambition underpinning different categories of so-called low-carbon indices used as benchmarks for low-carbon investment portfolios.

(13) In the absence of a harmonised framework to ensure the accuracy and integrity of the main categories of low-carbon benchmarks used in individual or collective investment portfolios, it is likely that differences in Member States' approaches will create obstacles to the smooth functioning of the internal market.

([4]) Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' (OJ L 354, 28.12.2013, p. 171).

([5]) Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1).

(14) In order to maintain the proper functioning of the internal market for the benefit of investors, to further improve the functioning of the internal market, and to ensure a high level of consumer and investor protection, it is appropriate to amend Regulation (EU) 2016/1011 by introducing a regulatory framework which lays down minimum requirements for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks at Union level. In that regard, it is of particular importance that such benchmarks should not significantly harm other environmental, social and governance (ESG) objectives.

(15) Introducing a clear distinction between EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks and developing minimum standards for each of those benchmarks would contribute to consistency among those benchmarks. The EU Paris-aligned Benchmark should be in line with the objectives of the Paris Agreement at index level.

(16) In order to ensure that the labels 'EU Climate Transition Benchmark' and 'EU Paris-aligned Benchmark' are reliable and easy for investors across the Union to recognise, only administrators that comply with the requirements laid down in this Regulation should be eligible to use those labels when marketing EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks in the Union.

(17) In order to encourage companies to disclose credible targets for reducing carbon emissions, the administrator of an EU Climate Transition Benchmark, when selecting or weighting underlying assets, should take into account companies that have as an objective the reduction of their carbon emissions towards alignment with the objectives of the Paris Agreement. Such targets should be public and credible, in the sense that they should entail a genuine commitment to decarbonisation and should be sufficiently detailed and technically viable.

(18) Users of benchmarks do not always have the necessary information on the extent to which the methodology of the benchmark administrators takes into account ESG factors. Such information is often scattered or non-existent, and does not allow for an effective comparison across borders for investment purposes. To enable market participants to make well-informed choices, all benchmark administrators, with the exception of administrators of interest rate and foreign exchange benchmarks, should be required to disclose in their benchmark statement whether or not their benchmarks or families of benchmarks pursue ESG objectives, and whether or not the benchmark administrator offers such benchmarks.

(19) In order to inform investors about the degree to which significant equity and bond benchmarks, as well as EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks, contribute to meeting the objectives of the Paris Agreement, benchmark administrators should publish detailed information on whether or not and to what extent a degree of overall alignment with the target of reducing carbon emissions or the attainment of the objectives of the Paris Agreement is ensured.

(20) Administrators of EU Climate Transition Benchmarks and administrators of EU Paris-aligned Benchmarks should also publish the methodology that they use for the calculation of those benchmarks. That information should describe how the underlying assets were selected and weighted, which assets were excluded and for what reason. In order to assess how the benchmark contributes to environmental objectives, the benchmark administrator should disclose how the carbon emissions of the underlying assets were measured, their respective values, including the total carbon footprint of the benchmark, and the type and source of the data used. In order to enable asset managers to choose the most appropriate benchmark for their investment strategy, benchmark administrators should explain the rationale behind the parameters of their methodology and explain how the benchmark contributes to environmental objectives. The published information should also include details on the frequency of reviews and the procedure followed.

(21) The methodologies used for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks should be based on science-based decarbonisation trajectories or on an overall alignment with the objectives of the Paris Agreement.

(22) In order to ensure continued adherence to the selected objective of climate-change mitigation, administrators of EU Climate Transition Benchmarks and administrators of EU Paris-aligned Benchmarks should review their methodologies regularly and inform users of the applicable procedures for introducing any material change to those methodologies. When introducing a material change, benchmark administrators should disclose the reasons for that change and explain how that change is consistent with the initial objectives of the benchmarks.

(23) Benchmarks which do not have underlying assets that have an impact on climate change, as would be the case, for example, for interest rate and foreign exchange benchmarks, should be exempt from the requirement to disclose in their benchmark statement whether or not and to what extent a degree of overall alignment with their target for reducing carbon emissions or the attainment of the objectives of the Paris Agreement is ensured. Moreover, it should be sufficient for each benchmark or, where applicable, for each family of benchmarks which does not pursue carbon emission objectives to clearly state in the benchmark statement that they do not pursue such objectives.

(24) In order to enhance transparency and ensure an adequate level of harmonisation, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission to specify the minimum content of the disclosure obligations that administrators of EU Climate Transition Benchmarks and administrators of EU Paris-aligned Benchmarks should be subject to, and to specify the minimum standards for harmonisation of the methodology of EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks, including the method for the calculation of the carbon emissions associated with the underlying assets, taking into account the Product and Organisation Environmental Footprint methods as defined in points (a) and (b) of point 2 of Commission Recommendation 2013/179/EU ([6]) and the work of the Technical Expert Group on Sustainable Finance (TEG). It is of particular importance that the Commission carry out appropriate open and public consultations during its preparatory work on each of those delegated acts, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making ([7]). In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts, and are provided with the minutes of all meetings of the TEG.

(25) Regulation (EU) 2016/1011 introduced a transitional period in which index providers providing benchmarks on 30 June 2016 are to apply for authorisation by 1 January 2020. The discontinuation of a critical benchmark could impact market integrity, financial stability, consumers, the real economy and the financing of households and businesses in Member States. The discontinuation of a critical benchmark could also affect the validity of financial contracts or financial instruments and could cause disruption to both investors and consumers, with potentially severe repercussions for financial stability. In addition, if input data for critical benchmarks were no longer available, this could undermine the representative nature of such benchmarks and could negatively impact the ability of such benchmarks to reflect the underlying market or economic reality. Therefore, the maximum period of the mandatory administration of critical benchmarks and the maximum period for mandatory contributions to such benchmarks should be extended to five years. Critical benchmarks are currently being reformed. Switching from an existing critical benchmark to an appropriate successor rate requires a transition period so that all legal and technical arrangements necessary for such a switch can be completed without disruption. During that transition period, the existing critical benchmark should be published alongside its successor rate. It is therefore necessary to extend the period during which an existing critical benchmark can be published and used without its administrator having applied for authorisation.

(26) Regulation (EU) 2016/1011 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

*Article 1*

**Amendments to Regulation (EU) 2016/1011**

Regulation (EU) 2016/1011 is amended as follows:

(1) in Article 3(1), the following points are inserted:

'(23a) "EU Climate Transition Benchmark" means a benchmark which is labelled as an EU Climate Transition Benchmark and fulfils the following requirements:

([6]) Commission Recommendation 2013/179/EU of 9 April 2013 on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations (OJ L 124, 4.5.2013, p. 1).

([7]) OJ L 123, 12.5.2016, p. 1.

(a) for the purposes of point 1(b)(ii) of this paragraph and of Article 19b, its underlying assets are selected, weighted or excluded in such a manner that the resulting benchmark portfolio is on a decarbonisation trajectory; and

(b) it is constructed in accordance with the minimum standards laid down in the delegated acts referred to in Article 19a(2);

(23b) "EU Paris-aligned Benchmark" means a benchmark which is labelled as an EU Paris-aligned Benchmark and fulfils the following requirements:

(a) for the purposes of point 1(b)(ii) of this paragraph and of the delegated act referred to in Article 19c, its underlying assets are selected, weighted or excluded in such a manner that the resulting benchmark portfolio's carbon emissions are aligned with the objectives of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, approved by the Union on 5 October 2016 (*) (the "Paris Agreement");

(b) it is constructed in accordance with the minimum standards laid down in the delegated acts referred to in Article 19a(2); and

(c) the activities relating to its underlying assets do not significantly harm other environmental, social and governance (ESG) objectives;

(23c) "decarbonisation trajectory" means a measurable, science-based and time-bound trajectory towards alignment with the objectives of the Paris Agreement by reducing Scope 1, 2 and 3 carbon emissions as referred to in point (1)(e) of Annex III.

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(*) Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (OJ L 282, 19.10.2016, p. 1).';

(2) Article 13 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) the following point is added:

'(d) an explanation of how the key elements of the methodology laid down in point (a) reflect ESG factors for each benchmark or family of benchmarks, with the exception of interest rate and foreign exchange benchmarks.';

(ii) the following subparagraph is added:

'Benchmark administrators shall comply with the requirement laid down in point (d) of the first subparagraph by 30 April 2020.';

(b) the following paragraph is inserted:

'2a. The Commission is empowered to adopt delegated acts in accordance with Article 49 to supplement this Regulation by laying down the minimum content of the explanation referred to in point (d) of the first subparagraph of paragraph 1 of this Article, as well as the standard format to be used.';

(3) in Title III, the following Chapter is inserted:

*'CHAPTER 3A*

***EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks***

*Article 19a*

**EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks**

1. The requirements laid down in Annex III shall apply to the provision of, and contribution to, EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks, in addition to the requirements of Titles II, III and IV.

2. The Commission is empowered to adopt delegated acts in accordance with Article 49 to supplement this Regulation by laying down the minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks to specify:

(a) the criteria for the choice of the underlying assets, including, where applicable, any criteria for excluding assets;

(b) the criteria and method for the weighting of the underlying assets in the benchmark;

(c) the determination of the decarbonisation trajectory for EU Climate Transition Benchmarks.

3. Benchmark administrators which provide an EU Climate Transition Benchmark or an EU Paris-aligned Benchmark shall comply with this Regulation by 30 April 2020.

*Article 19b*

**Requirements for EU Climate Transition Benchmarks**

Administrators of EU Climate Transition Benchmarks shall select, weight, or exclude underlying assets issued by companies that follow a decarbonisation trajectory by 31 December 2022, in accordance with the following requirements:

(i) the companies disclose measurable carbon emission reduction targets to be achieved within specific timeframes;

(ii) the companies disclose a reduction in carbon emissions which is disaggregated down to the level of relevant operating subsidiaries;

(iii) the companies disclose annual information on progress made towards those targets;

(iv) the activities relating to the underlying assets do not significantly harm other ESG objectives.

*Article 19c*

**Exclusions for EU Paris-aligned Benchmarks**

1. The Commission is empowered to adopt a delegated act in accordance with Article 49 in order to supplement this Regulation by identifying, in respect of EU Paris-aligned Benchmarks, the sectors to be excluded because they do not have measurable carbon emission reduction targets with specific deadlines that are aligned with the objectives of the Paris Agreement. The Commission shall adopt that delegated act by 1 January 2021 and update it every three years.

2. When drawing up the delegated act referred to in paragraph 1, the Commission shall take into account the work of the TEG.

*Article 19d*

**Endeavour to provide EU Climate Transition Benchmarks**

By 1 January 2022, administrators which are located in the Union and which provide significant benchmarks determined on the basis of the value of one or more underlying assets or prices shall endeavour to provide one or more EU Climate Transition Benchmarks.';

(4) in Article 21(3), the third subparagraph is replaced by the following:

'By the end of that period, the competent authority shall review its decision to compel the administrator to continue to publish the benchmark. The competent authority may, where necessary, extend that period by an appropriate period not exceeding 12 months. The maximum period of mandatory administration shall not exceed five years.';

(5) Article 23 is amended as follows:

(a) in paragraph (6), the second subparagraph is replaced by the following:

'The maximum period of mandatory contribution under points (a) and (b) of the first subparagraph shall not exceed five years.';

(b) paragraph (10) is replaced by the following:

'10. In the event that a critical benchmark is to be ceased to be provided, each supervised contributor to that benchmark shall contribute input data for a period of time determined by the competent authority, but not exceeding the maximum five year period laid down in the second subparagraph of paragraph 6.';

(6) in Article 27, the following paragraphs are inserted:

'2a. By 30 April 2020, for each of the requirements referred to in paragraph 2, the benchmark statement shall contain an explanation of how ESG factors are reflected in each benchmark or family of benchmarks provided and

published. For those benchmarks or families of benchmarks that do not pursue ESG objectives, it shall be sufficient for benchmark administrators to clearly state in the benchmark statement that they do not pursue such objectives.

Where no EU Climate Transition Benchmark or EU Paris-aligned Benchmark is available in the portfolio of that individual benchmark administrator, or the individual benchmark administrator has no benchmarks that pursue ESG objectives or take into account ESG factors, this shall be stated in the benchmark statements of all benchmarks provided by that administrator. For significant equity and bond benchmarks, as well as for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks, benchmark administrators shall disclose in their benchmark statements details on whether or not and to what extent a degree of overall alignment with the target of reducing carbon emissions or the attainment of the objectives of the Paris Agreement is ensured in accordance with the disclosure rules for financial products in Article 9(3) of Regulation (EU) 2019/2088 of the European Parliament and of the Council (*).

By 31 December 2021, benchmark administrators shall, for each benchmark or, where applicable, each family of benchmarks, with the exception of interest rate and foreign exchange benchmarks, include in their benchmark statement an explanation of how their methodology aligns with the target of carbon emission reductions or attains the objectives of the Paris Agreement.

2b. The Commission is empowered to adopt delegated acts in accordance with Article 49 to supplement this Regulation by further specifying the information to be provided in the benchmark statement pursuant to paragraph 2a of this Article, as well as the standard format to be used for references to ESG factors to enable market participants to make well-informed choices and to ensure the technical feasibility of compliance with that paragraph.

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(*) Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (OJ L 317, 9.12.2019, p. 1).';

(7) in Article 42(1), the first subparagraph is replaced by the following:

'1. Without prejudice to the supervisory powers of competent authorities in accordance with Article 41, and the right of Member States to provide for and impose criminal sanctions, Member States shall, in conformity with national law, provide for competent authorities to have the power to impose appropriate administrative sanctions and other administrative measures in relation to at least the following infringements:

(a) any infringement of Article 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19a, 19b, 19c, 21, 23, 24, 25, 26, 27, 28, 29 or 34 where they apply; and

(b) any failure to cooperate or comply in an investigation or with an inspection or request covered by Article 41.';

(8) Article 49 is replaced by the following:

'*Article 49*

**Exercise of the delegation**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Articles 3(2), 13(2a), 19a(2), 19c(1), 20(6), 24(2), 27(2b), 33(7), 51(6) and 54(3) shall be conferred on the Commission for a period of five years from 10 December 2019. The Commission shall draw up a report in respect of the delegation of power no later than 11 March 2024. The delegation of power shall be tacitly extended for further periods of identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegations of power referred to in Articles 3(2), 13(2a), 19a(2), 19c(1), 20(6), 24(2), 27(2b), 33(7), 51(6) and 54(3) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of power specified in that decision. It shall take effect on the day following the publication of the decision in the *Official Journal of the European Union* or on a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.

5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

6. A delegated act adopted pursuant to Article 3(2), 13(2a), 19a(2), 19c(1), 20(6), 24(2), 27(2b), 33(7), 51(6) or 54 (3) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of three months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.';

(9) Article 51 is amended as follows:

(a) the following paragraphs are inserted:

'4a. An index provider may continue to provide an existing benchmark that has been recognised as a critical benchmark by an implementing act adopted by the Commission in accordance with Article 20 until 31 December 2021 or, where the index provider submits an application for authorisation in accordance with paragraph 1, unless and until such authorisation is refused.

4b. An existing benchmark that has been recognised as a critical benchmark by an implementing act adopted by the Commission in accordance with Article 20 may be used for existing and new financial instruments, financial contracts, or for measuring the performance of an investment fund until 31 December 2021 or, where the index provider submits an application for authorisation in accordance with paragraph 1, unless and until such authorisation is refused.';

(b) paragraph 5 is replaced by the following:

'5. Unless the Commission has adopted an equivalence decision as referred to in Article 30(2) or (3) or unless an administrator has been recognised pursuant to Article 32, or a benchmark has been endorsed pursuant to Article 33, the use in the Union by supervised entities of a benchmark provided by an administrator located in a third country where the benchmark is already used in the Union as a reference for financial instruments, financial contracts, or for measuring the performance of an investment fund, shall be permitted only for such financial instruments, financial contracts and measurements of the performance of an investment fund that already reference the benchmark in the Union on, or which add a reference to such benchmark prior to, 31 December 2021.';

(10) in Article 54, the following paragraphs are added:

'4. By 31 December 2022, the Commission shall review the minimum standards for EU Climate Transition Benchmarks and for EU Paris-aligned Benchmarks in order to ensure that the selection of the underlying assets is coherent with environmentally sustainable investments as defined in a Union-wide framework.

5. Before 31 December 2022, the Commission shall present a report to the European Parliament and to the Council on the impact of this Regulation and the feasibility of an "ESG benchmark", taking into account the evolving nature of sustainability indicators and the methods used to measure them. That report shall be accompanied, where appropriate by a legislative proposal.

6. By 1 April 2020, the Commission shall submit a report to the European Parliament and to the Council on the impact of this Regulation on the operation of third country benchmarks in the Union, including on the recourse by third country benchmark administrators to endorsement, recognition or equivalence, and on potential shortcomings of the current framework. That report shall analyse the consequences of the application of paragraphs 4a, 4b and 4c of Article 51 for Union and third-country benchmark administrators, including in terms of a level playing field. That report shall assess in particular whether there is a need to amend this Regulation and shall be accompanied by a legislative proposal, if appropriate.';

(11) the Annexes are amended in accordance with the Annex to this Regulation.

*Article 2*

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

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

Done at Strasbourg, 27 November 2019.

| *For the European Parliament* | *For the Council* |
| --- | --- |
| *The President* | *The President* |
| D. M. SASSOLI | T. TUPPURAINEN |

*ANNEX*

The following Annex is added:

*'ANNEX III*

**EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks**

Methodology for EU Climate Transition Benchmarks

(1) The administrator of an EU Climate Transition Benchmark shall formalise, document and make public any methodology used for the calculation of the benchmark, giving the following information, while ensuring confidentiality and the protection of undisclosed know-how and business information (trade secrets) as defined in Directive (EU) 2016/943 of the European Parliament and of the Council (*)

(a) the list of the main constituents of the benchmark;

(b) all criteria and methods, including selection and weighting factors, metrics and proxies used in the benchmark methodology;

(c) the criteria applied to exclude assets or companies that are associated with a level of carbon footprint or a level of fossil fuel reserves that are incompatible with inclusion in the benchmark;

(d) the criteria for the determination of the decarbonisation trajectory;

(e) the type and source of data used to determine the decarbonisation trajectory for:

(i) Scope 1 carbon emissions, namely emissions generated from sources that are controlled by the company that issues the underlying assets;

(ii) Scope 2 carbon emissions, namely emissions from the consumption of purchased electricity, steam, or other sources of energy generated upstream from the company that issues the underlying assets;

(iii) Scope 3 carbon emissions, namely all indirect emissions that are not covered by points (i) and (ii) that occur in the value chain of the reporting company, including both upstream and downstream emissions, in particular for sectors with a high impact on climate change and its mitigation;

(iv) whether the data uses the Product and Organisation Environmental Footprint methods as defined in points (a) and (b) of point 2 of Commission Recommendation 2013/179/EU or global standards such as those of the Financial Stability Board's Taskforce on Climate-related Financial Disclosures;

(f) the total carbon emissions of the index portfolio.

Where a parent index is used for the construction of an EU Climate Transition Benchmark, the tracking error between the EU Climate Transition Benchmark and the parent index shall be disclosed.

Where a parent index is used for the construction of an EU Climate Transition Benchmark, the ratio between the market value of the securities that are in the EU Climate Transition Benchmark and the market value of the securities in the parent index shall be disclosed.

Methodology for EU Paris-aligned Benchmarks

(2) In addition to points (1)(a), (1)(b), and (1)(c), the administrator of an EU Paris-aligned Benchmarks shall specify the formula or calculation that is used to determine whether the emissions are in line with the objectives of the Paris Agreement, while ensuring confidentiality and the protection of undisclosed know-how and business information (trade secrets) as defined by Directive (EU) 2016/943.

Changes to the methodology

(3) Administrators of EU Climate Transition and EU Paris-aligned Benchmarks shall adopt procedures for introducing changes to their methodology. They shall make those procedures public, and shall make public any proposed changes to their methodology and the rationale for those changes. Those procedures shall be consistent with the overriding objective that benchmark calculations be consistent with points (23a) and (23b) of Article 3(1). Those procedures shall provide:

(a) advance notice within a clear timeframe that gives users of benchmarks sufficient opportunity to analyse and comment on the impact of such proposed changes, having regard to the administrators' calculation of the overall circumstances;

(b) for the possibility for users of benchmarks to comment on those changes and for the administrators to respond to those comments, and shall make those comments accessible after any given consultation period, except where the commenter has requested confidentiality.

(4) Administrators of EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks shall regularly examine their methodologies on at least an annual basis to ensure that their benchmarks reliably reflect the stated objectives, and shall have a process in place for taking the views of all relevant users into account.'.

(*) Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157, 15.6.2016, p. 1).

II

*(Non-legislative acts)*

# REGULATIONS

## COMMISSION DELEGATED REGULATION (EU) 2019/2090

**of 19 June 2019**

**supplementing Regulation (EU) 2017/625 of the European Parliament and Council regarding cases of suspected or established non-compliance with Union rules applicable to the use or residues of pharmacologically active substances authorised in veterinary medicinal products or as feed additives or with Union rules applicable to the use or residues of prohibited or unauthorised pharmacologically active substances**

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2017/625 of the European Parliament and the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (Official Controls Regulation) ([1]), and in particular Articles 19(2)(a) and 19(2)(b), thereof,

Whereas:

(1) Regulation (EU) 2017/625 lays down rules for the performance of official controls and other official activities by the competent authorities of the Member States to verify compliance with Union legislation, inter alia, in the area of food safety at all stages of production, processing and distribution. It provides for specific rules on official controls in relation to substances whose use may result in residues in food and feed.

(2) Articles 137 and 138 of Regulation (EU) 2017/625 respectively lay down obligations of the competent authorities as regards actions to be taken in case of suspicion of non-compliance and list actions and measures to be taken in the event of established non-compliance.

(3) Regulation (EU) 2017/625 repeals Directive 96/23/EC ([2]) with effect from 14 December 2019. That Directive currently lays down measures to monitor certain substances and residues thereof in live animals and animal products and specifically defines the enforcement measures to be taken by the competent authorities in cases of suspected or established non-compliance related to substances and residues within its scope.

([1]) OJ L 95, 7.4.2017, p. 1.

([2]) Council Directive 96/23/EC of 29 April 1996 on measures to monitor certain substances and residues thereof in live animals and animal products and repealing Directives 85/358/EEC and 86/469/EEC and Decisions 89/187/EEC and 91/664/EEC (OJ L 125, 23.5.1996, p. 10).

(4) The rules set out in Directive 96/23/EC ensure the harmonised enforcement of the EU food safety legislation related to the use and residues of pharmacologically active substances. In order to rationalise and simplify the overall legislative framework, the rules applicable to official controls in specific areas of the agri-food chain legislation have been integrated into the framework for official controls defined by Regulation (EU) 2017/625. In order to ensure a continued and harmonised enforcement, the rules of Directive 96/23/EC related to the follow-up to non-compliances, should be integrated in the new legal framework under Regulation (EU) 2017/625.

(5) The rules laid down in this Regulation should ensure, within the framework of Regulation (EU) 2017/625, a continuation of the requirements on the follow-up of suspected or established non-compliance with the rules applicable to the use or residues of pharmacologically active substances authorised in veterinary medicinal products or as feed additives or with Union rules applicable to the use or residues of prohibited or unauthorised pharmacologically active substances, in particular as laid down in:

— Regulation (EC) No 470/2009 of the European Parliament and of the Council ([3]) laying down rules for the establishment of residue limits of pharmacologically active substances in food of animal origin and for placing on the market food of animal origin containing residues of pharmacologically active substances;

— Commission Regulation (EU) No 37/2010 ([4]), which classifies pharmacologically active substances in light of their prohibition or the maximum residue limits applicable to them;

— Regulation (EC) No 1831/2003 of the European Parliament and of the Council ([5]), which lays down rules for the authorisation of certain veterinary medicinal products as feed additives and the legal acts adopted on this basis, define the authorisations of specific substances and their maximum residue limits in food of animal origin;

— Commission Regulation (EC) No 1950/2006 ([6]), which lays down a list of substances essential for the treatment of equidae;

— Commission Regulation (EC) No 124/2009 ([7]), which sets maximum levels for the presence of coccidiostats or histomonostats in foods resulting from the unavoidable carry-over of these substances in non-target feed ([8]) on the basis of Council Regulation (EEC) No 315/93 laying down Community procedures for contaminants in food ([9]).

— Council Directive 96/22/EC ([10]), which prohibits the use in stockfarming of certain substances having a hormonal or thyreostatic action and of ß-agonists.

(6) Where, on the basis of the Union rules referred to Recital 5, prohibited or unauthorised substances are discovered in the possession of non-authorised persons, thereby creating a suspicion of illegal treatment and a possible impact on food safety, the measures for official detention and investigations, as provided for in Regulation (EU) 2017/625 and in this Regulation should apply.

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([3]) Regulation (EC) No 470/2009 of the European Parliament and of the Council of 6 May 2009 laying down Community procedures for the establishment of residue limits of pharmacologically active substances in foodstuffs of animal origin, repealing Council Regulation (EEC) No 2377/90 and amending Directive 2001/82/EC of the European Parliament and of the Council and Regulation (EC) No 726/2004 of the European Parliament and of the Council (OJ L 152, 16.6.2009, p. 11).

([4]) Commission Regulation (EU) No 37/2010 of 22 December 2009 on pharmacologically active substances and their classification regarding maximum residue limits in foodstuffs of animal origin (OJ L 15, 20.1.2010, p. 1).

([5]) Regulation (EC) No 1831/2003 of the European Parliament and of the Council of 22 September 2003 on additives for use in animal nutrition (OJ L 268, 18.10.2003, p. 29).

([6]) Commission Regulation (EC) No 1950/2006 of 13 December 2006 establishing, in accordance with Directive 2001/82/EC of the European Parliament and of the Council on the Community code relating to veterinary medicinal products, a list of substances essential for the treatment of equidae and of substances bringing added clinical benefit use (OJ L 367, 22.12.2006, p. 33).

([7]) Commission Regulation (EC) No 124/2009 of 10 February 2009 setting maximum levels for the presence of coccidiostats or histomonostats in food resulting from the unavoidable carry-over of these substances in non-target feed (OJ L 40, 11.2.2009, p. 7).

([8]) Non-compliance with these maximum levels is considered to be non-compliance with the rules applicable to the use and residues of veterinary medicinal products.

([9]) Council Regulation (EEC) No 315/93 of 8 February 1993 laying down Community procedures for contaminants in food (OJ L 37, 13.2.1993, p. 1).

([10]) Council Directive 96/22/EC of 29 April 1996 concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of ß-agonists, and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC (OJ L 125, 23.5.1996, p. 3).

(7) Directive 2001/82/EC of the European Parliament and of the Council ([11]) establishes the regulatory framework for the placing on the market, manufacturing, import, export, supply, distribution, pharmacovigilance, control and the use of veterinary medicinal products. Pharmacologically active substances, which are not authorised in veterinary medicinal products, are not to be used on food-producing animals, with the exception of the use of substances essential for the treatment of equidae, as laid down in Regulation (EC) No 1950/2006. Follow-up on established or suspected non-compliances related to the use of veterinary medicinal products which have a suspected or established impact on food safety falls within the scope of Regulation (EU) 2017/625 and of this Regulation. Directive 2001/82/EC has been repealed and replaced by Regulation (EU) 2019/6 of the European Parliament and the Council on veterinary medicinal products (the new VMP Regulation) ([12]) which is to apply from 28 January 2022 and which amongst others provides for restrictions on the use in animals of antimicrobial veterinary medicinal products.

(8) In light of the fact that diverging enforcement practices could lead to an uneven protection of human and animal health, to disruptions of the internal market and to distortions of competition, Regulation (EU) 2017/625 should be supplemented by specific rules for the performance of official controls on animals and goods at any stage of production, processing, distribution and use in relation to suspected or established non-compliances related to the relevant substances and for action to be taken following those official controls.

(9) In view of the specificities of the actions and controls to be taken in case of suspected or established non-compliance with Union rules applicable to the use of pharmacologically active substances on food-producing animals and to their residues, and in order to ensure an Union-wide uniform application of enforcement actions, the cases where the measures listed in Articles 137 and 138 of Regulation (EU) 2017/625 are to be taken should be specified to tailor them to this sector.

(10) Pursuant to Article 79(2)(c) of Regulation (EU) 2017/625, costs generated by mandatory fees or charges for official controls taken under this Regulation, should be borne by the operator responsible for the animals and goods.

(11) Article 50 of Regulation (EC) No 178/2002 of the European Parliament and of the Council ([13]) requires Member States to notify a direct or indirect risk to human health deriving from food or feed via the network, which has been put in place for this purpose. Non-compliances related to residues of pharmacologically active substances and constituting such risks should therefore be notified accordingly. In addition, where the non-compliances are identified in relation to animals or products of animal origin originating from another Member State, the authorities of the Member State having identified the non-compliance and the Member State of origin should make use of the provisions on assistance set out in Regulation (EU) 2017/625 and take the appropriate follow-up measures, as defined in the present Regulation.

(12) As the rules laid down in Directive 96/23/EC for the follow-up of specific cases of established non-compliance or suspected non-compliance related to the substances and residues within its scope are repealed with effect from 14 December 2019, this Regulation should apply from that date onwards.

HAS ADOPTED THIS REGULATION:

*Article 1*

**Subject matter**

This Regulation lays down rules on specific requirements for official controls and applicable measures for cases of non-compliance or suspected non-compliance with Union rules applicable to the use of authorised, unauthorised or prohibited pharmacologically active substances on food-producing animals and to their residues.

([11]) Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products (OJ L 311, 28.11.2001, p. 1).

([12]) Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC (OJ L 4, 7.1.2019, p. 43).

([13]) Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ L 31, 1.2.2002, p. 1).

*Article 2*

**Definitions**

For the purposes of this Regulation, the definitions in Regulation (EU) 2017/625, Directive 2001/82/EC and Regulation (EC) No 470/2009 shall apply. The following definitions shall also apply:

(a) 'pharmacologically active substance' means any substance or mixture of substances intended to be used in the manufacture of a veterinary medicinal product that, when used in its production, becomes an active ingredient of that product;

(b) 'unauthorised substances' means pharmacologically active substances, which are not included in Table 1 of the Annex to Regulation (EU) No 37/2010 or substances that are not authorised as a feed additive under Regulation (EC) No 1831/2003, with the exception of substances essential for the treatment of equidae and substances bringing added clinical benefit compared to other treatment options available for equidae, as laid down in Regulation (EC) No 1950/2006.

(c) 'illegal treatment' means the use in food producing animals of

— prohibited or unauthorised substances or products, or

— substances or veterinary medicinal products authorised under Union legislation for purposes or under conditions other than those laid down in the said legislation or, where appropriate, in national legislation.

For the purpose of this Regulation for substances or veterinary medicinal products authorised under Union legislation, non-compliance with the withdrawal period or residues of pharmacologically active substances exceeding the maximum residue limit or maximum level shall not be considered as an illegal treatment, provided that all other conditions on the use of the substance or veterinary medicinal product, laid down in Union or national legislation, are complied with.

(d) 'residues of pharmacologically active substances exceeding the maximum residue limit' means the presence of residues of authorised pharmacologically active substances in products of animal origin in a concentration, exceeding the maximum residue limits set under Union legislation;

(e) 'residues of pharmacologically active substances exceeding the maximum level' means the presence of residues of pharmacologically active substances in products of animal origin, resulting from the unavoidable carry-over of these substances in non-target feed, in a concentration, exceeding the maximum levels set under Union legislation;

(f) 'batch of animals' means a group of animals of the same species, in the same age range, reared on the same holding, at the same time and under the same conditions of rearing.

*Article 3*

**Actions to be taken at the slaughterhouse in case of non-compliance or suspected non-compliance**

1. If the official veterinarian performing official controls in a slaughterhouse or the official auxiliary performing certain tasks in the framework of these controls suspect or has evidence that animals have been subject to illegal treatment, the official veterinarian shall ensure that the following actions are taken:

(a) order that the operator keeps the concerned animals separated from other batches of animals present or arriving at the slaughterhouse under the conditions to be established by the competent authority;

(b) arrange for the animals to be slaughtered separately from other batches of animals present at the slaughterhouse;

(c) order that the operator separates the carcases, meat, offal and by-products from the concerned animals, to be immediately identified and kept separated from other products of animal origin, and order such products not to be moved, processed or disposed without prior authorisation by the competent authority;

(d) order that samples necessary to detect the presence of prohibited or unauthorised substances or of authorised substances, in case of a suspected or established use under conditions other than those laid down in the legislation, are taken.

2. If the illegal treatment is established, the competent authority shall order the operator to dispose the carcasses, meat, offal and by-products as laid down in Regulation (EC) No 1069/2009 of the European Parliament and of the Council ([14]), without indemnity or compensation.

3. If the official veterinarian performing official controls in a slaughterhouse or the official auxiliary performing certain tasks in the framework of these controls suspects that the animals present in the slaughterhouse have been treated with an authorised veterinary medicinal product, but that the withdrawal period referred to in Directive 2001/82/EC has not been respected, the official veterinarian shall order that the concerned animals are separated from other batches of animals present or arriving at the slaughterhouse, under conditions to be established by the competent authority. The official veterinarian shall also:

— postpone the slaughter at the expense of the operator, until the withdrawal period has been respected, or;

— issue an order to slaughter the animals separately and, pending the outcome of an investigation, order for the carcases, meat, offal and by-products from the concerned animals, to be immediately identified and kept separated from other products of animal origin.

The slaughter may only be postponed temporarily, provided that the official veterinarian has verified that the Union legislation on animal welfare is respected and that the concerned animals can be kept separated from the other animals.

4. When the slaughter is postponed in accordance with paragraph (3), the withdrawal period shall in no circumstances be shorter than:

— the withdrawal period provided for in the summary of products characteristics of the marketing authorisation for veterinary medicinal products;

— the withdrawal period established under the Regulation authorising the use of a certain pharmacologically active substance as a feed additive in accordance with Regulation (EC) No 1831/2003.

— the withdrawal period prescribed by the veterinarian for uses in accordance Article 11 of Directive 2001/82/EC or, if no withdrawal period is prescribed for such uses, the minimum withdrawal period laid down in Article 11 of Directive 2001/82/EC;

Following the postponement of the slaughter, the competent authority may take samples at the expense of the operator to verify compliance with the maximum residue limits once the animals have been slaughtered after the expiry of the withdrawal period.

5. If the official veterinarian performing official controls in a slaughterhouse or the official auxiliary performing certain tasks in the framework of these controls has evidence that the animals present in the slaughterhouse have been treated with an authorised veterinary medicinal product, but that the withdrawal period referred to in Directive 2001/82/EC has not been respected, the official veterinarian shall order that the concerned animals are separated from other batches of animals present or arriving at the slaughterhouse, under conditions to be established by the competent authority. The official veterinarian shall also:

— postpone the slaughter at the expense of the operator under the conditions laid down in the second subparagraph of Article 3(3) and in Article 3(4) until the withdrawal period has been respected, or;

— issue an order that the operator kills the animals separately. In this case the official veterinarian shall declare them unfit for human consumption, whilst taking all necessary precautions to safeguard animal and public health.

6. If the operator fails to take all necessary measures to comply with the orders of the official veterinarian or competent authority in accordance with Article 3(1), 3(2), 3(3), 3(4), 3(5) and 3(6) of this Regulation, the official veterinarian or the competent authority shall take measures having the same effect, at the expense of the operator.

*Article 4*

**Investigation**

1. Where the maximum residue limits for pharmacologically active substances authorised in veterinary medicinal products or as feed additives, set on the basis of Regulation (EC) No 470/2009 and Regulation (EC) No 1831/2003, or, where the maximum levels for residues of pharmacologically active substances resulting from the unavoidable carry-over of these substances in non-target feed, set on the basis of Regulation (EC) No 315/93, have been exceeded, thereby establishing non-compliance, the competent authority, shall:

([14]) Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation) (OJ L 300, 14.11.2009, p. 1).

(a) carry out any necessary measure or investigation, which it deems appropriate in relation to the finding in question. This may include any investigation in the farm of origin or departure of the animals, including controls on animals or batches of animals on their farms of origin or place of departure, to determine the extent and origin of non-compliance and to establish the extent of the operator's responsibilities;

(b) request the animal keeper or the responsible veterinarian to provide the prescription and treatment records and any documentation, justifying the nature of the treatment.

2. Where residues are identified at concentrations below the maximum residue limits for pharmacologically active substances authorised in veterinary medicinal products or as feed additives, but where the presence of those residues is inconsistent with the food chain information, thereby creating a suspicion of non-compliance or illegal treatment, the competent authority shall carry out any measure of investigation which it deems appropriate for investigating the source of these residues or the deficiencies in the food chain information.

3. Where residues are suspected at levels exceeding the maximum residue limits or maximum levels for pharmacologically active substances authorised in veterinary medicinal products or as feed additives, set under Union legislation, the competent authority shall carry out any measure of investigation which it deems appropriate.

4. Where illegal treatment is suspected or established, or where substances falling under the scope of Directive 96/22/EC are discovered in the possession of non-authorised persons or operators, or where prohibited or unauthorised substances or products are discovered in the possession of non-authorised persons or operators, the competent authority shall:

(a) immediately place the livestock and products concerned by the investigation under official detention.

(b) during official detention the competent authority shall:

— order that the animals concerned by the investigation are not moved without prior authorisation by the competent authority and this for the duration of the investigation;

— order that carcases, meat, offal, by-products, milk, eggs and honey from those animals do not leave the farm or establishment of origin and are not handed over to any other person without prior authorisation of the competent authority;

— order that, where relevant, feed, water or any other products concerned, are kept separate and are not moved from the farm or establishment of origin;

— ensure that the animals concerned by the investigation bear an official mark or other means of identification, or, in the case of poultry, fishes and bees, that they are kept in a marked space or hive;

— take appropriate precautionary measures in accordance with the nature of the substance or substances identified;

(c) request the animal keeper and the responsible veterinarian to provide any documentation justifying the nature of the treatment;

(d) carry out any other official controls on animals or batches of animals at the farm of origin or place of departure of the animals, necessary to ascertain such use;

(e) carry out any other official controls necessary to ascertain the acquisition and presence of unauthorised or prohibited substances;

(f) carry out any other official controls deemed necessary to clarify the origin of the prohibited or unauthorised substances or products or of the treated animals.

5. The official controls referred to in this Article may also include controls on manufacturers, distributors, transporters, production sites of pharmacologically active substances and veterinary medicinal products, pharmacies, all relevant actors in the supply-chain and any other site concerned by the investigation.

6. The official controls referred to in this Article may also include official sampling, including of water, feed, meat, offal, blood, animal by-products, hair, urine, faeces and other animal matrices. The competent authority shall take any number of samples it considers necessary for investigating the suspected or established non-compliance or illegal treatment. In case of aquaculture animals, samples from the waters in which they are grown or caught and in the case of honey bees, samples of the hives may be required.

*Article 5*

**Follow-up on residues of pharmacologically active substances authorised in veterinary medicinal products or as feed additives, exceeding the applicable maximum residue limits or maximum levels**

1. Where the maximum residue limits for pharmacologically active substances authorised in veterinary medicinal products or as feed additives, set on the basis of Regulation (EC) No 470/2009 and Regulation (EC) No 1831/2003 have been exceeded or, where the maximum levels for residues of pharmacologically active substances resulting from the unavoidable carry-over of these substances in non-target feed, set on the basis of Regulation (EEC) No 315/93, have been exceeded, the competent authority shall:

— declare the carcases and products concerned by the non-compliance unfit for human consumption and order the operator to dispose of all products as category 2 material, as laid down in Regulation (EC) No 1069/2009;

— take any other measures necessary to safeguard public health, which may include prohibiting animals from leaving the farm concerned or products from leaving the farm or establishment concerned for a set period;

— order that the operator takes appropriate action to address the causes of the non-compliance;

— perform additional official controls to verify that action taken by the operator, to address the cause of non-compliance is effective. This may include taking as many follow-up samples as considered necessary in relation to animals or products from the same farm or establishment.

2. In the event of repeated non-compliance by the same operator, the competent authority shall perform regular additional official controls, including sampling and analysis, on the animals and products from the operator concerned for a period of at least six months from the date on which the second non-compliance was established. It shall also order the operator to ensure that the concerned animals and the carcases, meat, offal, by-products, milk, eggs and honey from these animals are kept separate from other animals, that they do not leave the farm or establishment of origin and are not handed over to any other person without prior authorisation of the competent authority.

3. If the operator fails to take all necessary measures to comply with the orders of the competent authority in accordance with this Article, the competent authority shall take measures having the same effect, at the expense of the operator.

*Article 6*

**Follow-up of illegal treatments and the possession of prohibited or unauthorised substances or products**

1. Where substances within the scope of Directive 96/22/EC, prohibited or unauthorised substances or products are discovered in the possession of non-authorised persons, thereby creating a suspicion of illegal treatment, those substances or products shall be placed under official detention until the measures provided for under paragraphs 2, 3 and 4 of this Article are taken by the competent authority, without prejudice to the subsequent destruction of the products and the possible imposition of penalties on the offender(s).

2. Where illegal treatment is established or where substances falling under the scope of Directive 96/22/EC, prohibited or unauthorised substances or products are discovered in the possession of non-authorised operators or persons, the competent authority shall:

— place or keep the livestock and the carcases, meat, offal and by-products of the animals concerned by the illegal treatment together with the milk, eggs and honey from those animals under official detention as provided for in Article 4(4)(b);

— take samples from all relevant batches of animals belonging to the farm.

— order the operator to kill the animal or animals for which illegal treatment has been established, and to dispose them as laid down in Regulation (EC) No 1069/2009;

— declare all carcases or products concerned by the illegal treatment unfit for human consumption and order the operator to dispose of them as laid down in Regulation (EC) No 1069/2009;

3. For the purposes of paragraph 2:

— all animals of the batch or batches from which one or more animals were confirmed to have been subject to an illegal treatment with prohibited or unauthorised substances shall be considered to have been also subject to an illegal treatment, unless the competent authority, at the request and at the expense of the operator, agrees to perform additional official controls on all animals of the relevant batch or batches to ascertain that no illegal treatment took place in relation to those animals.

— all animals of the batch or batches from which one or more animals were confirmed to have been subject to an illegal treatment due to the use in food producing animals of substances or veterinary medicinal products authorised under Union legislation for purposes or under conditions other than those laid down in that legislation or, where appropriate, in national legislation, shall be considered to have been also subject to an illegal treatment, unless the competent authority, at the request and at the expense of the operator, agrees to perform additional official controls on the animals of the relevant batch or batches, which are suspected to have been illegally treated, to ascertain that no illegal treatment took place in relation to those animals.

4. In the case of established illegal treatment in aquaculture, samples from all relevant ponds, pens and cages shall be taken. In case the illegal treatment in aquaculture is established, if the sample taken from a specific pond, pen or cage is non-compliant, all the animals in that pond, pen or cage shall be considered to have been subject to illegal treatment.

5. The competent authority shall perform regular additional official controls for a period of at least 12 months from the date upon which the non-compliance was ascertained on the farm or farms under the responsibility of the same operator and on the animals and goods belonging to the farm or farms in question.

6. The farms or establishments, supplying the holding concerned by the non-compliance, as well as all farms in the same supply chain of animals and animal feed as the farm of origin or departure may be subject to official controls to determine the origin of the substance in question:

— during the transport, distribution and sale or acquisition of pharmacologically active substances;

— at any point in the animal feed production and distribution chain;

— throughout the production chain of animals and products of animal origin

7. If the operator fails to take all necessary measures to comply with the orders of the competent authority in accordance with this Article, the competent authority shall take measures having the same effect, at the expense of the operator.

*Article 7*

**Requirements for analytical methods and sampling**

All samples referred to in this Regulation shall be taken and analysed in accordance with Regulation (EU) 2017/625, Commission Decision 1998/179/EC ([15]) and Commission Decision 2002/657/EC ([16]).

*Article 8*

**Actions on registration, authorisation and official approval arrangements**

Where the possession, use or manufacture of unauthorised substances or products is confirmed, all registration, authorisation or official approval arrangements enjoyed by the establishment or the operator concerned shall be suspended for a period established by the competent authority.

In case of a repeat offence, such arrangements shall be withdrawn by the competent authority. In case of withdrawal, the operator shall be required to re-apply for the concerned registration, authorization or official approval arrangements and demonstrate its compliance with relevant requirements in this regard.

([15]) Commission Decision 1998/179/EC of 23 February 1998 laying down detailed rules on official sampling for the monitoring of certain substances and residues thereof in live animals and animal products (OJ L 65, 5.3.1998, p. 31).

([16]) Commission Decision 2002/657/EC of 14 August 2002 implementing Council Directive 96/23/EC concerning the performance of analytical methods and the interpretation of results (OJ L 221, 17.8.2002, p. 8)

*Article 9*

**Administrative assistance**

Where the non-compliance referred to in Articles 5 and 6 is ascertained in relation to animals or products of animal origin originating from another Member State, the competent authority carrying out the investigation shall send a notification of the established non-compliance in accordance with Articles 105 and 106 of Regulation (EU) 2017/625 and, if required, it shall issue a request for administrative assistance from the competent authority of the Member State of origin in accordance with Article 104 of that Regulation. The competent authority of the Member State of origin shall apply Articles 5 and 6 of this Regulation to the farm or establishment of origin or departure.

*Article 10*

**References**

References to Article 13, Article 15(3), Article 16(2), Article 16(3), Article 17, Article 18, and Articles 22 to 25 of Directive 96/23/EC shall be construed as references to this Regulation and read in accordance with the correlation table in the Annex.

*Article 11*

**Entry into force and application**

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

It shall apply from 14 December 2019 onwards.

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

Done at Brussels, 19 June 2019.

*For the Commission*
*The President*
Jean-Claude JUNCKER

*ANNEX*

**CORRELATION TABLE REFERRED TO IN ARTICLE 10**

| Directive 96/23/EC | This Regulation |
|---|---|
| Article 13 | Article 4 |
| Article 15(3) | Article 4, 5, 6 and 9 |
| Article 16(2) | Article 4, 5 and 6 |
| Article 17 | Article 6 |
| Article 18 | Article 5 |
| Article 22 | Article 6(1) |
| Article 23(1) | Article 4(4) |
| Article 23(2), 23 (3), 23 (4) and 23 (5) | Article 6 |
| Article 24 | Article 3 |
| Article 25 | Article 8 |

# COMMISSION IMPLEMENTING REGULATION (EU) 2019/2091

## of 28 November 2019

## amending Implementing Regulation (EU) 2015/2197 with regard to closely correlated currencies in accordance with Regulation (EU) No 575/2013 of the European Parliament and of the Council

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 ([1]), and in particular Article 354(3) thereof,

Whereas:

(1) In order to ensure that the currency pairs referred to in the Annex to Commission Implementing Regulation (EU) 2015/2197 ([2]) continue to reflect the actual correlation between the relevant currencies, it is necessary to update the list of closely correlated currencies.

(2) The list uses 31 March 2018 as the end date for the purpose of computing the three and five year data series required to assess the currency pairs in accordance with Regulation (EU) No 575/2013.

(3) This Regulation is based on the draft implementing technical standards submitted by the European Banking Authority (EBA) to the Commission.

(4) Given that the necessary amendments to Implementing Regulation (EU) 2015/2197 do not involve significant changes in substantive terms, in accordance with the second subparagraph of Article 15(1) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council ([3]), EBA has not conducted an open public consultation, considering that it would be disproportionate in relation to the scope and impact of the draft implementing technical standards concerned.

(5) Implementing Regulation (EU) 2015/2197 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

*Article 1*

The Annex to Implementing Regulation (EU) 2015/2197 is replaced by the text in the Annex to this Regulation.

*Article 2*

This Regulation shall enter into force on the twentieth 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, 28 November 2019.

*For the Commission*
*The President*
Jean-Claude JUNCKER

([1]) OJ L 176, 27.6.2013, p. 1.

([2]) Commission Implementing Regulation (EU) 2015/2197 of 27 November 2015 laying down implementing technical standards with regard to closely correlated currencies in accordance with Regulation (EU) No 575/2013 of the European Parliament and of the Council (OJ L 313, 28.11.2015, p. 30).

([3]) Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

*ANNEX*

The Annex to Commission Implementing Regulation (EU) 2015/2197 is replaced with the following:

*'ANNEX*

**List of closely correlated currencies**

*Part 1- List of closely correlated currencies against the Euro (EUR)*

Albanian Lek (ALL), Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Swiss Franc (CHF), Czech Koruna (CZK), Croatian Kuna (HRK), Hungarian Forint (HUF), Moroccan Dirham (MAD), North Macedonian Denar (MKD), Polish Zloty (PLN), Romanian Leu (RON), Serbian Dinar (RSD), Swedish Krona (SEK).

*Part 2- List of closely correlated currencies against the Arab Emirates Dirham (AED)*

Chinese Yuan (CNY), Hong Kong Dollar (HKD), Israeli New Shekel (ILS), Indian Rupee (INR), Lebanese Pound (LBP), Moroccan Dirham (MAD), Macau Pataca (MOP), Philippine Peso (PHP), Singapore Dollar (SGD), Thai Baht (THB), Taiwanese Dollar (TWD), US Dollar (USD).

*Part 3- List of closely correlated currencies against the Albanian Lek (ALL)*

Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Swiss Franc (CHF), Czech Koruna (CZK), Danish Krone (DKK), Croatian Kuna (HRK), Moroccan Dirham (MAD), Romanian Leu (RON), Serbian Dinar (RSD), Euro (EUR).

*Part 4- List of closely correlated currencies against the Bosnia and Herzegovina Mark (BAM)*

Albanian Lek (ALL), Bulgarian Lev (BGN), Swiss Franc (CHF), Czech Koruna (CZK), Danish Krone (DKK), Croatian Kuna (HRK), Hungarian Forint (HUF), Moroccan Dirham (MAD), North Macedonian Denar (MKD), Polish Zloty (PLN), Romanian Leu (RON), Serbian Dinar (RSD), Swedish Krona (SEK), Euro (EUR).

*Part 5- List of closely correlated currencies against the Bulgarian Lev (BGN)*

Albanian Lek (ALL), Bosnia and Herzegovina Mark (BAM), Swiss Franc (CHF), Czech Koruna (CZK), Danish Krone (DKK), Croatian Kuna (HRK), Hungarian Forint (HUF), Moroccan Dirham (MAD), North Macedonian Denar (MKD), Polish Zloty (PLN), Romanian Leu (RON), Serbian Dinar (RSD), Swedish Krona (SEK), Euro (EUR).

*Part 6- List of closely correlated currencies against the Swiss Franc (CHF)*

Albanian Lek (ALL), Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Czech Koruna (CZK), Danish Krone (DKK), Croatian Kuna (HRK), Moroccan Dirham (MAD), Romanian Leu (RON), Serbian Dinar (RSD), Euro (EUR).

*Part 7- List of closely correlated currencies against the Chinese Yuan (CNY)*

Arab Emirates Dirham (AED), Hong Kong Dollar (HKD), Israeli New Shekel (ILS), Lebanese Pound (LBP), Macau Pataca (MOP), Philippine Peso (PHP), Singapore Dollar (SGD), Thai Baht (THB), Taiwanese Dollar (TWD), US Dollar (USD).

*Part 8- List of closely correlated currencies against the Czech Koruna (CZK)*

Albanian Lek (ALL), Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Swiss Franc (CHF), Danish Krone (DKK), Croatian Kuna (HRK), Hungarian Forint (HUF), Moroccan Dirham (MAD), North Macedonian Denar (MKD), Polish Zloty (PLN), Romanian Leu (RON), Serbian Dinar (RSD), Euro (EUR).

*Part 9- List of closely correlated currencies against the Danish Krone (DKK)*

Albanian Lek (ALL), Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Swiss Franc (CHF), Czech Koruna (CZK), Croatian Kuna (HRK), Hungarian Forint (HUF), Moroccan Dirham (MAD), North Macedonian Denar (MKD), Polish Zloty (PLN), Romanian Leu (RON), Serbian Dinar (RSD), Swedish Krona (SEK).

*Part 10- List of closely correlated currencies against the Hong Kong Dollar (HKD)*

Arab Emirates Dirham (AED), Chinese Yuan (CNY), Israeli New Shekel (ILS), Indian Rupee (INR), Lebanese Pound (LBP), Moroccan Dirham (MAD), Macau Pataca (MOP), Philippine Peso (PHP), Singapore Dollar (SGD), Thai Baht (THB), Taiwanese Dollar (TWD), US Dollar (USD).

*Part 11- List of closely correlated currencies against the Croatian Kuna (HRK)*

Albanian Lek (ALL), Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Swiss Franc (CHF), Czech Koruna (CZK), Danish Krone (DKK), Hungarian Forint (HUF), Moroccan Dirham (MAD), North Macedonian Denar (MKD), Romanian Leu (RON), Serbian Dinar (RSD), Euro (EUR).

*Part 12- List of closely correlated currencies against the Hungarian Forint (HUF)*

Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Czech Koruna (CZK), Danish Krone (DKK), Croatian Kuna (HRK), Moroccan Dirham (MAD), Polish Zloty (PLN), Romanian Leu (RON), Serbian Dinar (RSD), Euro (EUR).

*Part 13- List of closely correlated currencies against the Israeli New Shekel (ILS)*

Arab Emirates Dirham (AED), Chinese Yuan (CNY), Hong Kong Dollar (HKD), Lebanese Pound (LBP), Moroccan Dirham (MAD), Macau Pataca (MOP), Philippine Peso (PHP), Singapore Dollar (SGD), Thai Baht (THB), US Dollar (USD).

*Part 14- List of closely correlated currencies against the Indian Rupee (INR)*

Arab Emirates Dirham (AED), Hong Kong Dollar (HKD), Macau Pataca (MOP), Philippine Peso (PHP), Thai Baht (THB), US Dollar (USD).

*Part 15- List of closely correlated currencies against the South Korean Won (KRW)*

Singapore Dollar (SGD).

*Part 16- List of closely correlated currencies against the Lebanese Pound (LBP)*

Arab Emirates Dirham (AED), Chinese Yuan (CNY), Hong Kong Dollar (HKD), Israeli New Shekel (ILS), Macau Pataca (MOP), Philippine Peso (PHP), Singapore Dollar (SGD), Thai Baht (THB), Taiwanese Dollar (TWD), US Dollar (USD).

*Part 17- List of closely correlated currencies against the Moroccan Dirham (MAD)*

Arab Emirates Dirham (AED), Albanian Lek (ALL), Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Swiss Franc (CHF), Czech Koruna (CZK), Danish Krone (DKK), Hong Kong Dollar (HKD), Croatian Kuna (HRK), Hungarian Forint (HUF), Israeli New Shekel (ILS), North Macedonian Denar (MKD), Macau Pataca (MOP), Philippine Peso (PHP), Romanian Leu (RON), Serbian Dinar (RSD), Singapore Dollar (SGD), Thai Baht (THB), US Dollar (USD), Euro (EUR).

*Part 18- List of closely correlated currencies against the North Macedonian Denar (MKD)*

Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Czech Koruna (CZK), Danish Krone (DKK), Croatian Kuna (HRK), Moroccan Dirham (MAD), Romanian Leu (RON), Serbian Dinar (RSD), Euro (EUR).

*Part 19- List of closely correlated currencies against the Macau Pataca (MOP)*

Arab Emirates Dirham (AED), Chinese Yuan (CNY), Hong Kong Dollar (HKD), Israeli New Shekel (ILS), Indian Rupee (INR), Lebanese Pound (LBP), Moroccan Dirham (MAD), Philippine Peso (PHP), Singapore Dollar (SGD), Thai Baht (THB), Taiwanese Dollar (TWD), US Dollar (USD).

*Part 20- List of closely correlated currencies against the Philippine Peso (PHP)*

Arab Emirates Dirham (AED), Chinese Yuan (CNY), Hong Kong Dollar (HKD), Israeli New Shekel (ILS), Indian Rupee (INR), Lebanese Pound (LBP), Moroccan Dirham (MAD), Macau Pataca (MOP), Singapore Dollar (SGD), Thai Baht (THB), Taiwanese Dollar (TWD), US Dollar (USD).

*Part 21- List of closely correlated currencies against the Polish Zloty (PLN)*

Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Czech Koruna (CZK), Danish Krone (DKK), Hungarian Forint (HUF), Euro (EUR).

*Part 22- List of closely correlated currencies against the Romanian Leu (RON)*

Albanian Lek (ALL), Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Swiss Franc (CHF), Czech Koruna (CZK), Danish Krone (DKK), Croatian Kuna (HRK), Hungarian Forint (HUF), Moroccan Dirham (MAD), North Macedonian Denar (MKD), Serbian Dinar (RSD), Euro (EUR).

*Part 23- List of closely correlated currencies against the Serbian Dinar (RSD)*

Albanian Lek (ALL), Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Swiss Franc (CHF), Czech Koruna (CZK), Danish Krone (DKK), Croatian Kuna (HRK), Hungarian Forint (HUF), Moroccan Dirham (MAD), North Macedonian Denar (MKD), Romanian Leu (RON), Euro (EUR).

*Part 24- List of closely correlated currencies against the Swedish Krona (SEK)*

Bosnia and Herzegovina Mark (BAM), Bulgarian Lev (BGN), Danish Krone (DKK), Euro (EUR).

*Part 25- List of closely correlated currencies against the Singapore Dollar (SGD)*

Arab Emirates Dirham (AED), Chinese Yuan (CNY), Hong Kong Dollar (HKD), Israeli New Shekel (ILS), South Korean Won (KRW), Lebanese Pound (LBP), Moroccan Dirham (MAD), Macau Pataca (MOP), Philippine Peso (PHP), Thai Baht (THB), Taiwanese Dollar (TWD), US Dollar (USD).

*Part 26- List of closely correlated currencies against the Thai Baht (THB)*

Arab Emirates Dirham (AED), Chinese Yuan (CNY), Hong Kong Dollar (HKD), Israeli New Shekel (ILS), Indian Rupee (INR), Lebanese Pound (LBP), Moroccan Dirham (MAD), Macau Pataca (MOP), Philippine Peso (PHP), Singapore Dollar (SGD), Taiwanese Dollar (TWD), US Dollar (USD).

*Part 27- List of closely correlated currencies against the Taiwanese Dollar (TWD)*

Arab Emirates Dirham (AED), Chinese Yuan (CNY), Hong Kong Dollar (HKD), Lebanese Pound (LBP), Macau Pataca (MOP), Philippine Peso (PHP), Singapore Dollar (SGD), Thai Baht (THB), US Dollar (USD).

*Part 28- List of closely correlated currencies against the US Dollar (USD)*

Arab Emirates Dirham (AED), Chinese Yuan (CNY), Hong Kong Dollar (HKD), Israeli New Shekel (ILS), Indian Rupee (INR), Lebanese Pound (LBP), Moroccan Dirham (MAD), Macau Pataca (MOP), Philippine Peso (PHP), Singapore Dollar (SGD), Thai Baht (THB), Taiwanese Dollar (TWD).'

# COMMISSION IMPLEMENTING REGULATION (EU) 2019/2092

## of 28 November 2019

## imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia

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]) ('the basic Regulation'), and in particular Article 15 thereof,

Whereas:

### 1. PROCEDURE

#### 1.1. Initiation

(1) On 6 December 2018, the European Commission ('the Commission') initiated an anti-subsidy investigation with regard to imports into the European Union ('the Union') of biodiesel originating in Indonesia on the basis of Article 10 of the basic Regulation.

(2) The Commission published a Notice of initiation in the *Official Journal of the European Union* ([2]) ('the Notice of initiation').

(3) The Commission initiated the investigation following a complaint lodged on 22 October 2018 by the European Biodiesel Board ('the complainant' or 'the EBB') on behalf of producers representing 32 % of total Union production.

#### 1.2. Provisional measures

(4) On 14 August 2019, the Commission imposed provisional countervailing duties on imports into the Union of biodiesel originating in Indonesia by Commission Implementing Regulation (EU) 2019/1344 ([3]) ('the provisional Regulation').

(5) As stated in recital 13 of the provisional Regulation, the investigation of subsidisation and injury covered the period from 1 October 2017 to 30 September 2018 ('the investigation period' or 'IP') and the examination of trends relevant for the assessment of injury covered the period from 1 January 2015 to the end of the investigation period ('the period considered').

#### 1.3. Subsequent procedure

(6) Following the disclosure of the essential facts and considerations on the basis of which provisional countervailing duties were imposed ('provisional disclosure'), the EBB, the Government of Indonesia ('GOI') and all four Indonesian exporting producers made written submissions making their views known on the provisional findings.

(7) The parties who so requested were granted an opportunity to be heard. Hearings took place with the EBB, the GOI, and all four Indonesian exporting producers.

(8) The Commission considered the comments submitted by interested parties and addressed them as detailed in this Regulation.

([1]) OJ L 176, 30.6.2016, p. 55.
([2]) OJ C 439, 6.12.2018, p. 16.
([3]) OJ L 212, 13.8.2019, p. 1.

(9) The Commission informed all interested parties of the essential facts and considerations on the basis of which it intended to impose a definitive countervailing duty on imports into the Union of biodiesel originating in Indonesia ('final disclosure').

(10) Following final disclosure, the EBB, the GOI and three out of the four Indonesian exporting producers made written submissions making their views known on the definitive findings. The Commission noted that the submissions of the GOI and two exporting producers were in all respects the same, and in this Regulation these comments on final disclosure will be summarised as the comments of the GOI.

(11) The parties who so requested were granted an opportunity to be heard. Hearings after the final disclosure took place with the EBB, the GOI and two out of the four Indonesian exporting producers.

(12) In their comments to the final disclosure, the GOI and two of the exporting producers submitted that their rights of defence had not been respected, in particular regarding the undercutting calculations and the disclosure to interested parties of the product control numbers ('PCNs') of the Union industry used in the calculations, the feedstock used in the blends of the Union industry, and the cold filter plugging point ('CFPPs') ([4]) of the Union industry sales.

(13) The GOI and two out of the four Indonesian exporting producers requested a hearing in the presence of the Hearing Officer and such hearing took place on 14 October 2019.

(14) All of these points were already dealt with in the final disclosure and were explained to the GOI during the hearings that took place after the final disclosure was sent.

(15) The Commission considered the comments submitted by interested parties following final disclosure and addressed them as detailed in this Regulation.

### 1.4. **Investigation period and period considered**

(16) In the absence of comments concerning the investigation period and period considered, recital 13 of the provisional Regulation was confirmed.

## 2. **PRODUCT CONCERNED AND LIKE PRODUCT**

### 2.1. **Claims regarding the product scope**

(17) After the publication of the provisional Regulation, the Wilmar Group ('Wilmar'), an exporting producer in Indonesia, made a claim that their exports of fractionated methyl esters should not be considered as exports of the product concerned. Wilmar noted that this claim had been made within the deadline, as it was to be found in Annex I of their sampling form.

(18) The claim was however not made separately, and therefore was not noted by other interested parties until the receipt of comments to the provisional Regulation.

(19) The Commission noted that the same claim was made during the previous anti-dumping investigation into imports of biodiesel from Indonesia by the same exporting producer on the basis of the same information, and was rejected in both the provisional Regulation ([5]) and the definitive Regulation ([6]) ('the original investigation').

(20) In this investigation, the Commission again rejected the product exclusion request for the same three reasons as set out in the previous anti-dumping regulation, as follows.

([4]) The CFPP is the lowest temperature at which a given volume of (bio)diesel can pass through a standard filter. This gives an estimate of the lowest temperature limit for the use of (bio)diesel.

([5]) OJ L 141, 28.5.2013, p. 6, recitals 35 and 36.

([6]) OJ L 315, 26.11.2013, p. 2, recitals 17 to 21.

(21) First, fractionated methyl esters are fatty acid methyl esters and can be used for biodiesel. In this sense, biodiesel declared for non-fuel use can be used for fuel as it has the same physical and technical properties.

(22) Second, it is difficult to distinguish one fatty acid methyl ester from another without chemical analysis at the port of importation.

(23) Third, although fractionated methyl esters do not meet the European norm (EN 14214), they can be mixed with other biodiesels to create a blend that meets the norm.

(24) Wilmar also requested that the Commission confirms that as a matter of principle fractionated methyl esters can benefit from the customs procedure of end-use, where duties are exempted, provided the company can prove to the satisfaction of the national customs authority that the end use of the fractionated methyl ester is not fuel.

(25) The Commission noted that suspension of duties subject to end-use customs supervision has been granted on some imports of fractionated methyl esters as set out in Council Regulation (EU) 2018/2069 ([7]). However, this relief concerns only the autonomous Common Customs Tariff duties and is without prejudice to the application of the countervailing duties. Consequently, the Commission rejected the end-use relief request as far as the application of the countervailing duties is concerned.

(26) Following final disclosure, Wilmar again made its claim for end-use relief with respect to countervailing duties for their exports of fractionated methyl esters. No new information or reasons why end-use relief should be extended to provide relief from countervailing duties, was provided and the claim was therefore rejected. The Commission did not find any valid reason to exclude fractionated methyl esters from the product scope. Simply that fractionated methyl esters may be used by Wilmar on other uses than fuel does not mean that such a product type must be excluded from the scope of this investigation.

(27) In the absence of any other comments with respect to the product scope, the Commission confirmed the conclusions set out in recitals 31 to 37 of the provisional Regulation.

## 3. **SUBSIDISATION**

### 3.1. **Government support to the biodiesel industry through direct transfer of funds via the Oil Palm Plantation Fund**

#### 3.1.1. *Financial contribution*

(28) Following the provisional disclosure, the GOI claimed that the Commission failed to prove the existence of a financial contribution in favour of the exporting producers.

(29) The GOI as well as all exporting producers claimed that the Oil Palm Plantation Fund (the 'OPPF') is exclusively financed by the collection of the export levy on crude palm oil ('CPO') and derivative products and in large part by the biodiesel producers themselves. Additionally, the GOI claimed that the export levy is paid directly by the exporting producers to the OPPF prior to exporting the goods. According to the GOI therefore no money is withdrawn from the general budget of the State and therefore there is no financial contribution.

(30) In this regard, the Commission reiterated that, as stated in the provisional Regulation in recitals 56 to 61, the Oil Palm Plantation Fund Management Agency (the 'Management Agency') acts as a public body in the sense of Article 2(b) of the basic Regulation read in conjunction with Article 3(1)(a)(i) of the basic Regulation and in accordance with the relevant WTO case-law. Therefore, the funds used by the Management Agency constitute public funds.

([7]) OJ L 331, 28.12.2018, p. 4.

(31) Further, during the verification visit carried out at the GOI's premises, the Commission sought to obtain and verify evidence to support the GOI's claim that the OPPF's funds are not part of the State budget. The GOI, however, could not provide such evidence.

(32) Instead, the GOI provided evidence indicating that the exporting producers did indeed pay the export levy prior to exporting their goods. However, it could not provide any indication that these payments are made into a specific account of the OPPF that would be distinct from the general State budget and would thus prevent the payments collected from the export levy on CPO and its derivative products from going into the general State budget and being used for any other purpose deemed fit by the GOI. Moreover, there is no indication that the OPPF has separate accounts for the collection of export levies derived from biodiesel and other products (including CPO). This implies that the funds available to the Management Agency are not dependent on the exporting producers of biodiesel first paying the levy, since the GOI may have already collected public revenue through the imposition of export levies upon other products. Thus, absent further evidence showing the contrary, the Commission confirmed the findings made in recital 64 of the provisional Regulation.

(33) The Commission further observed that the qualification of the OPPF as a public body was not disputed by neither the GOI nor any of the exporting producers. Hence, and considering the failure of the GOI to provide compelling evidence to the contrary, the funds available to the OPPF shall be considered as public funds and therefore drawn from government resources (such as the compulsory export levy).

(34) The GOI and all exporting producers additionally claimed that the Commission erred in analysing the payments of the OPPF in isolation, and not as part of the payment made by the GOI when purchasing biodiesel. The GOI and all exporting producers also claimed that the Commission mischaracterised the scheme as a grant, whereas it should be at most qualified as a government's purchase of goods for more than adequate remuneration.

(35) For the reasons set out below, the Commission rejected the claim that the Commission examined the payments made by the OPPF in isolation and that the programme should be regarded as a purchase of goods (biodiesel) by the GOI.

(36) The Commission observed that the GOI does not purchase the biodiesel, which is purchased by the selected blenders instead (Pertamina and AKR). The GOI, via the OPPF, does not have any contractual purchase relation with the biodiesel producers and does not receive anything in exchange of the money it disburses to the biodiesel producers. The fact that the GOI has any contractual relation with the biodiesel producers has also not been claimed by any of the interested parties during the investigation.

(37) The applicable legislation mandates the biodiesel suppliers willing to participate in this programme to deliver the palm methyl ester ('PME') to the Petrofuel Entities (see recitals 45 and 46 of the provisional Regulation), Pertamina or AKR, which will then blend it with mineral diesel to obtain the B20 diesel. The applicable legislation gives the biodiesel producers participating in this programme the right to receive (a) the payment for the biodiesel by the blenders; and (b) the additional money from the OPPF. There are no contractual obligations of the biodiesel producers towards the GOI nor towards the OPPF, other than the duty to comply with the mandate received in accordance with the relevant rules and for which they receive compensation. Lacking any mutual contractual obligation, the money disbursed by the OPPF are not therefore part of a contract for consideration (such as the purchase of biodiesel by the government in exchange of a price). Simply put, the GOI mandates each of the biodiesel producers participating in the programme to sell specific quantities of biodiesel to Pertamina or AKR at a given price (mineral diesel reference price) and the GOI provides additional funds directly to the biodiesel producers. Whereas the purpose and context of the programme is to incentivise the use of biodiesel on the domestic market, the GOI does not purchase biodiesel directly and then uses it for governmental purposes or resells it on the market. Rather, the GOI supports the sales of biodiesel by providing additional funds to biodiesel producers also in transactions where private operators (such as AKR) are involved. Neither the GOI nor the exporting producers provided evidence showing that Pertamina and AKR are public bodies in this respect. They are operators which voluntarily participate in this programme.

(38) The Commission therefore examined the programme in this context and found that the disbursement of the OPPF in favour of the biodiesel producers cannot qualify as payments due in a purchase contract between the GOI and the biodiesel producers but constitute a direct transfer of funds, as concluded in recital 69 of the provisional Regulation.

(39) Following final disclosure, the GOI Wilmar, PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo (together 'Permata Group') and PT Ciliandra Perkasa claimed that the payments from the OPPF cannot be considered as a financial contribution. According to the GOI this is because the OPPF is funded by the collection of the export levy on palm oil and derivative products, and therefore should be regarded as privately funded.

(40) The Commission observed that this claim was made already by the GOI after the provisional measures and was addressed by the Commission (recitals 30 to 33 above). No new evidence was provided by the parties in support of their repeated arguments. Consequently, the Commission confirmed the conclusions reached in these recitals and therefore rejected this claim.

(41) The GOI, PT Ciliandra Perkasa and the Permata Group additionally claimed that the Commission erred in confirming the findings that the OPPF funds are public money and not privately sourced for the reasons set out in recital 32. According to the GOI this is because the applicable provisions of Minister of Finance Regulation (EC) No 133/2015 and of Presidential Regulation 66 of 2018 mandate (1) that the OPPF shall be exclusively financed by the collection of the export levy, and (2) that those funds shall be used only for specific disbursements, including the grant pay-outs to the biodiesel producers.

(42) As explained in recital 31 above, during the verification visit, the Commission asked the GOI to provide evidence of how the payments of the export levy are accounted for in the budget. The GOI failed to provide any evidence in support of its claim that the funds of the OPPF are not part of the State budget.

(43) In any event, the above is irrelevant to the conclusion that the funds of the OPPF constitute public funds as explained in recital 63 of the provisional Regulation. The funds are collected pursuant to a compulsory export levy. Thus, as opposed to a situation where private operators freely decide to collect private funds for a particular use, in the present case, the GOI imposes an obligation upon some producers (including but not limited to biodiesel producers) to pay the export levy.

(44) Following final disclosure, the GOI, PT Ciliandra Perkasa, the Permata Group and Wilmar claimed that the Commission erred in classifying the payments of the OPPF as a grant, while they should be qualified as a purchase of biodiesel. According to the respondents, the Commission also erred in asserting that there is no contractual relationship between the biodiesel producers and the OPPF. To support its claim, Wilmar submitted copies of its agreements with the OPPF as well. According to the GOI, the payments of the OPPF should be regarded as consideration for the purchase of goods (namely biodiesel) because Pertamina is a state-owned company, and therefore it should be treated as a single economic entity with the GOI which is the ultimate purchaser of the biodiesel.

(45) The Commission considered that the contracts should have been submitted before for a proper verification. Even acknowledging that there are contracts in force between the OPPF and the biodiesel producers, the Commission noted that according to information provided by the GOI, these contracts do not create a contractual obligation of the biodiesel producers towards the OPPF. Rather, as explained by the GOI, these contracts merely restate the legal obligation of the OPPF to pay the difference between the price paid by the blenders and the biodiesel reference price once the relevant biodiesel producer delivers the biodiesel to Pertamina. Importantly, nowhere in those contracts it is stated that the GOI purchases biodiesel and that the payments are made because of such reason. Quite to the contrary, the contract in force between the OPPF and the biodiesel producers does not refer to any purchase of biodiesel made by the GOI, rather it contains the terms pursuant to which the GOI disburses the so-called 'biodiesel financing funds' to the biodiesel producers. More precisely, the contracts stipulate that the OPPF provides financing to the biodiesel producers, after the latter delivered biodiesel to one of the blenders and that delivery is verified.

(46) The Commission observed that the existence of contracts in place between the OPPF and the biodiesel producers does not change the conclusion reached by the Commission that the payments of the OPPF constitute a grant. This is because the only contracts with mutual obligations (i.e. the delivery of goods and the payment of the price) are the ones in force between Pertamina and the biodiesel suppliers. Consequently, the Commission rejected this claim.

(47) For the reasons set out below, the Commission also considered that the claim that Pertamina and the GOI should be regarded as a single economic entity cannot be accepted.

(48) As mentioned in recital 53 to 54, apart from being a State owned company, there is no other evidence that Pertamina is a public body and thus is part of the government. Moreover, in its claim the GOI failed to mention that Pertamina is not the only blender subject to the blending mandate, but during the investigation period AKR was also subject to the same mandate. At the same time, AKR as explained in recital 37 above is a private company. Both AKR and Pertamina operate the blending mandate pursuant the same legal instruments and under the same system. Under the blending mandate, therefore, the GOI does not purchase the biodiesel, unless the GOI also considers that AKR should be regarded as being part of the same economic entity.

(49) In light of the above, the Commission maintained its conclusion that Pertamina, despite being a State-owned company, acts as a market operator purchasing biodiesel from the biodiesel producers, in order to blend it with mineral diesel which is subsequently sold by Pertamina.

(50) The Commission therefore also maintained its conclusion that the payments by the Management Agency of the OPPF constitute a grant. As explained by the GOI neither in the applicable legislation nor in the contracts between the OPPF and the blenders there are reciprocal obligations. Rather, in the whole set-up of the blending mandate the only reciprocal obligations are between the biodiesel producers (having the obligation to supply the biodiesel) and the blenders (having the obligation to pay a price). In the Commission's view, therefore, the Management Agency of the OPPF disburses the money without expecting anything in return. Hence, the pay-outs from the OPPF qualify as grants.

(51) Wilmar, the Permata Group and PT Ciliandra Perkasa additionally claimed that Pertamina, being entirely State-owned, should be regarded as a public body. None of the respondents provided any evidence in support of this claim.

(52) The Commission observed that if Pertamina should have been considered as a public body for the purposes of this investigation (purchasing biodiesel jointly with the Management Agency of the OPPF), the GOI should have raised this claim early in the investigation process and, should have instructed Pertamina to cooperate and be part of the investigation.

(53) The Commission considered that the State ownership *per se* does not equate to the notion of 'public body'. As already explained in recital 55 of the provisional Regulation, the WTO Appellate Body in the Report on the US-Anti-Dumping and Countervailing Duties (China) found that the term 'public body' means an entity that 'possesses, exercises or is vested with governmental authority' ([8]). Mere formal indicia of control (such as state ownership) are insufficient for a public body finding ([9]).

(54) None of the parties substantiated their claims by elaborating how Pertamina is vested with governmental authority. The Commission noted that Pertamina, like AKR, has to comply with the obligations arising from the blending mandate. Yet, complying with a legal requirement does not mean that an entity has been vested with public authority. Additionally, Pertamina (just like AKR) simply purchases the biodiesel, and has no role in the disbursement of the grant in favour of the biodiesel producers.

(55) Finally, the Commission observed that AKR, a private company, is also part of the same mandate and has the same obligations as Pertamina. If one was to follow the respondents' claims, the Commission would have no choice but to find that AKR as well is a public body, vested with governmental authority. Yet, in contradiction with their own reasoning, none of the respondents put forward such a claim. In fact the parties are silent on how their claim of joint purchase of biodiesel by Pertamina and OPPF reconciles with the system being applicable to privately owned AKR. The Commission therefore rejected the claim.

([8]) Appellate Body Report, United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB, 11 March 2011, paragraph 317. See also Appellate Body Report, United States — Countervailing Duty Measures on Certain Products from China, WT/DS437/AB/RW, adopted 16 July 2019, paragraph 5.96.

([9]) Appellate Body Report, United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB, 11 March 2011, paragraph 318.

(56) In addition, Wilmar claimed that, even if Pertamina was not considered a public body, the blenders are entrusted and directed by the GOI to purchase biodiesel on behalf of the government and/or the biodiesel suppliers are entrusted or directed to sell biodiesel to the blenders. Wilmar did not provide any evidence in support of this claim. In fact, the evidence available rather shows that during the investigation period there is a programme in place where blenders and biodiesel producers willingly participate in the context where the GOI imposes certain blending requirements and where the GOI financially intervenes to ease the burden arising from the blending mandate.

(57) The Commission noted that the mere existence of an obligation to blend puts a legal obligation to purchase biodiesel, but does not entail that the GOI purchases biodiesel on the market. The GOI simply mandates the percentage of PME to be blended with mineral diesel. The GOI does not purchase PME nor does have the intention to purchase it.

(58) Hence, the Commission rejected this claim as well.

3.1.2. *Benefit*

(59) All exporting producers alleged that, even if the Commission was correct in qualifying the payments received by the OPPF as a grant, it erred in considering that there is a benefit.

(60) In summary, the exporting producers claimed that because the OPPF is financed exclusively by the export levy paid among others by the biodiesel producers, the latter do not receive a benefit as they pay more into the fund than what they receive from it. According to the exporting producers, the OPPF is privately funded and therefore the Commission should have deducted the amounts paid into the OPPF at a group level. Additionally, the exporting producers claimed that the Commission should have deducted the amount of levy paid on the export of every product subject to it, and not only the amount of levy paid for the export of biodiesel.

(61) For the reasons set out below, the Commission disagreed with this claim.

(62) First, the Commission observed that all the companies involved in the CPO value chain, including the biodiesel producers, are compelled to pay the levy by force of regulation. Just as for general taxation, undertakings active in the CPO value chain have no discretion whether to contribute or not into the OPPF, and therefore it is inappropriate to argue that the latter is privately funded. Rather, the OPPF is financed through the normal fiscal and public revenue collecting activity of the GOI. In fact, the GOI failed to provide evidence showing that the revenues collected through the export levy are directly accounted for in a specific account of the OPPF as opposed to the general State budget. Thus, deducting the export levies paid by biodiesel producers to determine the existence of benefit would be as inappropriate as deducting all taxes paid by the beneficiaries.

(63) Secondly, the Commission observed that in any event the claim that biodiesel producers paid more into the OPPF than what they have received is factually wrong. That claim is in fact based on the total export levy paid at group level and for all products subject to the export levy. However, by considering only the levy paid by the exporting producers (individually, not their group) on biodiesel, the amounts paid into the OPPF are lower than what has been received in grant payments by the OPPF.

(64) The GOI and exporting producers Wilmar, Permata Group and PT Ciliandra Perkasa further submitted that the Commission erred in finding that this programme grants a benefit in favour of the biodiesel producers. This is because, absent the payments of the OPPF, the blenders would be forced to purchase the biodiesel at the biodiesel reference price. Hence, the biodiesel producers would receive the same amount of money that they receive today and are therefore not 'better off' than they would otherwise be.

(65) The Commission disagreed with this claim. The Commission concluded that the correct counterfactual is not that absent the OPPF the blenders would pay the biodiesel reference price. One of the policy objectives of the OPPF and the very purpose of blending mandates is to foster the use of biodiesel in Indonesia (as opposed to the use of mineral diesel). Since the price of mineral diesel is normally lower than the price of biodiesel, the GOI intervenes to facilitate the sale of biodiesel by biodiesel producers. At the same time, these payments contribute to the fulfilment of the mandatory blending requirements. The mere existence of the OPPF programme shows that the normal market conditions would not support the biodiesel reference price which is used to top up the transactions between Pertamina/AKR and the biodiesel producers. Thus, without the blending mandate, blenders would not have an incentive to purchase biodiesel at all. Absent the OPPF and its payments there would not be any domestic sales of biodiesel. Biodiesel producers would have to compete with mineral diesel producers. But for the OPPF and the programme put in place by the GOI, biodiesel producers would not receive the additional funds to the level of the biodiesel reference price fixed by the GOI.

(66) In the Commission's view, under the correct counterfactual, the biodiesel producers would be worse off than during and after the investigation period. For biodiesel producers the blending mandate effectively means having a predictable and reliable source of income via guaranteed sales. Additionally, the total revenues of domestic sales, i.e. the amount paid by the blenders plus the grant disbursed by the OPPF, are determined *ex ante* by the GOI, effectively shielding biodiesel suppliers from normal price fluctuations that they would otherwise face on a free market, assuming there would be one.

(67) In that respect, the Commission also took the view that the calculation of the reference price for biodiesel paid to independent suppliers does not reflect demand and supply under normal market conditions without government intervention. Pertamina, in fact, irrespective of whether it received a benefit or not, was not willing to pay the biodiesel at the reference price, but only at a lower price. This finding has also been confirmed by the GOI during the verification visit when it explained that if Pertamina was to purchase biodiesel at the biodiesel reference price, it would be loss making. This statement evidenced that, under undistorted market conditions, the market price for biodiesel would be significantly lower than the biodiesel reference price currently set by the GOI.

(68) The Commission inferred from the GOI's statement that no buyer — just as Pertamina — would be in a position to profitably carry on business if the price of biodiesel would be the reference price set by the GOI. Hence, either there would be no biodiesel sold in Indonesia, and therefore no revenues for the biodiesel producers, or the biodiesel prices would be lower than the level set by the GOI. As in Indonesia the GOI sets up and implements a blending obligation (see recitals 49 and 50 of the provisional Regulation), the first scenario is very unlikely to happen. Hence, the Commission considered that — absent the scheme under analysis — the most likely counterfactual was that the prices of biodiesel would be lower.

(69) Notably, the Commission observed that the reference prices used by the GOI to determine the amount of grant disbursed by the OPPF are not indicative of a market price as the formula to calculate them is not based on an undistorted market reality. This is because on the one hand the whole market, upstream and downstream, is distorted and cannot be therefore representative of normal, competitive, market conditions. On the other hand, the Commission considered that the amount of the conversion costs calculated by the GOI as part of the formula used to calculate the reference price for biodiesel (the average domestic price for CPO and a conversion fee of USD 100 per tonne added to that) is excessive. The Commission verified the actual transformation costs of some of the exporting producers and observed that the GOI's calculation overstates those costs. These actual transformation costs amounted to, on average, an amount between USD 60 to USD 80 per tonne during the investigation period ([10]).

(70) Therefore, even if the Commission was to accept the claim that the combined payments of the blenders and the OPPF constitutes payment of the price of biodiesel, *quod non*, the Commission would nonetheless have to conclude that the 'price' paid to biodiesel suppliers would be excessive.

([10]) The Commission noted that one exporting producer reported higher conversion costs for one of its plants. That producer explained that this is because that plant is new and depreciation has a significant impact on costs. However, it further explained that the costs of its other plants are more representative. Those costs are within the bracket reported above. In light of this, the Commission disregarded that cost, which is however lower than the conversion costs calculated by the GOI.

(71) The Commission thus concluded that the existence of the programme puts the biodiesel producers in a better situation than they would otherwise be and therefore confers them a benefit.

(72) The GOI and all exporting producers also claimed that, even if there was a benefit, it would be entirely passed on to the blenders (Pertamina and AKR). This is because the biodiesel producers allegedly get the market price for biodiesel while the blenders benefit from purchasing it at a lower price (namely, the reference price for mineral diesel).

(73) The Commission did not agree with this claim. As already discussed in recitals 195 to (201) of the provisional Regulation, and also addressed in recital 67, the Commission took the view that in Indonesia there is no real market price for biodiesel as the GOI regulates and distorts the whole CPO-biodiesel value chain. In any event, the Commission observed that the only price existing on the market is the one that was paid by the blenders (namely, the reference price for mineral diesel).

(74) With regard to the claim that the benefit of the programme lays with the blenders which ultimately pay a lower price for the biodiesel they purchase, the Commission noted that the issue whether Pertamina or AKR (also) benefit from this programme is not subject of this investigation, since they are not exporting producers of the product concerned.

(75) Following definitive disclosure the GOI, PT Ciliandra Perkasa, Permata Group and Wilmar claimed that the Commission erred in finding that the OPPF confers a benefit to the biodiesel producers because:

(a) the counterfactual identified by the Commission is incorrect insofar as it finds that absent the OPPF biodiesel producers would receive a lower price for their biodiesel. According to the GOI, absent the OPPF and lacking any legal obligation on the producers to sell biodiesel domestically, biodiesel producers would simply maximise their profit and sell on the export market; and,

(b) The conversion cost used by the GOI in the formula to calculate the biodiesel reference price is not excessive as it does account for SG&A and profit.

(76) The Commission considered the counterfactual presented in the final disclosure and spelled out in recital 65 above. The Commission, however, considered that the claim laid down by the GOI further confirms that the OPPF confers a benefit to the biodiesel producers. The GOI's argument relies on two main elements: (1) there is no legal obligation for biodiesel producers to sell biodiesel domestically; and, (2) biodiesel producers are rational economic operators striving to maximise their profit.

(77) The Commission did not contest the two elements put forward by the GOI. In the Commission' view, the fact that despite the lack of a legal obligation to do so, rational economic operators like the biodiesel producers decide to take part to the OPPF scheme is empiric and undisputable evidence that this is their best option to operate their business.

(78) If, as the GOI claimed and the Commission had no reason to contest, '*the privately-owned biodiesel producers (many of which are part of multinational groups) aim to maximize profitability*' ([11]), then it means that being part of the OPPF scheme is the most profitable way of carrying out business available to them. Hence, under every counterfactual the biodiesel producers would be worse off. If that would not be the case, a rational economic operator, free from any legal constraint, would have chosen a more profitable option instead of opting to be part of the scheme.

(79) The Commission therefore concluded that the biodiesel producers are better off under this scheme regardless of the alternative counterfactual. Consequently, the Commission confirmed its conclusion that the OPPF confers a benefit to the biodiesel producers.

(80) With regard to the GOI's claim that the conversion costs used in the formula to calculate the biodiesel reference price is not excessive, the Commission observed that it considered that the payments by the OPPF to biodiesel producers constitute a grant and are not part of the consideration for the purchase of biodiesel. Therefore, in the Commission's view, it was irrelevant for the determination of the existence of a benefit whether those conversion costs are excessive or not.

([11]) Comments on the final general disclosure document on behalf of the Government of the Republic of Indonesia, 14 October 2019, paragraph 16.

(81) In any event, even if the Commission were to follow the GOI's line of reasoning that there is no benefit in this case because the payments of the OPPF are the consideration for the purchase of biodiesel, the Commission observed that the amount of conversion costs is not changed regularly and it has been set at 100 USD/tonne since 21 March 2016. The Commission acknowledged that the GOI claimed during the verification visit that the conversion costs are reviewed annually. The Commission however considered that the result of such a review process does not reflect market reality as the amount of conversion costs is higher than the real costs incurred by biodiesel producers as explained in paragraph (69).

(82) The GOI also claimed that it considered the range of conversion costs collected by the Commission to be non-representative. In this regard the Commission first observed that the GOI did not provide any factual evidence to support its statement. Secondly, the Commission observed that it verified those costs during the verification visits carried out at some of the biodiesel producers' premises. For the sake of clarity, to obtain those costs the Commission deducted the value of the glycerine generated in the refining process from CPO to biodiesel ([12]).

(83) In light of the above, even if the Commission were to accept the GOI's claim that the payments of the OPPF are the consideration for the purchase of biodiesel, *quod non*, then there would still be a benefit in favour of the biodiesel producers. Even if the blending mandate would not exist, biodiesel producers would not obtain the full compensation provided by the OPPF.

(84) Wilmar additionally claimed that the reference price set for domestic Indonesian biodiesel reflects and closely follows undistorted market dynamics. The Commission observed that the Indonesian domestic biodiesel market is entirely regulated, from the price of the CPO to the price and demand of biodiesel. Biodiesel suppliers have to sell specific quantities at a specific price, calculated according to a formula fixed in advance and based on elements that do not adhere to market reality. The Commission therefore maintained its conclusion that the reference price set by the GOI does not reflect what the price would be under undistorted market conditions. Particularly, this is because the Commission considered that the only reliable proxy for an undistorted domestic market price is the one that the blenders pay. The claim was therefore rejected.

(85) Following definitive disclosure, the GOI and Wilmar claimed that the Commission erred in considering irrelevant that the OPPF confers a benefit to the blenders as well. According to the GOI, this is because the very fact that the OPPF is designed to benefit the blenders (as well) means that it cannot be qualified as a grant.

(86) As explained in recitals 64 to 74, the Commission considered that whether the blenders obtained a benefit from the programme at issue is not relevant for the purpose of the present investigation. It is uncontested that the OPPF provides a grant in favour of the biodiesel producers, a grant which, absent the programme would not have taken place. The claim was therefore rejected.

3.1.3. *Methodology used in the calculation of the total amount of benefit*

(87) All exporting producers claimed that the Commission erred in calculating the amount of benefit received by the exporting producers as it included the amount of money paid by the OPPF as reimbursement for transport costs. According to the exporting producers, this money is merely a reimbursement of costs already incurred by them and therefore not a benefit. Additionally, an exporting producer claimed that these costs shall be qualified as a cost incurred to be eligible for the subsidy scheme and shall be therefore excluded pursuant to Article 7(1)(a) of the basic Regulation.

([12]) The chemical reaction used in the refining process produces glycerine as by product. Glycerine is then sold on the market, and therefore it does not represent a cost.

(88) For the reasons set out below, the Commission disagreed with this claim as it does not consider transport costs incurred by the biodiesel producers as *'any application fee or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy*'.

(89) First, the Commission observed that the Guidelines for the calculation of the amount of subsidy in countervailing duty investigations ('the Guidelines') clarify that *'the only fees or costs that may normally be deducted are those paid directly to the government in the investigation period. It must be shown that such payment is compulsory in order to receive the subsidy. Thus payments to private parties, e.g. lawyers, accountants, incurred in applying for subsidies, are not deductible*' ([13]).

(90) Contrary to what is stipulated in the Guidelines, the transport costs in question are not paid directly to the GOI but to private companies. Nor did the exporting producer explain how these transport costs are 'compulsory' to receive the subsidy.

(91) Second, the Commission took the view that the transport costs are rather costs normally incurred by biodiesel producers in their commercial transactions with the blenders. Transport costs would normally be part of the purchase price/contract and the Commission therefore sees no objective justification for their reimbursement. Consequently, the amount of money paid by the OPPF as reimbursement for transport costs constitutes a benefit.

(92) In light of the above, this claim was rejected and the Commission concluded that the reimbursement of the transport costs incurred by the biodiesel producers shall not be deducted from the calculation of the benefit. The funds provided by the Management Agency to the biodiesel producers not only cover the difference between the reference price of mineral diesel and the reference price for biodiesel but also the transport costs, as part of the same grant.

(93) The exporting producers also claimed that they incur credit costs relating to the OPPF payments. According to the biodiesel producers this is because the OPPF disburses the grant payment several months after the producers have invoiced the relevant blender.

(94) The Commission disagreed with this claim as it maintained its conclusion that the payments of the OPPF constitute a grant and not payment for the purchase of goods. The Commission therefore considered that the exporting producers should have not received those grants in the first place and that no credit cost of any sort can be attached to those grants.

(95) In light of the above, this claim is rejected and the Commission concluded that alleged credit costs incurred by the biodiesel producers shall not be deducted from the calculation of the benefit.

(96) Consequently, the Commission maintained its findings that the GOI's support to the biodiesel industry through direct transfer of funds via the 'Biodiesel Subsidy Fund' amounted to a countervailable subsidy, as concluded in recitals 80 to 83 of the provisional Regulation.

(97) Following final disclosure, the GOI, PT Ciliandra Perkasa, the Permata Group and Wilmar claimed that the Commission erred in rejecting the exporting producers' claim that the Commission should have deducted transport costs and credit costs from the calculation of the benefit. According to the GOI, this is because these costs are necessarily incurred in order to obtain the grant pay-outs.

(98) The Commission already discussed this claim in recital 89 above. In addition to what already explained in recital 91 above, the Commission noted that according to the Guidelines *'the only fees or costs that may normally be deducted are those paid directly to the government in the investigation period*'. In this case, the transportation costs are not paid to the Government, rather they are paid to private parties and then reimbursed by the GOI. The Commission therefore maintains its conclusion that the transport costs do not qualify as costs that can be deducted according to the Guidelines. The claim is therefore rejected.

([13]) OJ C 394, 17.12.1998, p. 13.

(99) Following final disclosure, the GOI claimed that the Commission erred in not deducting inputs to the OPPF in its calculation of the benefit received under this scheme. However, these inputs related to payment of export levies set by the GOI on various CPO based products exported from Indonesia. These levies were therefore collected for many other products than the product under investigation. As explained in recital 64 of the provisional Regulation and further explained in recital 62 above, these levies are public resources. This point is correct whichever Government body was responsible for their collection. Therefore it was concluded that it was not appropriate to deduct inputs to the OPPF from the benefits received. This claim was therefore rejected.

(100) Also following final disclosure, the GOI claimed that the Commission erred in using the turnover of biodiesel for the determination of the subsidy amount. The claim was that the total turnover of the biodiesel producers (and thus including products other than biodiesel) should have been used. However, the subsidies granted from the OPPF were solely because the producers had sold biodiesel. Consequently, the Commission considered that it had used the correct turnover in its calculation and this claim was therefore rejected.

(101) The Commission observed that the GOI did not put forward any further arguments to support its claims and therefore confirmed its findings in recital 95.

### 3.2. **Government support to the biodiesel industry through the provision of CPO for less than adequate remuneration**

(102) Following provisional disclosure, the GOI as well as most of the exporting producers claimed that the Commission erred in qualifying the export restraints imposed by the GOI on CPO and its derivatives as a countervailable subsidy. According to the GOI and the exporting producers, this is because the WTO case-law consistently considers export restraints not to be countervailable subsidies.

(103) Concerning this claim, the Commission observed that the provisional Regulation does not consider export restraints *per se* as countervailable subsidies. Rather, the Commission considered that the imposition of export restraints (such as export taxes and levies) is one of the means or tools used by the GOI to provide CPO for less than adequate remuneration. The Commission found (see recital 172 of the provisional Regulation) that, in view of the available evidence in this investigation, and in accordance with the EU and WTO case-law, the provision of CPO for less than adequate remuneration amounted to a countervailable subsidy.

(104) The Commission will address below the claims raised by interested parties as regards the Commission's provisional findings that the GOI's support to the biodiesel industry through the provision of CPO for less than adequate remuneration amounts to a financial contribution under Article 3(1)(a)(iv) of the basic Regulation and/or income or price support under Article 3(1)(b) of the basic Regulation. The Commission will also address the allegations concerning errors in the determination of benefit.

(105) Following final disclosure, the GOI and the Permata Group claimed that export restraints imposed by a government can never amount to a financial contribution. In this regard, the Commission observed that this claim is irrelevant for the purposes of this case. This is because the Commission concluded that the financial contribution granted by the GOI in favour of the exporting producers derives from the provision of CPO for less than adequate remuneration. The claim was therefore rejected.

#### 3.2.1. *Failure to prove the existence of a financial contribution*

(106) Following final disclosure, the GOI, the Permata Group and Wilmar claimed that the Commission failed to prove that there is a financial contribution. In the respondents' view, this is because:

(a) The export restraints were not collected during the investigation period as the export tax was suspended during the investigation period and the export levy was suspended after the investigation period. Additionally, that suspension indicates that the GOI no longer has the intention to impose export restraints; and,

(b) The Commission failed to prove entrustment or direction of the CPO suppliers.

(107) With regard to the claim sub (a) above, the Commission observed that during the investigation period the export levy was in force and was collected. Hence, the GOI's claim that export restraints were not collected during the investigation period is factually incorrect since the export levy was in place and had an effect during the investigation period.

(108) The Commission disagreed with the second leg of the argument. If the GOI had the intention to no longer impose export restraints on CPO and derivatives, it would have repealed the legislation. Temporarily setting the rate of export levy and export tax at zero indicates that the GOI still intends to be able to make use of these restraints in the future. This finding can also be corroborated by public statements of members of the GOI. One press article dated 25 September 2019 for example reports the following: *'The government has decided to suspend an export tax imposed on crude palm oil (CPO) and its derivative products until next year to ease the financial burdens of palm oil producers amid a drop in CPO prices on the world market. Economic Coordinating Minister Darmin Nasution, said in Jakarta on Tuesday that the export tax was suspended until January next year as the government officially begins the implementation of its mandatory B-30 biodiesel program. Darmin said he hoped the implementation of the B-30 biodiesel policy, which was supposed to significantly raise the demand for palm oil, would be able to push up palm oil prices in the domestic market. He said that the suspension of the export tax had been approved by President Joko "Jokowi"Widodo. Based on a 2019 Finance Ministry regulation, the government would have imposed an export tax of up to $25 per ton if prices hovered between $570 and $619 per ton and up to $50 if it goes beyond $619 per ton. As of Sept. 20, the CPO price was at $574.9 per ton and it is expected to slightly fall to $570 per ton until the end of this year. The minister therefore called for the revision of the regulation to allow for the suspension of the export tax because, if based on the above price formula, it was still applicable'* ([14]).

(109) This statement also establishes a direct link between imposition of export restraints (together with other elements to induce the specific conduct from CPO suppliers) and the actual level of prices on the domestic market. It also demonstrates that the GOI uses those instruments in order to influence the level of those prices.

(110) Despite the GOI's and Wilmar's allegation in its response to definitive disclosure, the Commission concluded that the GOI's intention in the future is to continue using the export levy and possibly the export tax. The fact that the GOI temporarily did not collect taxes and levies, also bearing in mind that these are only some of the tools of the GOI to provide CPO for less than adequate remuneration, cannot therefore call into question the existence of a financial contribution.

3.2.2. *Failure to prove entrustment or direction under Article 3(1)(a)(iv) of the basic Regulation*

(111) According to all exporting producers, the Commission's allegation of entrustment or direction rests upon the incorrect finding that the tax and export levy on CPO and its derivatives imposed by the GOI are designed to support the biodiesel industry. In addition, Wilmar and Permata alleged that the Commission wrongly found that the domestic CPO prices are *de facto* set by PT Perkebunan Nusantara, a CPO producer wholly owned by the GOI ('PTPN').

(112) With regard to the first claim, exporting producers further clarified that during the investigation period the export tax was set at zero and therefore is irrelevant for the assessment. The export levy on the contrary was not at zero, and that in any event it was not designed to support the biodiesel industry, but to finance the OPPF.

([14]) https://www.thejakartapost.com/news/2019/09/25/palm-oil-export-levies-suspended-to-help-producers-cope-with-low-prices.html, last accessed on 21 October 2019.

(113) The Commission acknowledged in recital 88 of the provisional Regulation that during the investigation period the export tax was set at zero. Yet, even if it was not implemented during the investigation period in view of the specific market circumstances, the export tax constitutes evidence of the tools used by the GOI to induce CPO suppliers to provide CPO for less than adequate remuneration. Moreover, the Commission observed that the export tax, albeit at zero during the investigation period, has not been repealed by the GOI. The Commission also observed that, as discussed in recitals 117 to 121 of the provisional Regulation, it has not been contested that the GOI's intention of using the export tax is to keep domestic CPO prices artificially low.

(114) With regard to the export levy, the Commission observed that, whilst the legislation imposing export levy does not mention explicitly that it is designed to support the biodiesel industry by providing CPO at lower prices, the export levies which become part of the OPPF *de facto* support exclusively the biodiesel industry via the OPPF's grants. During the investigation, the Commission could indeed verify that, despite a broader formal remit, the OPPF has been supporting almost exclusively the biodiesel industry during the investigation period.

(115) Moreover, the introduction of the export levy in 2015 by the GOI coincided with a period where Indonesian CPO prices were nearly identical to world prices. In this regard, and as already demonstrated in recitals 64 to 68 of the provisional Regulation, the export levy shall not be regarded in isolation, but as part of a broader set of measure designed to support the biodiesel industry and regulate domestic CPO prices.

(116) Moreover, the Commission observed that in practice the export levy has achieved the intended objective of depressing the domestic CPO prices. In its analysis, the Commission could in the first place observe a difference between the domestic prices and the export prices of Indonesian CPO. The Commission considered that this price difference can be explained by the fact that the very imposition of the export levy depressed the domestic prices by artificially keeping CPO in the country at the low prices set by the GOI and *de facto* followed by CPO suppliers.

(117) The fact that the GOI did not repeal the export tax but only set it at zero clearly indicates that it still maintains the intention to keep the CPO prices low. Having put in place two instruments that have the same effect on the domestic CPO prices, and having achieved the desired effect, the GOI therefore had rationally decided to keep active the one with the widest range of desired effects (i.e. keeping the CPO prices low and financing the OPPF), i.e. the export levy.

(118) Therefore, the Commission confirmed that the overall system of export restraints put in place by the GOI is designed to benefit the biodiesel industry by keeping domestic prices of CPO artificially low (as opposed to a mere side-effect of a government measures to collect public revenue).

(119) With regard to the claim that domestic CPO prices are not *de facto* set by the GOI, Wilmar further alleged that the Commission's conclusion was incorrect because:

(a) The bids placed by interested buyers are generally based on international market prices;

(b) The tendering process is very competitive, and PTPN can counter-offer if the price is deemed too low;

(c) There is no evidence supporting the Commission's claim that PTPN does not act as a rational operator;

(d) The domestic CPO suppliers, based on the results of tenders, choose whether to sell their CPO and at which prices;

(e) The fact that PTPN sells CPO via public tenders makes it a price taker rather than a price setter.

(120) With regard to the claim under (a) above, the Commission recalled that, as noted in recitals 91 to 99 and 126 of the provisional Regulation, the Commission had to rely on facts available in view of the lack of cooperation of CPO suppliers and PTPN. In their comments on the provisional Regulation no exporting producer provided any evidence concerning how they formulate their bids for CPO, other than vaguely claiming that they are based generally on 'international market prices'.

(121) The Commission, lacking any verifiable evidence supporting this statement, rejected this claim accordingly. Rather than independently setting their prices in view of international prices, CPO suppliers follow the CPO prices effectively set by PTPN.

(122) With regard to the claim under (b) above, the Commission explained in recital 133 of the provisional Regulation that PTPN is in fact under no obligation to counter-offer a higher price if the bids received are below the 'price idea' for that specific day. In fact, the Commission confirmed during the verification visit that PTPN regularly accepted offers below such a price.

(123) The Commission additionally observed that, as explained in section 3.3.2 of the provisional Regulation, it applied the provisions of Article 28(1) of the basic Regulation as PTPN failed to reply to Appendix B attached to the anti-subsidy questionnaire (questionnaire for palm oil suppliers) to all producers and distributors of palm oil. Furthermore, during the verification visit at the GOI's premises, PTPN failed to explain how it determines the daily 'price idea' for CPO. PTPN instead vaguely explained that it is based on international benchmarks without providing any detailed information.

(124) The Commission therefore could not obtain any evidence that the 'price idea' reflects a market price resulting from a competitive tendering process. Rather, the Commission found that the domestic CPO price is lower than any of the alleged international benchmarks (including the Indonesian export price) which were alleged to be the basis of PTPN's prices.

(125) With regard to the claim (c), the Commission observed that as far as PTPN is concerned, it did not provide a reply to the Commission's questionnaire mentioned above. The Commission therefore applied facts available. During the GOI verification, PTPN submitted a copy of its audited accounts for 2016 and 2017. These showed that PTPN operated at a loss. At a later stage and even beyond the deadline for comments on the letter announcing that the Commission would apply facts available, PTPN provided additional information. The GOI claimed that such additional information should change the Commission's assessment. The Commission noted that the information was provided very late and well beyond any deadlines. PTPN did not submit audited accounts for the year 2018. As regards the latest period, the Commission therefore only received audited accounts for one quarter of the investigation period (last quarter of 2017). The audited accounts that the Commission received showed that PTPN operated at a loss. The belated information submitted by the GOI regarding the period from 2016 to the investigation period (in particular an excel table) attempts to show that PTPN's CPO business (which accounts for the majority of its activities) was profitable and that the company achieved the same profit on its domestic and export sales. This information, however, was not supported by audited accounts. In contrast, the information provided on the basis of audited accounts confirmed that PTPN was not making profits when selling its CPO, thereby failing to act as a rational economic operator would. In any case, the Commission noted that information submitted at such a late stage (even after the comments on the provisional Regulation) cannot be accepted because it cannot be verified. Consequently, the claim was rejected.

(126) With regard to the claim (d), the GOI and exporting producers also claimed that the Commission failed to prove that the conduct of CPO suppliers was irrational as they were profitable. This claim relates to CPO suppliers that provided replies to the Commission's questionnaire as well as to PTPN ([15]).

(127) The Commission considered that the notion of irrational behaviour is not limited to operating a business at a loss but includes also actions that put a business operation at a less advantageous (less profitable) position. The Commission established a clear price difference between domestic and export CPO prices in Indonesia, so that but for the export levy, selling for export would be more profitable for CPO suppliers.

([15]) As discussed below in recital 142, the Commission could not draw any conclusion from the replies of CPO supplier regarding their profitability.

(128) Additionally, the finding that the export restraints system put in place by the GOI effectively prevents domestic CPO producers to act rationally is corroborated by the fact that exports are expected to raise as a result of lifting the export levy. In this regard, in a recent press article, the following was noted: *'The Indonesian Palm Oil Association, or GAPKI, projected that the country's CPO exports may jump 10 % to 15 % after the export levy is reduced to zero, down from $50 per tonne previously, secretary general Togar Sitanggang said. Mr Sitanggang estimated that Indonesia's monthly CPO exports have already risen to between 800,000 tonnes and 900,000 tonnes, up from an average of 700,000 tonnes before. "It would not be surprising that monthly CPO exports would hit one million tonnes if the zero export levy stays," he added. Indonesia has already exported 6m tonnes of CPO this year, about one-fifth of its year-to-date overall exports of CPO and other palm oil derivatives, GAPKI's estimates show'* ([16]).

(129) Another press article further corroborates the finding that the collection of the export levy has the effect of inducing CPO suppliers to sell domestically instead of selling for more profit on the export market. In that article an independent analyst found *'this news (i.e. the setting of the export levy at zero) as positive for upstream planters with exposure to Indonesia, as the revision in export levy rates could help support CPO prices at their current levels. However, Ng does not expect on FY19F-20F net profit for planters — and cautions that the news is negative for Indonesian downstream processors as the revised levy at lower CPO prices will erode their margin advantage, which is currently the prices difference between CPO and processed palm products. "We maintain our view that the removal of export levy will raise the competitiveness of Indonesian palm oil product exporters as they would have saved between US$20-50 per tonne export tax when CPO price is below US$570 per tonne. The bulk of the savings is likely to flow back to the Indonesian farmers via higher domestic CPO prices"'* ([17]).

(130) This latter press article also corroborates the finding that the intended effect of the export levy, namely to suppress domestic CPO prices, was achieved. The fact that there are some exports of CPO from Indonesia does not mean that the measures taken by the GOI to keep CPO within Indonesia did not induce CPO suppliers to follow an irrational economic behaviour. In light of the above, the Commission therefore rejected these claims.

(131) Finally, with regard to the claim (e), the Commission observed that in order to support its argument that PTPN acts as a price taker, Wilmar only partially quotes recital 146 of the provisional Regulation. By doing so, Wilmar claimed that the Commission reached a conclusion which in reality contradicted the conclusion reached in that recital. Particularly, after stating that *'Also, the investigation indicated that in terms of negotiating power the market is significantly imbalanced in favour of CPO buyers'*, as correctly quoted by Wilmar, the Commission further explained that *'(…). In this context, any purchaser will have a significant degree of buying power, such that it can resist any attempt from its supplier to ask for a price higher than that set by the GOI. Hence, the Commission concluded that by communicating transparently the daily CPO prices, the GOI is, through PTPN, effectively setting the maximum daily CPO prices in Indonesia'*. Recital 146 of the provisional Regulation therefore reached a conclusion opposite to the one claimed by Wilmar. PTPN in fact acts as a price setter of CPO in the market since CPO suppliers *de facto* follow such a price, despite of the market structure (which in principle shows that CPO suppliers have significant negotiating power that is not used against buyers).

(132) In addition to the above factual mistake, the Commission further took note of the fact that Wilmar's comment is not supported by any factual evidence. Lacking any new factual evidence, the Commission rejected this claim.

(133) Wilmar further claimed that the Commission failed to prove that the GOI induces CPO suppliers to provide CPO for less than adequate remuneration.

([16]) https://lloydslist.maritimeintelligence.informa.com/LL1125599/Indonesia-CPO-exports-get-boost-from-levy-relief, accessed on 23 September 2019.

([17]) https://www.theedgesingapore.com/new-indonesian-export-levies-great-news-upstream-planters-threat-processors-cgs-cimb, accessed on 23 September 2019.

(134) The Commission observed that Wilmar did not provide any evidence supporting the claim that this is not the case. In this regard, the Commission recalls the claim made by the EBB concerning limited number of replies to the questionnaire provided by CPO suppliers. Absent cooperation by CPO suppliers, and on the basis of the elements contained in the provisional Regulation, the Commission considered that there is significant evidence showing that CPO suppliers have been entrusted or directed by the GOI to provide CPO for less than adequate remuneration in pursuit of the GOI's policy objectives to support the development of the biodiesel industry.

(135) Moreover, the Commission observed that Wilmar's claim contradicts the uncontested factual finding that virtually all domestic CPO purchases in Indonesia are carried out at the daily PTPN prices, adjusted to transport costs discussed in recital 168 of the provisional Regulation. If Wilmar's claim was to be correct and CPO suppliers act totally independently from any government's direction, such a perfect alignment of CPO prices could not be explained in a market which is fragmented.

(136) The Commission therefore rejected this claim.

(137) Wilmar also claimed that the Commission failed to prove entrustment or direction of CPO suppliers to provide CPO for less than adequate remuneration. Wilmar's claim essentially rely on the fact that (1) PTPN is not a price setter, and therefore CPO is not provided for less than adequate remuneration and (2) CPO suppliers are not prevented to sell on the export market.

(138) The Commission already addressed and rejected these points in recitals 127 to 135. The Commission therefore considered that Willmar's claim relies on incorrect facts and cannot be accepted. The evidence available in this investigation showed that PTPN acts as a price setter for CPO on the market and that the ability of CPO suppliers to export CPO is undermined by the measures adopted by the GOI.

(139) Similar claims have been made by the GOI, PT Intibenua Perkasatama and PT Musim Mas ('Musim Mas Group') and Permata. In its comments, the GOI claimed that CPO prices are determined by market forces and that buyers usually formulate their price ideas on international market prices.

(140) The Commission already discussed similar arguments in recitals 62 to 96, and found that they cannot be accepted. The same conclusion is maintained concerning the GOI's claims. The Commission again observed that the GOI did not provide any new evidence to support its claim.

(141) The GOI claimed that the Commission failed to prove that there is a demonstrable link between the CPO producers' behaviour and the GOI's measures. In that regard, the Commission noted once again the finding of recital 168 of the provisional Regulation, recalled in recital 137. In the Commission's view the fact that all independent CPO suppliers virtually always follow PTPN's prices is an unequivocal proof of the existence of that link (and more so in a market which is fragmented in terms of the number of CPO suppliers as well as geographically/several islands). Even more so in a situation where domestic CPO prices do not reflect what would be an undistorted market price but for the GOI's targeted measures.

(142) In its submission, the GOI also claimed that the Commission instructed the GOI and independent CPO suppliers to provide detailed information but did not verify this information. The GOI further claimed that the Commission totally disregarded this information in reaching its findings. Lastly, in this regard the GOI noted that the Commission applied Article 28 of the basic Regulation to the GOI for the GOI not further pursuing more such responses and for not getting more information from PTPN.

(143) In this regard, the Commission considered that this claim is factually incorrect. The Commission did analyse all the replies received by CPO suppliers. The Commission, however, noted that, despite all the reminders sent, all but one independent CPO supplier failed to provide an open version of their replies. In light of Article 29(3) of the basic Regulation, the Commission may disregard information which has been provided but for which a proper summary was not provided by the submitting party. Furthermore, the vast majority of the replies were incomplete and many of them did not contain information on profitability. The Commission therefore could not draw any conclusion from these replies. In fact, the lack of cooperation by the GOI as well as the CPO suppliers was a further indication that CPO suppliers are acting following the GOI's command in support of the biodiesel producers.

(144) Similarly, the claim of the GOI that the Commission disregarded the reply of PTPN is unjustified. As explained before, the Commission unsuccessfully requested on several occasions the cooperation from PTPN. As stated in recitals 29 and 30 of the provisional Regulation, the Commission observed that PTPN, wholly owned by the GOI, did not respond to Appendix B to the GOI's questionnaire within the stipulated deadline. The Commission therefore issued an Article 28 letter to the GOI, limited to the specific information that was not provided. As noted in recital 98 of the provisional Regulation, the GOI submitted a reply to the Appendix B for PTPN on 30 June 2019. This was long after the deadline for the submission of that information (14 March 2019) and after the verification visit at the GOI's premises took place. The submission was therefore submitted long after the deadline, was not verifiable and the GOI has not acted to the best of its ability in accordance with Article 28 of the basic Regulation. In any event, the Commission used all the evidence provided by PTPN and which could be verified. Therefore, the Commission properly assessed the information provided by PTPN together with the other available facts about the CPO market in Indonesia.

(145) Following final disclosure, the GOI, the Permata Group and Wilmar claimed that the Commission erred in finding entrustment or direction of CPO suppliers because:

(a) The export restraints are not designed to support the biodiesel industry and any impact on prices is a mere side-effect of the measures;

(b) PTPN sets its prices via competitive tenders and is profitable;

(c) Price alignment of CPO suppliers to PTPN does not show entrustment or direction;

(d) CPO suppliers are rational operators on the market and the Commission failed to carry out verification of their responses; and,

(e) The Commission failed to prove a demonstrable link between the action of the GOI, via PTPN, and the action of the CPO suppliers. According to the GOI, the limited market share of PTPN would not allow it to set market prices.

(146) The Commission firstly observed that the export levy is expressly designed to support the OPPF and that the OPPF is designed to support the palm oil industry at large but, as explained in recitals 76 and 77 of the provisional Regulation, *de facto*, only supports the biodiesel industry. Additionally, the Commission concluded that the GOI support of the biodiesel industry is achieved also with the provision of CPO for less than adequate remuneration. This objective is reached by the combined effect of various measures, including the export levy.

(147) The Commission therefore concluded that the imposition of the export levy has since its inception two distinct objectives: funding the OPPF and being part of a set of measure to depress domestic prices. In the Commission's view, the GOI deliberately sought (and succeeded) to obtain that effect on the market and this is not a mere side-effect of a governmental policy.

(148) With regard to the claim that PTPN sets its prices via competitive tenders and that therefore that outcome should be regarded as a market price, the Commission reiterates that, as noted in recitals 91 to 99 and 126 of the provisional Regulation, the Commission had to rely on facts available in view of the lack of cooperation of CPO suppliers and PTPN. In their comments on the provisional Regulation no exporting producer provided any evidence concerning how they formulate their bids for CPO, other than vaguely claiming that they are based generally on 'international market prices'. Yet, there was no direct evidence available on how CPO suppliers set their prices; rather, the facts show price alignment to the price set by PTPN.

(149) In this regard, in its comments to the definitive disclosure, Wilmar highlighted that the Commission services during the verification visit at its premises have asked the question how it reaches the decision on the price to offer at each PTPN's tender. Wilmar further explained that the subsequent mission report does not indicate any missing information. In this respect the Commission observed that Wilmar does not contest that the information it had provided in that instance had been very vague. Additionally, the Commission observed that Wilmar did not consider it appropriate providing a more detailed explanation of this mechanism at any further stage of the investigation, despite this being repeatedly mentioned by the Commission.

(150) The Commission, lacking any verifiable evidence supporting this statement, rejected this claim. Rather than independently setting their prices in view of international prices, CPO suppliers follow the CPO prices effectively set by PTPN.

(151) With regard to the claim that PTPN is profitable, the Commission observed that, in addition to what was already explained in recitals 125 and 144, the GOI belatedly submitted PTPN's 2018 audited accounts after the final disclosure. However, a translation was received only for part of these accounts. The 2018 accounts appear to show that PTPN was profitable in 2018. However, the Commission could not assess this because key parts of the accounts were not translated and because these accounts covered all products not just revenue from CPO sales. Furthermore, as explained above the data for both CPO sales and the company as a whole were submitted late and were therefore unverifiable. This is in addition to the fact that PTPN did not cooperate with the investigation. The Commission therefore concluded that the accuracy of the claim made could not be assessed and had to be rejected. With regard to the claim under (b) above, the Commission explained in recital 133 of the provisional Regulation that PTPN is in fact under no obligation to re-offer a higher price if the bids received are below the 'price idea' for that specific day. In fact, the Commission confirmed during the verification visit that PTPN regularly accepted offers below such a price. Additionally, the Commission observed that the GOI can and does influence PTPN's decisions as regards the pricing policy of PTPN ([18]).

(152) With regard to the claim that the price alignment of CPO suppliers to the daily PTPN prices is an indication of the fact that the market is undistorted rather than an indication of entrustment or direction, the Commission observed that all independent CPO suppliers offered prices which are the same or lower prices compared to the PTPN's price of that day. In the Commission's view, this cannot be an indication of undistorted market dynamics: it is counterintuitive how in a competitive market all CPO suppliers would not sell for a price higher than the one set by a competitor (unless that competitor is effectively setting the maximum price for that good on the market and the government mandates or induces all the other players to respect that ceiling).

(153) With regard to the GOI's claim that CPO producers are rational operators on the market as 70 % of the CPO is exported, the Commission observed that according to public sources, the domestic consumption of CPO amounts to 30 % of the production ([19]). This means that CPO producers entirely satisfy the domestic demand and, after having satisfied that demand, they resort to export. The fact that 70 % of the CPO production is exported therefore does not contradict the finding that CPO suppliers are deprived of a rational choice, but to the contrary. If Indonesian CPO suppliers would behave rationally, they would not satisfy the domestic demand, and they would

([18]) As explained in recital 133 of the provisional Regulation, '(…) when the price offered by prospective buyer is below that "price idea" the matter is referred to the Board of Directors which can decide to accept the offer. The Commission confirmed during the verification visit that these acceptances take place on a regular basis. In any event, the fact that the decisions on prices are taken by PTPN's management board where the GOI is solely represented indicates that the GOI exercises meaningful control over PTPN and its conduct relating to pricing decisions'.

([19]) GAIN report Indonesia Oilseeds and Products Annual 2019.

export all, or a significantly larger proportion of, their production where they could achieve greater profit. Those potential extra-profits from exports are limited by the export restraints used by the GOI to induce CPO suppliers to sell domestically and satisfy the local needs. Hence, the fact that all the domestic demand is satisfied rather indicates that the GOI achieved its objective to source the domestic market at prices favourable to biodiesel producers.

(154) In its comments to the definitive disclosure, Wilmar further claimed that the fact that following the setting of the export levy at zero, the share of export of CPO did not increase is evidence that the Commission erred in concluding that the export levy is designed to keep CPO in the country and depress its price.

(155) In this respect, the Commission observed that the data provided by Wilmar indicated that the domestic consumption increased and that therefore it took a larger proportion of the total CPO production. This may support Wilmar' claim if the GOI would have expressed its intention to end the export restraints system. However, as explained in recital 108 the intention of the GOI is not to end the export restraints mechanism. Rather, it is clear that the rate of export restraints system is simply at zero in reaction to external factors, i.e. the global drop of palm oil prices. All Indonesian producers are well aware that this level is merely temporary and are therefore continuing to give preference in satisfying the domestic demand first.

(156) Wilmar also provided price information in its reply, arguing that since the zeroing of the export levy, domestic CPO prices did not substantially increase. The Commission analysed that information and observed that it could not determine the source of the data used by Wilmar; therefore the Commission could not verify nor asses their accuracy. However the Commission, should it rely on those data, observed that, notwithstanding the temporary nature of the fact that the rate of the export levy is at zero, they show an alignment of domestic price to the export prices. Particularly, whereas during the investigation period the average difference between the two prices was around 50 USD/tonne, the data provided by Wilmar indicated that the domestic prices has risen close to the export prices and the difference is now of less than 20 USD/tonne. The fact that the domestic price have not substantially increased in absolute terms is simply due to the fact that world prices have dropped.

(157) In the Commission's view, this supports its finding that the export restraints system is designed, inter alia, and together with the other measures, to depress domestic CPO prices.

(158) With regard to the GOI's claim that the Commission did not verify the independent CPO suppliers' responses, the Commission observes that this is a factually incorrect allegation. As already indicated in recital 143, the Commission duly analysed all the responses received but it observed that the vast majority of the replies were incomplete, many of them did not contain information on profitability and many did not provide open versions of their replies.

(159) In addition to this claim, the GOI submitted that the Commission's assertions in the final disclosure, reported in recital 143, are incorrect as it could not find track of the reminders on the open file. With reference to this claim, the Commission observed that those reminders are part of the limited file and they can be found on the list of limited documents available to interested parties. The Commission nonetheless provided a list of the relevant save numbers to the GOI during a hearing held on 16 October 2019. The Commission also observed that that the questionnaires to independent CPO suppliers were part of the questionnaire addressed to the GOI, and therefore the responsibility to coordinate, collect and ensure the timely sending of complete replies lied entirely on the GOI.

(160) With reference to the claim under (e) above, the Commission explained in recitals (124) to (143) of the provisional Regulation how the GOI, via PTPN, acts as a price setter on the Indonesian domestic market and how all independent CPO suppliers follow those price indications. In its comment to the definitive disclosure, the GOI stated that in light of PTPN's limited market share that result is unlikely. The Commission however observed that the GOI failed to provide any factual evidence whatsoever to support its statement and to contradict the Commission's finding.

(161) In light of the above, the Commission rejected the GOI's and exporting producers' claims and confirmed its finding of entrustment and direction.

3.2.3. *Failure to prove income or price support under Article 3(1)(b) of the basic Regulation*

(162) Following provisional disclosure the GOI and the exporting producers claimed that the Commission failed to prove the existence of income and price support in favour of biodiesel producers according to the required standard set out by the WTO case-law.

(163) On this point, the Commission observed that neither the GOI nor the exporting producers provided new information or evidence to substantiate a claim of lack of income or price support. The claims raised in this respect merely disagree with the interpretation of the case-law followed by the Commission. The Commission considered that the analysis carried out in section 3.3.3.7 of the provisional Regulation satisfies the standard of proof laid down by the basic Regulation, the SCM agreement and the WTO case law.

(164) Lacking any new factual element which could trigger a reassessment of its finding, the Commission confirmed the conclusion reached in section 3.3.3.7 of the provisional Regulation.

(165) Following definitive disclosure, the GOI submitted that the Commission erred in finding income and price support because that requires the existence of a measure that guarantees a certain result, and not any measure having an incidental effect on prices.

(166) In that regard, the Commission already explained in recitals 153 and 160 that the set of measure have the objective of regulating and depressing domestic prices, and that is not simply a side-effect of the GOI's policy. Additionally, the Commission observed that neither the GOI nor the exporting producers provided new information or evidence to substantiate a claim of lack of income or price support.

(167) Wilmar claimed that the Commission failed to consider its claims in response to the provisional disclosure and urged the Commission to do so.

(168) Contrary to Wilmar' allegation, the Commission analysed those allegations and, as indicated in recital 163, it could not find any new factual element. Rather, Wilmar explains why it disagrees with the Commission' interpretation of the WTO case law and of the facts of the case. In those comments, Wilmar also discusses its view of the correct counterfactual.

(169) For the sake of clarity, the Commission restated that it disagreed with Wilmar's interpretation of the WTO case law and the facts of the case as laid down in section III.B.3 of the Comments to the Provisional Regulation and entirely confirmed the conclusion reached in section 3.3.3.7 of the provisional Regulation.

3.2.4. *Failure to prove existence of a benefit: error in identifying the appropriate benchmark*

(170) In the provisional Regulation, the Commission found that the FOB CPO export prices from Indonesia to the rest of the world as found in the Indonesia Export Statistics are an appropriate benchmark as they are set according to free market principles, compete with prices of other products in foreign markets, reflect prevailing market conditions in Indonesia, and are not distorted by government intervention. Additionally, the Commission considered that the benchmark used is the closest proxy to what an undistorted Indonesian domestic price would be absent the GOI's intervention. The Commission also found that the FOB prices used as a benchmark are in line with international prices (such as, for example, CIF Rotterdam).

(171) The Commission therefore calculated the amount of countervailable subsidy for each exporting producer in terms of the benefit conferred on the recipient found to exist during the investigation period. The Commission assessed the benefit as being the sum of the differences between the prices paid for domestically purchased CPO and the benchmark price of CPO calculated per month of the investigation period.

(172) The GOI, Wilmar and Permata Group claimed that the Commission erred (1) in considering that benchmark as appropriate and, (2) in calculating the total benefit. The GOI, Wilmar and Permata Group claim that this is because the FOB export price includes the export levy and is therefore distorted. The EBB submitted a very similar claim as well.

(173) The Commission observed that the claim that the export price is distorted essentially tries to conceptually reverse the reasoning of the case. While the Commission considered that the domestic CPO prices are artificially low, the exporters claim that it is the export prices (roughly in line with international prices) that are too high. In other words, the exporters claim that the export levy makes export prices too high. However, it is the domestic price that is distorted because of the export levy, among other things. Finally, the GOI itself claimed that the export levy is not included in the export price used by the Commission in its calculations ([20]). The Commission noted this claim of the GOI. However, it considered that the effects of the export levy are factored in the FOB price. The Commission in fact considered that the seller takes into account the obligation to pay the levy when setting the export price, which is then communicated to the GOI's authorities for statistical purposes.

(174) Moreover, as set out in recital 198 of the provisional Regulation, the Commission considered the monthly FOB export price, reported in the Indonesian statistics, as the most suitable benchmark. The Commission considered this benchmark as suitable for the individual purchase transactions. The Commission found that the FOB incoterm of the benchmark price and the incoterms of domestic purchase transactions made by the exporting producers were comparable. The Commission did not receive any comments in this respect by interested parties.

(175) In addition to the above, Wilmar claimed that the Commission erred in calculating the amount of benefit received by the former as it should have deducted from the calculation of the benefit the amounts by which the CPO purchase price exceeds the benchmark. In this respect, the Commission noted that it had only taken into account the transactions for which a benefit was conferred (in other words, where the price paid by the exporting producers was below the benchmark). These are the transactions where the programme in question results in granting benefits to exporting producers. So it would not make sense to deduct transactions where no advantage was granted since they were market conform. In this sense, the Commission observed that the WTO panel in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* ([21]), examining how the USDOC had determined the amount of benefit conferred thorough the subsidy at issue referred to as the provision of 'rubber' for less than adequate remuneration ([22]), noted that the alleged subsidies 'must be analysed in relation to a particular period to ultimately arrive at an overall amount of subsidisation of the investigated product' ([23]) and that 'Article 14 (d) of the SCM Agreement contains no reference to any notion of offsetting, or "negative benefits" or of averaging across the period of investigation, for a particular good' ([24]). The comparison is a comparison of individual purchase transactions with a benchmark individual for that purchase transaction. The Commission performed a transaction to transaction comparison to establish whether there was a benefit and the amount of that benefit. The total of the benefits found per transaction is the amount of subsidy. Therefore, this claim is dismissed.

([20]) t19.005028.

([21]) See Panel Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/R), paragraphs 11.38-11.69.

([22]) The USDOC calculated monthly market benchmark prices for each type of rubber, based on the tire producers' actual purchases of rubber from private sources, and used these monthly benchmarks to determine on a monthly basis whether a benefit had been conferred. For each tire producer, the USDOC summed the positive benefit amounts thus calculated for each type of rubber, to arrive at a total benefit for the period of investigation to that tire producer from that type of rubber. These input-product-specific benefit totals then were added together to arrive at the total benefit to the tire producer from government provision of rubber inputs of all kinds during the period of investigation. China argued that if some purchases during the period of investigation were made for a higher-than-benchmark, or above market, price, the full amount of these 'negative' benefit amounts, as measured against the benchmark price, must, as a matter of law, be offset against the 'positive' benefit amounts, over the full period of investigation.

([23]) See Panel Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/R), paragraph 11.45. See also to the same effect the judgement of the General Court of 10 April 2019, T-300/16, Jindal Saw, ECLI:EU:T:2019:235, paragraphs 180-182.

([24]) See Panel Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/R), paragraph 11.47.

(176) Following final disclosure, the GOI also claimed that the Commission failed to prove the existence of a benefit because (1) it is illogical to find a benefit in the form of export restraints in a competitive financial market, and (2) domestic CPO prices follow competitive market dynamics.

(177) In this respect, the Commission would like to point out once again that the benefit in this case is in the form of provision of CPO for less than adequate remuneration. The GOI's first claim is therefore rejected.

(178) With regard to the GOI's claim that domestic CPO prices follow competitive and undistorted market dynamics, the Commission refers to the analysis carried out, and in particular in recital 151.

(179) The Commission therefore maintained its finding that this scheme grants a benefit to the exporting producers.

(180) The GOI also claimed that the Commission identified the incorrect benchmark essentially because the one it used is inclusive of the export levy and that it should deduct the export levy from the benchmark.

(181) In this respect the Commission observed a contradiction between this statement and the reply of the GOI to the deficiency letter of 14 March 2019. In that reply, the GOI stated that: '*The GOI confirms that export statistics to the EU only cover biodiesel produced in Indonesia. The reported value of the export is FOB and export tax/levy is not included*'. The Commission additionally observed that the GOI did not provide any additional factual element to support its statement. As explained in recital 173, the Commission considered that the reported FOB export price *de facto* includes the effects of the export levy.

(182) It was claimed by Wilmar that the benchmark used to calculate the benefit was excessive because an 'out-of-country' benchmark had been used. However, in determining the most accurate and appropriate benchmark to be used it should be recalled that the Commission did not use 'out-of-country' benchmarks such as those available in Malaysia or Europe such as CIF Rotterdam. The Indonesian export prices were used because they are Indonesian (and in this sense are in-country prices) and because they represent a reliable market basis for comparison purposes. Therefore this claim was rejected.

(183) The Commission therefore confirmed the conclusion reached in recital 172.

3.2.5. *Specificity*

(184) Following definitive disclosure, the GOI claimed that the Commission failed to prove specificity of the programme. According to the GOI, a subsidy which is specific if it refers to a single industry only.

(185) The Commission disagreed with this claim. The Commission noted that the Panel in US — Upland Cotton explained that: '*According to the text of Article 2 of the SCM Agreement, a subsidy is "specific" if it is specific to an enterprise or industry or group of enterprises or industries (referred to in the SCM Agreement as "certain enterprises") within the jurisdiction of the granting authority.(…)*'. The Panel further explained that '*(…) "Specificity" extends to a group of industries because the words "certain enterprise" are defined broadly in the opening terms of Article 2.1, as an enterprise or industry or group of enterprises or industries.*' ([25])

(186) The Appellate Body in *US — Anti-Dumping and Countervailing Duties (China)* considered the meaning of 'certain enterprises' in Article 2: '*Furthermore, a subsidy is specific under Article 2.1(a) of the SCM Agreement when the explicit limitation reserves access to that subsidy to "certain enterprises". The chapeau of Article 2.1 establishes that the term "certain enterprises" refers to "an enterprise or industry or group of enterprises or industries". We first note that the word "certain" is defined as "[k]nown and particularized but not explicitly identified: (with sing. noun) a particular, (with pl. noun) some particular, some definite". The word "group", in turn, is commonly defined as "[a] number of people or things regarded as*

([25]) Panel Report, United States — Subsidies on Upland Cotton, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005: II, p. 299, paragraph 7.1140.

*forming a unity or whole on the grounds of some mutual or common relation or purpose, or classed together because of a degree of similarity". Turning to the nouns qualified by "certain" and "group", we see that "enterprise" may be defined as "[a] business firm, a company", whereas "industry" signifies "[a] particular form or branch of productive labour; a trade, a manufacture". We note that the panel in US — Upland Cotton considered that "an industry, or group of 'industries', may be generally referred to by the type of products they produce"; that "the concept of an "industry" relates to producers of certain products"; and that the "breadth of this concept of 'industry" may depend on several factors in a given case". The above suggests that the term "certain enterprises" refers to a single enterprise or industry or a class of enterprises or industries that are known and particularized. We nonetheless agree with China that this concept involves "a certain amount of indeterminacy at the edges", and with the panel in US — Upland Cotton that any determination of whether a number of enterprises or industries constitute "certain enterprises" can only be made on a case -by-case basis*'. ([26])

(187) The Commission therefore noted that the WTO case law does not require that a subsidy refers to a single industry to be specific, rather it can also refer to '*a class of enterprises or industries that are known and particularized*'. In this case, the Commission in recital 202 of the provisional Regulation concluded that the set of measures are specific because they benefit the enterprises active in the palm oil value chain. Hence, the Commission — in line with the WTO case law — concluded that the set of measure are specific because they refer to '*a class of enterprises or industries that are known and particularized*'. The GOI's claim is therefore rejected.

### 3.3. **Government support to the biodiesel industry through the exemption of import duties on imported machinery into bonded zones**

(188) As mentioned in recital 237 of the provisional Regulation, the Commission calculated the benefit to the exporting producers deriving from the exemption of import duty on imported machinery as the total amount of unpaid duty, allocated to the investigation period on the basis of the useful life of the underlying assets. Exporting producers claimed that when calculating the benefits obtained on account of exemption of import duties on imported machinery the Commission should have allocated the amounts received over the total turnover of the respective companies and not only the turnover of the product concerned. The exporting producers explained that this is because the list of machines imported duty free does not only include machines used for the production of biodiesel, but also for other products.

(189) In this respect, already in the questionnaire to exporting producers the Commission requested the companies to provide the list of machines and indicate their use. The Commission noted that none of the exporting producers raised possible dual use of specific machines before the verification visit, at the time when it would be possible to verify the information. Since it was not possible to verify this allegation, the claim was therefore rejected.

(190) Regarding the imports of machinery to bonded zones, following the publication of the provisional Regulation, the Commission received comments from the EBB on partial cooperation of Wilmar in this respect. The EBB recalled the fact that Wilmar did not reveal the amount of subsidies received under the bonded zone subsidy scheme. Further, the EBB noted that the provisional duty imposed on Wilmar is not the highest duty rate among the provisional duties imposed for this scheme.

(191) In this respect, the EU Commission confirmed, that due to partial lack of cooperation with regard to data on bonded zones, the Commission in this regard has applied to Wilmar the facts available in accordance with Article 28 of the basic Regulation.

([26]) WT/DS379/AB/R (US — Anti-Dumping and Countervailing Duties on Certain Products from China), Appellate Body Report of 11 March 2011, DS 379, paragraph 373.

(192) Following definitive disclosure, PT Ciliandra Perkasa claimed that the Commission erred in rejecting its claim that the Commission should have allocated the amounts received over the total turnover of the respective companies and not only the turnover of the product concerned. According to PT Ciliandra Perkasa, this is because the Commission could have guessed from the list provided whether each individual machine is used for biodiesel only or has a dual use.

(193) The Commission noted in recital 189 that none of the exporting producers, including PT Ciliandra Perkasa, raised possible dual use of specific machines before the verification visit, at the time when it would be possible to verify the information. Since it was not possible to verify this allegation, the claim was rejected.

### 3.4. **General comment on the methodology used for the subsidy calculations**

(194) Following provisional disclosure, Wilmar claimed that the Commission erred in calculating the subsidy amounts as it did so trough turnover allocations. Wilmar alleges that, pursuant to Article 7(1) of the basic Regulation, the Commission should have calculated the subsidy amount per unit of the subsidised product instead of for each programme.

(195) The Commission noted that no subsidy was granted by reference to the quantities manufactured, produced, exported or transported. Therefore, the amount of the total subsidy was allocated over the relevant sales turnover of the companies of the Wilmar group in line with Article 7(2) of the basic Regulation which reads as follows: '*Where the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount of countervailable subsidy shall be determined by allocating the value of the total subsidy, as appropriate, over the level of production, sales or exports of the products concerned during the investigation period for subsidisation*'.

(196) Since none of these subsidies are granted by reference to the quantities manufactured, produced, exported or transported, the relevant sales turnover of the company is the most appropriate denominator. In that respect, it should be noted that the relevant turnover has been determined on a basis which ensures that it reflects as closely as possible the sales value of the products sold by the recipient company. Any other proposed methodology in calculating the amount of countervailable subsidy would be contrary to the relevant provisions of the basic Regulation (Articles 7 and 15) and the administrative practice followed by the Commission in its anti-subsidy proceedings when selecting the appropriate numerator/denominator for the allocation of the amount of the countervailable subsidy. Wilmar's claim is therefore rejected.

### 3.5. **Conclusion on subsidisation**

(197) Following provisional disclosure, the GOI commented on the status of the support to the biodiesel industry through direct transfer of funds via the OPPF as well as through the provision of CPO for less than adequate remuneration. In particular, the GOI commented that the OPPF had stopped payment of funds to biodiesel exporters in September 2018, and that the export levy on CPO had been at zero from 4 December 2018.

(198) In response the Commission noted that both programmes remain in force and they have not been formally repealed. Given the way they operate, the benefits deriving therefrom to the exporting producers will continue in the future. The payments from the OPPF stopped because of the difference between the mineral diesel reference price and the biodiesel reference price, not because the programme has been eliminated. In addition, OPPF payments restarted to biodiesel producers in December 2018. Consequently, the Commission considered that the conditions of Article 15 (1) were met and rejected this claim.

(199) The definitive subsidy rates with regard to the set of measures described above expressed as a percentage of the CIF Union frontier price, duty unpaid, are as follows:

*Table 1*

**Definitive subsidy rates**

| Company | Definitive subsidy rate |
|---|---|
| PT Ciliandra Perkasa | 8,0 % |
| PT Intibenua Perkasatama and PT Musim Mas (Musim Mas Group) | 16,3 % |
| PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo (Permata Group) | 18,0 % |
| PT Wilmar Nabati Indonesia and PT Wilmar Bioenergi Indonesia (Wilmar Group) | 15,7 % |
| All other companies | 18,0 % |

## 4. **INJURY**

### 4.1. **Definition of the Union industry and Union production**

(200) Following the publication of the provisional Regulation the Indonesian exporting producer Wilmar requested to know whether Masol, a Spanish biodiesel producer and part of the sample, had standing as a member of the Union industry given its affiliation to the Indonesian exporting producer Musim Mas Group and that the company purchases biodiesel as well as manufactures it in the Union.

(201) The Commission considered that Masol falls within the definition of Union industry given that it produces biodiesel at its plants in the Union. Moreover, according to Article 9(1)(a) of the basic Regulation, the Commission may (but is not obliged to) include Union producers within the definition of industry even when they also import the product concerned. In this respect, the Commission noted that Masol's economic focus is also in the Union as its production in the Union greatly exceeds its purchases of biodiesel from Indonesia or elsewhere.

(202) Following final disclosure, Wilmar again requested to know whether Masol should be excluded from the definition of the Union industry, given that it is a wholly-owned subsidiary of the Indonesian exporting producer Musim Mas Group.

(203) The Commission considered this point but considered that Masol remained part of the Union industry as a Union producer of biodiesel. The ownership of this company is only one of the elements taken into account in this respect, and not decisive as to its status as a Union producer in the present case given the significant share of its production in the Union.

(204) After provisional disclosure Wilmar also commented on the level of Union production in Table 3 of the provisional Regulation, noting that if production had increased at the same percentage rate as consumption (33 %) from 2015 to the investigation period then production in the investigation period would have exceeded consumption in the investigation period.

(205) The Commission noted this comparison is affected by rounding, since the precise increase was 32,58 % of consumption during the period considered. The production was lower than the Union consumption in 2015. As a consequence, if both figures increase by the same percentage, it is mathematically impossible that the initially lower figure (production) exceeds the initially higher figure (consumption) if both figures are mathematically correctly increased by the same rate.

(206) Furthermore, the Commission pointed out that the statement made in recital 269 of the provisional Regulation, which notes that production of the Union industry did not keep up with demand, is factually accurate. In any case, the Commission noted that during the entire period considered the Union industry had the spare capacity necessary to increase its production and meet the increase of the level of consumption, which it did not achieve due to the subsidised imports of biodiesel.

(207) Following final disclosure, Wilmar again made the same comment, noting that Union production was nearly 100 % of Union consumption in 2015 and that therefore, if the Commission expected production to rise exactly in line with consumption, then the Union industry would be in effect monopolising the full EU consumption.

(208) However, recital 269 of the provisional Regulation simply stated that Union production did not keep up with Union demand, and that the difference was the imports of biodiesel into the Union. This statement remains factually correct. It is also factually incorrect to speak of a monopoly by the Union industry. As stated in recital 264 of the provisional Regulation, the Union industry consists of more than 200 producers, which are competing with each other on the Union market. It is therefore not appropriate to speak of a possible monopoly by the Union industry in this case.

(209) In the absence of any other comments with respect to the definition of the Union industry and Union production, the Commission confirmed its conclusions set out in recitals 264 to 269 of the provisional Regulation.

### 4.2. **Union consumption**

(210) Following provisional disclosure, the Indonesian exporting producer Wilmar noted that while analysing Union consumption, the Commission did not make reference to the Second RED Directive ([27]) ('RED II') or the Commission Delegated Regulation ([28]) referring to high-risk indirect land use change feedstock.

(211) The Commission noted that these two documents deal with the future, and not with past consumption, and continue the Union policy of encouraging the use of biodiesel in diesel engines, and Wilmar's point that these laws may well limit the consumption of PME has nothing to do with total Union consumption of biodiesel.

(212) Furthermore, Wilmar confirmed in its comments to provisional disclosure that the consumption of PME can remain at the level of 2019 until the end of 2023 ([29]). Only after 31 December 2023, the consumption of high-risk indirect land use change feedstock will decrease.

(213) Furthermore, a significant part of PME is currently produced by the Union industry. Indonesian imports can continue to increase in the medium term by replacing PME currently produced by the Union industry.

(214) In the absence of any comments with respect to the Union consumption, the Commission confirmed its conclusions set out in recitals 270 to 278 of the provisional Regulation.

### 4.3. **Imports from Indonesia and price undercutting**

(215) Regarding the volume and market share of imports from Indonesia, following the publication of the provisional Regulation, the Commission received comments on the volume of imports from Indonesia during the period considered from Indonesian exporters, Gunvor (an unrelated trader of biodiesel) and the GOI.

(216) They commented that the analysis of imports from Indonesia was flawed, as it did not cover the period 2010-2012, that is prior to the imposition of anti-dumping duties in 2013.

(217) The Commission took note of those comments but recitals 279 to 282 of the provisional Regulation correctly described the import volumes from Indonesia, and the Commission made clear in recitals 281 and 282 the effect of the anti-dumping duties that were in force.

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([27]) Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328, 21.12.2018, p. 82).

([28]) Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels (OJ L 133, 21.5.2019, p. 1).

([29]) Article 26(2) of Directive (EU) 2018/2001.

(218) The Commission also noted that the period considered starts in 2015, and therefore the analysis of the volume of imports from Indonesia cannot be backdated to 2010-2012 without breaching the consistency with the period considered in this investigation. The duration of the period considered in this case is the normal time period used for such investigations. In any event, looking at the import volumes from Indonesia as established in the anti-dumping investigation concluded in 2013, it can be observed that the import volumes from Indonesia in 2010-2011 were similar to the existing volumes during the current investigation period as well as the expected volumes in the near future, if measures are not imposed ([30]).

(219) Gunvor also commented that considering imports from Indonesia alone failed to take into account the level of imports from Argentina during the investigation period. However, this analysis was carried out in the provisional Regulation under Section 6 Causation, in recitals 368 to 370 of the provisional Regulation.

(220) Regarding price undercutting, the Commission received comments after provisional disclosure from the Indonesian exporting producers and the GOI that the undercutting calculations required adjustments or further clarification.

(221) The provisional Regulation set out three methods for calculating undercutting between imports of biodiesel from Indonesia and the sales of biodiesel on the Union market. The Commission will further clarify the three methods used in this case to establish the existence of significant undercutting on the basis of the data relating to the sampled exporting producers.

(222) Following final disclosure, the GOI commented on the Commission's three methods of price undercutting calculation, and said that the Commission had not taken into account various legal judgements of the European Court of Justice and the World Trade Organisation.

(223) The Commission disagrees. The three methods presented below analyse in detail the undercutting of Union prices by Indonesian imports of biodiesel and the three methods all result in a finding of undercutting.

(224) In their comments to final disclosure, the GOI also made some general observations regarding price undercutting, which are addressed here.

(225) Firstly, the GOI compared PME and rapeseed oil methyl ester ('RME') and noted that they have different physical properties (one has a CFPP of +13C and the other -14C) and prices.

(226) The Commission agrees with the GOI and this is why the Commission has not made any direct comparison between sales of PME and RME.

(227) Secondly the GOI quotes recital 290 of the provisional Regulation, which states that *'PME is normally not used in its pure form but is usually mixed with other biodiesels to produce a blend with a lower CFPP'*.

(228) It is clarified that the fact that PME is usually mixed with other biodiesels does not mean that PME is not directly blended with mineral diesel. An analysis of the sales of the sampled Union producers showed significant sales of pure PME directly to mineral diesel refineries, which will be in direct competition with imports of pure PME from Indonesia.

4.3.1. *General observations concerning the EU biodiesel market*

(229) Biodiesel is a homogeneous product with one predominant use, namely as a fuel in diesel engines. It is produced from different non-fossil raw materials. Depending on the raw material, there are certain differences in physical properties, namely the CFPP. The market often describes biodiesel at a particular CFPP as FAMEX ([31]), such as FAME0 for biodiesel with a CFPP of 0 °C or FAME5 for biodiesel with a CFPP of 5 °C.

([30]) Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, Table 2 (OJ L 141, 28.5.2013, p. 6).

([31]) Chemically, biodiesel is typically a fatty-acid methyl ester, or FAME.

(230) Most types of biodiesel, including PME, are sold either pure, or as a blend with other types of biodiesel. In this context, the term 'blend' refers to a blend consisting of different types of biodiesel, but not mineral diesel. This should not be confused with the 'blend' usually sold at the pump, which for instance in the Union typically normally consists of no more than 10 % of biodiesel, and no less than 90 % of mineral diesel.

(231) The demand for biodiesel is driven by two major factors: the consumption of diesel fuel and the content of biodiesel in this fuel. The price of biodiesel has no noticeable impact on either of these factors, in particular due to the limited impact of the price of biodiesel on the price of diesel fuel at the pump.

(232) Therefore, unlike many other products, the demand for biodiesel is inelastic with regard to prices. Low-priced biodiesel does typically not lead to increased consumption on the biodiesel market. Price competition on the biodiesel market is therefore a zero-sum-game, where quantities gained by one market operator are lost at the same level by other market operators.

(233) Therefore, with stable demand, increasing import quantities of subsidised biodiesel, at low prices, will have an impact on the supply/demand balance, leading to oversupply on the whole biodiesel market. In a situation of oversupply on the biodiesel market as a whole, the availability of a cheaper option, such as the subsidised imports, will exercise a downward price pressure also on the biodiesel market as a whole, which negatively affects all producers of biodiesel, irrespective of the raw materials used.

4.3.2. *Method 1 — Comparing PME imports to PME produced in the EU*

(234) The first method in recitals 292 to 295 of the provisional Regulation compared imports of PME from Indonesia to sales of PME produced in the European Union. The undercutting margins ranged from 6,0 % to 11,6 %.

(235) To clarify the calculation, on the request of those submitting comments, the exact comparison was between PME at cold filter plugging point ('CFPP') + 13 from Indonesia and PME at CFPP +10 from the Union industry ([32]). The PME sold at CFPP +10 was not blended to reach that CFPP, an additive costing less than EUR 1 per MT, i.e. only around 0,1 % of the cost of production, was added to the biodiesel. The Commission does not consider that an adjustment for this additive is necessary as it would not have any impact on the calculations.

(236) After provisional disclosure, Wilmar commented that in recital 287 of the provisional Regulation, the Commission should explain further how they took into account the specific German system of 'double counting'.

(237) To clarify the methodology, Germany has implemented mandatory greenhouse gas emission targets which have to be met by petroleum companies. As a result, transactions with low $CO_2$ emission levels attract a price premium. Sales transactions for the German market were identified by using the indicator '2' in the PCN where appropriate (emissions less than 9g/MJ) so that the Commission could compare these transactions to the equivalent Indonesian imports to other Member States where a double-counting system is in place.

(238) The Commission noted that, as set out in recital 288 of the provisional Regulation, imports from Indonesia without a RED certificate were compared to sales of the Union industry with a RED certificate. Following provisional disclosure, the exporting producer Wilmar and the GOI stated that biodiesel without a RED certificate was cheaper than that with a RED certificate and requested an adjustment.

(239) The Commission noted that these parties did not contest that this product was identical to PME sold with a RED certificate, and did not provide any evidence that this product is not in direct competition with PME produced by the Union industry. The Commission therefore considered that an adjustment for the price difference was not necessary, in particular since no conclusive evidence concerning such a price difference during the investigation period was submitted.

([32]) PCNs P101P and P102P.

(240) The Commission therefore continued to consider that this method accurately shows the undercutting caused by the type of biodiesel imported from Indonesia. In any case, the undercutting margin established for products without a RED certificate significantly exceeds the price difference alleged by Wilmar. Therefore, even if the adjustment claimed by Wilmar had been granted, the impact of such an adjustment would be moderate, and there would still have been significant undercutting for Indonesian imports.

(241) Following final disclosure, the GOI and Wilmar both requested an adjustment be made to account for the price difference between CFPP10 and CFPP13 biodiesel.

(242) No such price difference was found by the Commission and no evidence of a price difference was provided by the GOI or Wilmar. The Commission found that biodiesel was quoted on the markets as pure RME, FAME0, and pure PME. The quotes for pure PME made no reference to the actual CFPP of the product, but only to PME, which supports the Commission's argument that all PME is sold at similar prices irrespective of the precise CFPP. This claim was therefore rejected.

(243) Following final disclosure the Commission received again a request from Wilmar and the GOI for a price adjustment to compare imports of PME without a RED certificate with production of PME in the Union with a RED certificate.

(244) The Commission reiterated its position that such an adjustment is not necessary and rejected the request. There are large quantities of PME imported into the Union from Indonesia during the investigation period without a RED certificate, and this PME is only useful for blending with mineral diesel if it has a RED certificate attached. Wilmar did not provide any evidence showing that PME imported without a RED certificate was not in competition with the PME production in the Union with a RED certificate.

4.3.3. *Method 2 — comparing PME imports to sales of EU produced PME and also EU produced biodiesel at CFPP0 (FAME0)*

(245) The second method in recitals 296 to 297 of the provisional Regulation expanded the quantity of Union produced biodiesel that was compared to imports from Indonesia by including the sales of FAME0 biodiesel by the sampled Union producers in the comparison.

(246) To compare the Union sales of FAME0 to the countrywide imports of PME from Indonesia, the price of Union sales of FAME0 was adjusted and as a result reduced to the price level of Union sales of PME in order to take into account the market value of the differences in physical properties.

(247) To clarify the calculation, on the request of those submitting comments, the price of the reduction above was in the range of EUR 100 to 130 per metric ton. Also, to clarify the calculation, the 55 % of all sales of the Union industry covered by this comparison includes both PME and FAME0 ([33]).

(248) The countrywide undercutting margin found under this method was 7,4 %.

(249) The Commission considered this calculation to be a reasonable estimate of the effect of Indonesian imports on the price of FAME0.

(250) Following final disclosure, the exporting producer Wilmar contested this comparison, quoting the findings in the WTO dispute settlement case *European Union — Anti-Dumping Measures on Biodiesel from Indonesia* ([34]) where the Commission made a similar adjustment. The Panel said at paragraph 7.157:

'Even though both PME from Indonesia and blended CFPP 0 biodiesel might compete for sales to the companies who blend biodiesel with mineral diesel, this point nonetheless does not address the fact that the EU authorities failed to explain whether the comparison between sales of PME and blended CFPP 0 biodiesel was made at a proper comparison level, given that PME is an input to the blends, including CFPP 0 biodiesel'.

([33]) The remaining 45 % of sales of the Union industry have a CFPP other than +10 and 0.

([34]) WT/DS480/R European Union — Anti-Dumping Measures on Biodiesel from Indonesia.

(251) The Commission notes that the Union market has changed since the original investigation into imports from Indonesia. The Panel noted that at that time '*PME may only be used in a blend, and is actually a component of the different blends sold to end users in the EU market*' ([35]).

(252) In the original investigation against Indonesia, the Commission found that the Union industry was unable to produce PME from imported palm oil, as the price of PME was in fact lower than that of palm oil. The Union industry therefore purchased pure PME from Indonesia and blended it with their own production of other biodiesels before resale ([36]).

(253) However, in the current investigation the Commission found that PME made in the Union was sold directly to the oil companies and so the market dynamics have changed in this respect.

(254) The Commission does not dispute that PME is also imported into the Union to be mixed with other biodiesels to make, for example, FAME0. However the quantity of PME imported is driven by the price of these imports as well as their physical properties, and therefore the price of imported PME exerts a price pressure on blends as well. PME is among the cheapest types of biodiesel which can be used in blends such as FAME0 and FAME+5 which are suitable for use in a significant part of the Union market throughout the year. Imports of PME thus directly compete with other types of biodiesel produced in the EU which would otherwise be blended in larger quantities to achieve the same blend result.

(255) Following final disclosure, the GOI rejected this calculation method, saying that it only dealt with one segment of the Union market and did not cover all product types sold by the Union industry. The Commission disagreed, on the grounds that the calculation requested by the GOI which would cover all product types sold by the Union industry is detailed below as Method 3.

4.3.4. *Method 3 — comparing all imports of biodiesel from Indonesia to all Union sales of biodiesel without any adjustment to the price*

(256) The third method in recitals 298 to 299 of the provisional Regulation compared the countrywide imports of biodiesel from Indonesia to all the sales of biodiesel of the sampled Union producers. The countrywide undercutting margin found under this method was 17,1 % ([37]).

(257) The Commission considered that this calculation, which compares countrywide imports of the product concerned from Indonesia to sales of the like product on the Union market from the sampled Union producers, shows that even when comparing across all product types there is significant undercutting from Indonesia. This is also confirmed on the basis of the data available and referred to in recital 284 of the provisional Regulation.

(258) Following final disclosure, Wilmar referred to an inconsistency between the sales volumes disclosed for Methods 2 and 3, and the ratio of 55 % of all sales of the Union industry covered by Method 2.

(259) The Commission notes this difference at final disclosure, being that the total of Method 2 is not 55 % of the total of Method 3, as it was in the provisional Regulation recital 296.

(260) The Commission clarified that this was due to the different sources used to calculate undercutting between the three Methods, which were set out in the provisional Regulation recitals 292 to 299.

(261) Method 1 used the transaction-by-transaction sales listings of the Indonesian exporting producers to calculate a unit price per MT for each PCN, and then compared this unit price per MT using the transaction-by-transaction sales listings of the sampled Union producers.

([35]) Panel Report, EU — Biodiesel (Indonesia) para 7.156.
([36]) OJ L 141, 28.5.2013, p. 19, recitals 133 to 135.
([37]) It is noted that the recital 298 of the provisional Regulation contained a clerical error and mentioned an undercutting margin of 17,5 %.

(262) Method 2 took the same transaction-by-transaction listings of Method 1 for the Indonesian exporting producers, and then added the sales of FAME0 from the sampled Union producers' listings.

(263) However Method 3 was calculated by comparing the transaction-by-transaction listings of Method 1 for the Indonesian exporting producers to the unit price of the sampled Union industry as reported in their questionnaire replies rather than their transaction listings. This was to ensure that for Method 3 the total coverage did not include the quantity purchased and then resold by the Union producers.

(264) Therefore the totals for Methods 1 and 2 are not directly comparable to the total for Method 3 as the sources are different.

(265) No interested party proposed another method for calculating undercutting between Indonesian imports and the sales of the Union industry, and no interested party put forward calculations that would show no undercutting in the investigation period.

(266) After final disclosure, Wilmar stated that '*the only correct way to calculate price undercutting is to compare product type to product type, making adjustments for differences in physical characteristics which affect prices … whilst addressing the complexities of the price comparability as found by the WTO panel*'.

(267) The Commission noted the suggestion of Wilmar as regards the calculation of price undercutting using all the sales of the Union industry as above. However, given that they did not make any suggestions or estimations on the amount of the adjustments for differences in physical characteristics, or any suggestion as to how to deal with the complexities of the price comparability as found by the WTO panel ruling, no further action on this suggestion was possible.

(268) The Commission conducted several price comparisons in order to capture all the possible configurations of product types, ensuring full comparability to the extent possible. The Commission also explained that the market situation during the investigation period was different to the situation examined by the WTO panel (with now direct sales of PME by Union producers). The Commission also examined the interaction and competitive relationship between Indonesian imports of PME and Union sales and concluded that PME, being among the cheapest types of biodiesel, is capable of exercising a price pressure on Union sales.

(269) Following final disclosure, the GOI described this calculation as the comparison of Indonesian PME at CFPP13 with Union-produced FAME0 and RME at CFPP -14, and stated that without adjustments for physical characteristics (that is to say, CFPP) this comparison is essentially meaningless.

(270) The Commission noted that this calculation is the comparison of Indonesian PME at CFPP13 to all EU sales of the Union industry's own production, which also includes PME. As regards any possible adjustments, no substantiated and quantified claim for such an adjustment was submitted.

(271) Given the above, the Commission concluded that the imports from Indonesia during the investigation period significantly undercut the sales of the Union industry under all three methods examined.

4.3.5. *Post-importation costs*

(272) The exporting producer Wilmar indicated that the level of adjustment used by the Commission for post-importation costs of EUR 8,50 per metric ton, established in the preceding anti-dumping investigation, was too low and provided documentation purporting to support an adjusted figure of EUR 14,50 per metric ton.

(273) The data submitted concerned one shipment which arrived after the investigation period and most of the costs were related to warehousing after importation which should not be part of importation costs. The Commission did not consider this to be a more reliable basis than the figure previously established from an unrelated importer and, therefore, did not accept the adjustment.

(274) The biodiesel trader Gunvor asked whether its data had been used to determine the importation costs used in the undercutting calculations. The costs submitted by Gunvor in its questionnaire response included a combined figure for importation costs (which are used in the undercutting calculation) and post-importation costs (which are incurred between importation and resale, and not taken into account in the undercutting calculation).

(275) During the on-spot investigation, Gunvor provided revised figures using different bases, while the final figures provided by Gunvor were based on estimates and not verifiable. As a result, the Commission decided to use the importation costs used in the investigation resulting in the anti-dumping duties imposed by Regulation (EU) No 1194/2013, which were also used in the previous investigation against imports from Argentina ([38]). The Commission considered these costs to be more reliable than those supplied by Gunvor.

(276) Since inflation in the Eurozone has been very low since 2012 (around 6 % in total between 2012 and 2018), the Commission considered it appropriate to use these importation costs without adjusting for inflation. In any event, any adjustment in this sense would have no impact on the final undercutting margins.

(277) In the absence of any other comments with respect to the imports from Indonesia, the Commission confirmed its conclusions set out in recitals 279 to 301 of the provisional Regulation.

### 4.4. **Economic situation of the Union industry**

#### 4.4.1. *General remarks*

(278) In the absence of comments, the Commission confirmed recitals 302 to 308 of the provisional Regulation.

#### 4.4.2. *Macroeconomic indicators*

##### 4.4.2.1. Production capacity and capacity utilisation

(279) Following disclosure the GOI and Wilmar commented on the production capacity of the Union industry by noting the increasing production and capacity over the period considered, but did not dispute the level or trend of the indicators. They argued that these increases showed that Indonesian biodiesel was not harming the Union industry.

(280) These arguments are dealt with under Section 6 Causation, recitals 368 to 370 of the provisional Regulation.

(281) In the absence of any other comments with respect to production, production capacity and capacity utilisation, the Commission confirmed the conclusions set out in recitals 309 to 313 of the provisional Regulation.

##### 4.4.2.2. Sales volume and market share

(282) Following disclosure, the GOI noted that the market share of the Union industry in 2015 was due to the industry being 'almost an absolute monopoly with no free competition'.

(283) The Commission noted that given that the Union industry consists of more than 100 companies who compete with each other, this cannot constitute a monopoly. No evidence concerning a monopolistic behaviour of the Union industry was provided throughout the investigation.

(284) The exporter Wilmar and the GOI both stated that recital 317 of the provisional Regulation was incorrect as it did not take into account the imports of biodiesel from Argentina into the EU at the same time.

([38]) Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina (OJ L 40, 12.2.2019, p. 1).

(285) These imports are considered under Section 6 Causation, recitals 368 to 370 of the provisional Regulation.

(286) Following final disclosure, Wilmar argued that the decrease in market share of the Union industry after 2015 was not an indicator of injury '*to the extent that the Union industry occupied a virtual monopoly*' of the Union market. Wilmar also referred to the special situation created by the anti-dumping duties imposed as a result of the original investigation.

(287) The scope of the investigation is limited to the period considered, which is defined in the Notice of initiation. Also, the impact of the removal of the anti-dumping duties is recognised in recital 317 of the provisional Regulation. Consequently, the Commission rejected this claim.

(288) Following final disclosure, the GOI again said that the Commission had not addressed their arguments on the negative effect of Argentinian biodiesel imports on the performance of the Union industry.

(289) In this respect, the Commission referred to section 6.2.1 of the provisional Regulation, and section 6.2.1 of this Regulation, where the effect of the Argentinian imports on the Union industry was addressed.

(290) In the absence of any other comments with respect to sales volume and market share, the Commission confirmed the conclusions set out in recitals 314 to 317 of the provisional Regulation.

4.4.2.3. Growth

(291) After disclosure, the exporting producer Wilmar noted that the Union industry's performance from 2015 onwards should be looked at in the light of its 'virtual monopoly position'. As described in recital 283, no evidence concerning a monopolistic situation was provided.

(292) In the absence of other comments, the Commission confirmed its conclusions set out in recital 318 of the provisional Regulation.

4.4.2.4. Employment and productivity

(293) The GOI commented on the increasing trends set out in Table 10 of the provisional Regulation but did not dispute the levels or trends themselves. They alleged that these increasing trends show no signs of material injury to the Union industry.

(294) Given that the case is based on a threat of injury, these comments were rejected.

(295) In the absence of other comments with respect to employment and productivity, the Commission confirmed the conclusions set out in recitals 319 to 320 of the provisional Regulation.

4.4.2.5. Magnitude of the amount of countervailable subsidies and recovery from past subsidisation or dumping

(296) In their post-disclosure comments, the exporting producer Wilmar noted that the Commission did not assess the effect of imports of subsidised Argentinian biodiesel in this section. The Commission noted, again, that analysis of Argentinian imports is set out in the Causation section, recitals 368 to 370 of the provisional Regulation.

(297) In the absence of any other comments, the Commission confirmed its conclusions set out in recitals 321 and 324 of the provisional Regulation.

4.4.3. *Microeconomic indicators*

4.4.3.1. Prices and factors affecting prices

(298) After provisional disclosure, the GOI referred to the trend in unit sales prices and unit cost of production, noting that both indicators rose by close to 10 % during the period considered. A link between the cost of production and the sales price was noted by the GOI and the exporting producer, Wilmar, which the Commission does not dispute.

(299) The exporting producer Wilmar noted the Commission's comment in recital 328 of the provisional Regulation that biodiesel is a commodity and that a price undercutting of 10 % would have a significant downward pressure on prices. Wilmar disagrees, claiming that this is in conflict with the Commission's own statement that there are limitations to the usage of PME due to its CFPP level.

(300) The Commission found no conflict between the two statements. Wilmar does not state whether the limit on use of PME was reached during the investigation period. Even if this supposed limit had been reached, the fact that PME can be used by itself, or in a blend to reduce the price of such a blend means that it inevitably has an effect on prices. The Commission noted this blending effect in recital 290 of the provisional Regulation.

(301) Wilmar further noted that the Commission was wrong to see a link between the price pressure caused by imports of PME and the profitability of the Union industry in recital 329 of the provisional Regulation and referred to the situation of the Union industry between 2012-2013 and September 2017 for this assertion.

(302) In this respect, the Commission noted that the conclusion in recital 329 of the provisional Regulation was reached having regard to the data from the period considered, which is set at the start of the investigation without reference to any outside factors. Wilmar does not dispute as such the correlation established between the increase in costs of production and the unsatisfactory profit margin due to the price pressure of the subject imports. This argument was therefore rejected.

(303) In addition, Wilmar indicated that there were stark differences in profitability, cash flow and return on investment for different Union producers in the sample, which emphasises that factors other than price pressure from Indonesian biodiesel producers are affecting the EU producer's profits and financial situation.

(304) The Commission considered that sampled producers will all show individual trends but the effect of individual anomalies is reduced by establishing the findings on the basis of the sample as a whole. This argument was therefore rejected.

(305) Following final disclosure, Wilmar restated their arguments above without providing any new evidence for their assertions. Their claims were therefore again rejected.

(306) In the absence of any other comments, the Commission confirmed its conclusions set out in recitals 325 to 329 of the provisional Regulation.

4.4.3.2. Labour costs

(307) In the absence of any comments, the Commission confirmed its conclusions set out in recitals 330 and 331 of the provisional Regulation.

4.4.3.3. Stocks

(308) Following provisional disclosure the GOI referred to the trend in stocks of the sampled Union producers but without disputing the Commission's finding in recital 333 of the provisional Regulation.

(309) In the absence of any other comments, the Commission confirmed its conclusions set out in recitals 332 and 333 of the provisional Regulation.

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

(310) Following the imposition of provisional measures, the GOI noted the profitability of the Union industry in the period considered and therefore the return on investment. The GoI made comments on the trend of profitability of the Union industry against the volume of imports from Indonesia, saying that the negative profitability in 2015 could not be attributed to Indonesian biodiesel imports as they were negligible during that year.

(311) This point was dealt with under Section 6, Causation, of the provisional Regulation, recitals 361 to 365. Indeed, the slightly negative profitability in 2015 was not attributed to Indonesian biodiesel imports in the provisional Regulation.

(312) The exporting producer, Wilmar, commented that the statement in recital 329 of the provisional Regulation (namely, that the Union industry could not improve its unsatisfactory profit margin due to price pressure from subsidised imports) is unfounded.

(313) Wilmar indicated that the Union industry's financial situation was not good when the EU biodiesel industry was shielded by the annulled biodiesel duties from 2012-2013 until at least September 2017 and therefore, the lack of improvement in their financial situation can only be explained by deficiencies that exist within the industry.

(314) The Commission noted that following the sudden increase in subsidised imports of Indonesian biodiesel after the annulment of the existing anti-dumping duties in March 2018, the Union industry could not improve their unsatisfactory profit margin which was substantially below the target profit in a growing market. Therefore, this confirms the Commission's provisional finding.

(315) Following final disclosure, the exporting producer Wilmar restated their comments at provisional stage, as dealt with above. They also alleged that the low profits could not be linked to imports, given the 'virtual monopoly' of the Union industry at the start of the period considered.

(316) This argument is unfounded, as the Union industry consisted of more than 200 companies in competition with each other on the Union market for biodiesel and there is no evidence that there is any kind of collusion between the Union producers.

(317) In the absence of any other comments on profitability, cash flow, investment, return on investments and ability to raise capital, the Commission confirmed its conclusions set out in recitals 334 to 340 of the provisional Regulation.

4.4.4. *Conclusion on injury*

(318) Following the imposition of provisional measures, the GOI concluded that based on the indicators in the provisional Regulation, the Union industry was 'in a robust state'.

(319) The Commission disagreed, noting that an industry whose profitability remains below 1 % of turnover, and which is losing almost 15 percentage points of market share, and is not able to benefit from a market growing by 33 % is not robust.

(320) In the absence of any further comments, the Commission confirmed its conclusions on injury set out in recitals 341 to 346 of the provisional Regulation.

### 4.5. **Economic indicators following the investigation period**

(321) In order to further examine the state of the Union industry in the context of making findings on threat of injury, the Commission sent additional questions to and received replies from the sampled Union producers for data for the period October 2018 — June 2019 ('the post-IP'). The post-IP data given below, such as the microeconomic indicators, is presented as a weighted average of the three sampled Union producers.

(322) For the post-IP, for certain macroeconomic indicators such as capacity, capacity utilisation, production and sales the information could only be analysed for the sampled Union producers, due to the time limits of the investigation. Therefore, the figures for the investigation period are not directly comparable to the figures for the post-IP. It is also the case that the Commission is comparing the 12 months of the investigation period with the 9 months of the post-IP, but at this stage of the investigation, 12 months of post-IP data is not yet available.

(323) The figures nevertheless allow an analysis of the development of the situation of the sampled Union producers after the investigation period, and the figures are indexed to each other on an annualised basis.

(324) Following final disclosure, Wilmar again requested the Commission to collect 12 months of post-IP data (from October 2018 to September 2019), and also requested the Commission to collect data from all Union producers. However, collecting this additional information was not possible in the time available. Consequently, the request was rejected.

(325) The production, sales and unit costs, and unit sales prices of the sampled Union producers developed as follows:

*Table 2*

**Union industry during and after the investigation period**

| | Investigation period | October 2018-June 2019 |
|---|---|---|
| Total production (tonnes) | 2 510 356 | 1 824 599 |
| *Index (annualised)* ([39]) | *100* | *97* |
| Sales volume on the Union market (tonnes) | 2 524 646 | 1 871 962 |
| *Index (annualised)* | *100* | *99* |
| Unit cost of production (EUR/tonne) | 791 | 760 |
| *Index* | *100* | *96* |
| Average unit sales price in the Union on the total market (EUR/tonne) | 794 | 790 |
| *Index* | *100* | *100* |
| Capacity utilisation rate | 82 % | 80 % |

*Source:* Sampled Union producers.

(326) Production post-IP was slightly down on the investigation period, whereas sales on the Union market remained rather constant.

(327) The unit cost of production for the sampled companies dropped slightly post-IP whereas the unit sales price remained stable.

(328) The profit of the sampled companies was calculated using data from the post-IP questionnaire, giving an average profit of the sampled companies of 3,8 % for the nine months post-IP. The sampled companies provided monthly cost and price data, which the Commission then aggregated to an average per quarter and disclosed below in Table 3.

(329) However, when that profit is analysed quarter-per-quarter a different trend emerges:

*Table 3*

**Profits in the post-IP**

| | Q4 2018 | Q1 2019 | Q2 2019 | Total post IP |
|---|---|---|---|---|
| Profit of the sampled Union producers | 10,8 % | 0,1 % | -5,0 % | 3,8 % |

*Source:* Sampled Union producers.

([39]) The production and sales volume data for the 9 month post-investigation period (October 2018 to June 2019) recorded in this table has been extrapolated to an annual basis by multiplying by a factor of 12/9 in order to obtain comparable annualised index figures.

(330) Therefore, Tables 2 and 3 show that post-IP the Commission observed relatively little change compared to the investigation period apart from the level of profit of the sampled producers, which increased from 0,8 % for the investigation period to 3,8 % in the post-IP. The increase in profit in the post-IP is driven by Q4 2018.

(331) The higher profits in the winter of 2018-19 were exceptional. They were recorded by one sampled company which was able to take advantage of an uncertain transport situation in their region. The temporary shortage of supply caused by this situation allowed the company to increase their prices and therefore their profits in this period, which affected Q4 2018 and part of Q1 2019 ([40]).

(332) However, the profits of the other sampled companies remained significantly lower than the target profit during all quarters of the post-IP. In Q2 2019, when the uncertain transport situation had resolved itself, the profits of the sampled Union producers dropped to a loss of 5 %.

(333) The GOI argued that the negative profitability in Q2 2019 was caused by extraordinary events at Saipol during that quarter. However, while this Union producer indeed had an exceptional issue during the post-IP, this issue affected Q1 2019 and not Q2 2019. It is therefore considered that the drop in profitability is caused by the substantial quantities of subsidised imports entering the Union market at very low prices.

(334) Following the final disclosure, Wilmar commented that they felt that the non-confidential summaries of the post-IP questionnaires were not sufficient to allow interested parties to respond to the Commission's conclusions.

(335) However, all questionnaire replies were accompanied by meaningful open versions. Where data was not capable of being summarised at a company level, the Commission has aggregated the data and published it in the final disclosure, and in Tables 2 and 3 above.

(336) For further transparency, the Commission identified relevant non-confidential information indicating that RME prices hit all-time high levels due to low levels of water in the Rhine during the winter of 2018-19 and added that information to the open file.

(337) The GOI responded to this information, and argued that the exceptional profits in the winter of 2018-19 were also due to the increased demand for RME in the Union in winter due to its physical characteristics and the decrease in costs of production in the Union industry in the post-IP.

(338) They further argued that the unit sales price remained stable and even decreased during the post-IP, indicating that the price increase was not exceptional.

(339) The GOI further argued that supply problems for raw materials in the winter of 2018-2019 could have impacted profitability figures for the EU industry for Q2 2019.

(340) The arguments of the GOI were rejected as they were based on conjecture and not related to the article that the Commission had placed on the open file to assist parties regarding the particular situation in winter 2018-19.

(341) Therefore, the Commission concluded that in the post-IP the economic situation of the Union industry further deteriorated.

## 5. **THREAT OF INJURY**

### 5.1. **The nature of the subsidies in question**

(342) Following the imposition of provisional measures the exporting producer Wilmar commented that the Commission had not established a link between the subsidies found and the price undercutting and price depression.

([40]) For example see press article on AGQM dated 14 November 2018: https://www.agqm-biodiesel.de/en/news/news/price-european-rme-hits-all-time-high-due-low-rhine-levels (last accessed 22 October 2019).

(343) The Commission disagreed. There is a clear link between the availability of CPO at low prices and the price undercutting found during the investigation period, as members of the Union industry, having to source their CPO on the world market, pay much more for their raw materials and therefore cannot match the prices of the subsidised Indonesian biodiesel. The continuation of this programme, together with the other two subsidy programmes found in this investigation, are capable of keeping exports of Indonesian biodiesel at a price level affecting the Union industry.

(344) Wilmar then commented on recital 350 of the provisional Regulation, reiterating that there is a natural limit on imports of PME into the Union and therefore the Commission cannot say that imports would increase.

(345) Given that Wilmar did not explain what this 'natural limit' is, this allegation could not be tested and is therefore rejected. In the Commission's view, there are no impediments (other than market demand, subject to fair competition rules) to imports of biodiesel from Indonesia into the EU.

(346) Following final disclosure, Wilmar again restated their points that were made at provisional stage regarding the link between the subsidies found and the threat of injury. However, no new arguments were made and their claims were therefore again rejected.

(347) Wilmar also noted that Masol, the largest producer of PME in the Union was related to the Indonesian biodiesel producer Musim Mas Group, and raised the question at what price Masol could source their palm oil from Indonesia.

(348) The Commission did not comment on the confidential business operations of single companies in the Union or elsewhere. However, the Commission established that Masol sources its palm oil at arm's length. The relationship between Musim Mas Group and Masol did therefore not influence the injury analysis.

(349) Following final disclosure the GOI argued once again that the OPPF was not a subsidy programme and that the export levy on CPO had been reduced to zero.

(350) The Commission noted the findings of Section 3 on subsidisation above, which clearly confirm the opposite.

(351) In the absence of any further comments, the Commission confirmed its conclusions set out in recitals 349 to 350 of the provisional Regulation.

### 5.2. **Significant rate of increase of subsidised imports**

(352) Following the imposition of provisional measures, the GOI noted that the Commission should consider post-IP developments in biodiesel imports from Indonesia.

(353) The Commission analysed imports from Indonesia from the end of the investigation period to the end of June 2019 (therefore from Q4 2018 to Q2 2019):

*Table 4*

**Imports from Indonesia during and after the IP**

| | IP | 2018 Q4 | 2019 Q1 | 2019 Q2 |
|---|---|---|---|---|
| Total imports of biodiesel (metric ton) from Indonesia | 516 068 | 139 091 | 234 677 | 207 310 |

*Source:* Surveillance II.

(354) The Commission noted that although the investigation period covers four quarters from 2017 Q4 to 2018 Q3, there were only significant imports in the last two quarters. For reference, the four quarters of the investigation period are reproduced here:

*Table 5*

**Imports from Indonesia during the IP**

| | 2017 Q4 | 2018 Q1 | 2018 Q2 | 2018 Q3 |
|---|---|---|---|---|
| Total imports of biodiesel (metric ton) from Indonesia | 0 | 25 275 | 227 114 | 263 678 |

*Source:* Surveillance II.

(355) The data shows that imports from Indonesia did continue after the end of the investigation period, and in significant quantities. However, the high point in 2018 of 263 678 MT per quarter in Q3 cannot be compared to Q3 2019, since the imports during this quarter are affected by the imposition of provisional duties. Also, the first three quarters following the investigation period are not directly comparable to the last three quarters of the investigation period given seasonal differences, so the post-IP data is inconclusive as to whether substantially increased imports in the future should be expected.

(356) Following final disclosure, the GOI noted that when comparing Q2 2019 with Q2 2018, imports from Indonesia had fallen by 9 % and therefore this should show that substantially increased imports are not expected.

(357) The Commission rejected this claim, as the difference of 9 % equates to 20 000 MT or one shipment of biodiesel. Therefore, the difference between the two quarters can be explained by a single shipment falling on one side or the other of a quarter. Also, evidence concerning a single quarter does not contradict the Commission's finding of inconclusive data as to whether substantially increased imports should be expected in the future.

(358) The GOI and the exporting producer Wilmar also requested that the Commission considers 'substantial' in reference to the quantity of imports of biodiesel from Argentina, given that the bulk of the increase in imports in general came from Argentina. The Commission already referred to the impact of imports from Argentina in recitals 368 to 370 of the provisional Regulation, which neither GOI nor Wilmar dispute. The effect of imports from Argentina is part of the causation assessment and does not put into question the substantial increase of imports from Indonesia.

(359) The exporting producer Wilmar requested the Commission to consider 'substantial' in reference to the imports from Indonesia prior to the period considered. It is not the Commission's practice to extend its analysis beyond the period considered and this argument was rejected. In any event, as noted before, the imports from Indonesia appear to have been reaching volumes similar to the ones already seen in the context of the 2013 anti-dumping investigation.

(360) Both Wilmar and the GOI then noted the provisions of the RED II Directive which will limit in future the imports of high-ILUC risk PME into the EU. The Commission noted that this limit starts to have effect as of end 2023 ([41]). Given that the effect of this Directive cannot be forecast, and that PME can still be imported into the EU under this Directive under the conditions thereby set out, this argument was also rejected as it does not affect the current analysis of threat of injury that Indonesian imports pose to the Union industry in the near future.

(361) Following final disclosure, Wilmar restated their comments above regarding the likelihood of increased imports from Indonesia and again requested the Commission to open its period considered to prior to 2013.

(362) The Commission rejected those comments and in particular the request to artificially extend the period considered to take into account periods prior to the imposition of anti-dumping duties, which is not the Commission's practice. Thus, the Commission considered it appropriate in this case to focus its examination on the period considered plus post-IP developments.

([41]) Article 26(2) of Directive (EU) 2018/2001.

(363) Following final disclosure the GOI noted that some countries appear to be restricting market access to palm oil based biofuels, and made specific mention of Norway and France.

(364) The Commission notes that Norway is not a member of the European Union and therefore their legislation has no impact on the EU biodiesel market. Nevertheless the Commission noted that the Norwegian government appears to have imposed the same sustainability criteria (high risk ILUC) that is in force in the EU ([42]). The Commission sees no link between the legislation in force in Norway and exports from Indonesia to the EU.

(365) The GOI also made specific reference to a Regulation passed in France 'which will ban the use of palm oil in biofuels from 31 December 2019' ([43]).

(366) Analysis of this law appears to show that the French government will stop tax exemptions for palm oil on 1 January 2020, and therefore in France palm oil will not be considered a biofuel unless it is from a low-ILUC risk plantation ([44]).

(367) The Commission noted that the law does not take effect until 2020. This is the start of the period under the RED II Directive where EU-wide imports of high ILUC risk feedstock biodiesel, such as PME, will be capped at the 2019 levels.

(368) The Commission also noted that since this law only takes effect on 1 January 2020, and in France only, it has no effect on the quantity of PME consumed in the Union in 2019, and given that the level of 2019 becomes the cap for 2020, as a consequence the French law will have no effect on the quantity of PME imported Union-wide which counts towards the blending mandate in the following years.

(369) In the absence of any further comments, the Commission confirmed its conclusions set out in recitals 351 to 352 of the provisional Regulation.

### 5.3. **Sufficient freely disposable capacity and absorption capacity of third countries**

(370) Following the imposition of provisional measures, the GOI commented that the Commission had not provided any specific data to prove the potential capacity of the United States of America ('USA') to absorb additional exports from Indonesia, which was set out in recitals 355 and 356 of the provisional Regulation.

(371) Given the high level of the measures in force in the USA, the Commission considered that it is not plausible that the USA would absorb exports from Indonesia in the near future.

(372) The Commission also noted that the latest US GAIN report from Jakarta ([45]) analysed the Indonesian export statistics and showed that exports of biodiesel to the USA ended in November 2016 and have not restarted.

(373) In their response to the post-IP set of questions sent to them, the EBB noted that capacity in Indonesia was expected to increase from 11,5 billion litres to 13 billion litres by 2021, according to the latest US GAIN Jakarta report.

(374) The GOI then also noted that Indonesia is moving from a B20 to a B30 mandate, that is moving from blending 20 % biodiesel with mineral diesel to blending 30 % biodiesel, and that this would increase domestic demand. The same point was also raised by the exporting producer Wilmar.

(375) In their comments to the submission of the EBB regarding post-IP data, the GOI noted that the implementation of the B30 mandate would absorb all production capacity of biodiesel in Indonesia.

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([42]) For example see https://www.regnskog.no/en/news/palmoil-in-biodiesel-sees-massive-drop-in-norway (last accessed 21 October 2019).
([43]) https://www.ofimagazine.com/news/france-bans-palm-oil-from-biofuels (last accessed 21 October 2019).
([44]) https://www.reuters.com/article/us-total-biofuels-palmoil/french-court-rules-against-tax-breaks-for-palm-oil-biofuel-idUSKBN1WQ0ZG (last accessed 21 October 2019).
([45]) US GAIN Biofuels Annual Jakarta Indonesia 8.9.2019.

(376) The Commission noted the ambition of the Indonesian government in increasing the mandate from B20 to B30, but also noted the comments of the EBB dated 29 April 2019 showing that Indonesian operators faced difficulties in distribution, availability of storage and blending infrastructure in implementing the B20 mandate and that the purpose of the mandate increase is to reduce the imports of mineral diesel, rather than reduce the exports of biodiesel to other markets such as to the EU.

(377) In addition, the Commission noted the comments from the EBB in their post-IP List B of questions, submitted on 6 September 2019, that although the number of blending points is being reduced and their size increased, the B30 mandate is expected to take time to implement. Certain sectors (for example mining) are requesting delayed implementation for the B30 mandate, technical adaptations may be necessary for vehicles to run on B30 fuel and in the non-PSO sector, machines subject to the ASTM standard may be out of warranty if they use B30 fuel.

(378) The Commission therefore does not consider that the move from a B20 to a B30 mandate will significantly limit the amount of biodiesel exported from Indonesia to the EU in the near future, in particular given the very significant spare capacities of the Indonesian biodiesel industry which US GAIN estimate at 30 % for 2019.

(379) Following final disclosure, the GOI commented that the Commission had not fully addressed its argument, which was that the implementation of the B30 mandate is a commitment of the GOI with full trials starting in November 2019. Furthermore, the GOI claims that the Commission simply restated the arguments of the EBB.

(380) The exporting producer Wilmar also asked the Commission to look again at the effect of the B30 mandate on the future spare capacity of the Indonesian biodiesel industry.

(381) The Commission noted the further comments of the GOI and Wilmar and considered the issue of the B30 mandate with due care.

(382) However, the latest US GAIN report from Jakarta supports the doubts of the EBB as to whether the B30 mandate can be reached within the timeframe alleged by the GOI. The GAIN report notes that the B20 mandate, which was a mandatory target already for 2016, will possibly be met for the first time only in 2019, that is three years after the set deadline.

(383) Given that the average increase in blending rates is between 2,5 ([46]) and 3,2 ([47]) percentage points per year, an increase from 19,9 % to 30 % in one single year seems extremely ambitious.

(384) The Commission therefore concluded that it is unlikely that a B30 mandate will be met in the near future, and significantly affect the spare capacity in Indonesia in the near future.

(385) In recital 357 of the provisional Regulation the Commission considered that there were no other significant markets available to the Indonesian producers considering the prohibitively high level of duties applicable on imports into the USA.

(386) In response Wilmar noted that exports to China exist and they consider that China has the capacity to absorb exports of PME from Indonesia in the future.

(387) The Commission noted that there is no blending mandate in force in China and therefore sales are not made on a long-term basis. The EBB provided data in their submission to the post-IP questionnaire showing that China only imports PME opportunistically when it is cheaper than mineral diesel. This cannot be considered as a viable long-term alternative for Indonesian exports to the steadily growing demand for biodiesel on the Union market due to the blending mandate.

([46]) Average 2011-2019.
([47]) Average 2016-2019.

(388) Following final disclosure, Wilmar re-stated that regarding the export of PME and also palm oil from Indonesia to China, stating that China was a '*confirmed and stable export market for Indonesian biodiesel*'.

(389) Wilmar however noted that China imports palm oil biodiesel 'thanks to the low price'. This was the conclusion of the Commission at provisional stage that imports from Indonesia to China occur only when PME is cheaper than mineral diesel, and therefore exports to China are based on the existence of the subsidisation already found.

(390) Given that China has no mandates in force for blending biodiesel with mineral diesel, the Commission did not have evidence at its disposal that confirms Wilmar's statement that China is a confirmed and stable export market for Indonesian biodiesel.

(391) During the post-IP, China accounted for only about 27 % of Indonesian exports, while the Union accounted for about 71 %. So despite the opportunistic sales of Indonesian biodiesel to China, the Union is still the most important export market for Indonesian producers.

(392) Following final disclosure, the GOI also noted that China was importing large quantities of palm oil from Indonesia and that imports of palm oil are expected to increase, lowering the amount of palm oil available in Indonesia to be transformed into biodiesel.

(393) The Commission noted that the GOI therefore expects that increased demand of palm oil in China would be supplied by diverting existing palm oil from biodiesel production to export sales. No evidence that the exports of palm oil would lead to a shortage of supply of palm oil for the Indonesian biodiesel producers was provided. The Commission would expect that the Indonesian reaction to increased demand for palm oil would be to increase the supply, rather than divert existing supplies away from industrial activities such as the production of biodiesel.

(394) The Commission also analysed exports of palm oil to China using the US GAIN reports for 2019 from Jakarta. Exports to China appear to have increased, but are substituting exports to India, where import duties on palm oil are high.

(395) The Commission considered therefore there is no evidence of a long-term increase in demand for biodiesel exported from Indonesia to China, and no evidence that increased demand for palm oil in China would cause a shortage of supply of palm oil to produce biodiesel for export to the European Union.

(396) In the absence of any further comments, the Commission confirmed its conclusions set out in recitals 353 to 357 of the provisional Regulation.

### 5.4. **Price level of subsidised imports**

(397) Following the imposition of provisional measures, Wilmar stated that a finding of price undercutting cannot support a finding of threat of injury, since price undercutting is different from price depression and suppression.

(398) The Commission disagreed. The findings on significant undercutting are made in the context of a state of the Union industry which is extremely delicate although not yet materially injured by the observed undercutting. Such undercutting, if continued, poses a threat that the Union industry will suffer material injury.

(399) In any event, the Commission also established price depression in recital 328 of the provisional Regulation, concluding that due to the price pressure from subsidised Indonesian imports, the Union industry could not benefit from the decreasing costs during the investigation period, because it had to fully pass on this cost decrease to its customers to avoid an even larger loss of market share.

(400) The Commission notes in this context that exports of biodiesel from Indonesia to China were at the same price per metric ton as exports to the EU in 2018 and the first half of 2019.

(401) This equally shows the difficult situation of the Union industry and the current threat that the subject imports pose.

(402) Following final disclosure Wilmar again stated that a finding of price undercutting cannot support a finding of threat of injury. The Commission again responds by saying that the undercutting found poses a threat that the Union industry will suffer material injury.

(403) The Commission therefore rejected this claim and maintained its findings set out in recital 358 of the provisional Regulation.

### 5.5. **Level of stocks**

(404) In the absence of any comments, the Commission confirmed its conclusions on injury set out in recital 359 of the provisional Regulation.

### 5.6. **Conclusion**

(405) The Commission therefore concluded that during the investigation period, imports from Indonesia constituted a threat of material injury to the Union industry, and the Commission confirmed its conclusions on threat of material injury set out in recital 360 of the provisional Regulation.

## 6. **CAUSATION**

### 6.1. **Effects of the subsidised imports from Indonesia**

(406) In the provisional Regulation, the Commission provisionally concluded that the subsidised imports from Indonesia were causing a threat of material injury to the Union industry.

(407) The Commission concluded that the increase of imports during the investigation period and the undercutting and depression of Union industry prices by the subsidised imports caused the Union industry to lose market share despite increases in production and capacity, and prevented the Union industry from benefitting from an otherwise favourable market situation.

(408) Following provisional disclosure, the GOI and Wilmar noted that production and capacity of the Union industry increased during the period considered, along with absolute sales quantities. They also noted that, as imports from Indonesia grew, the profitability of the Union industry increased.

(409) The Commission disagreed with these observations, in particular on the profits of the Union industry, which remained within a band of -1 % to 1 % throughout the period considered. Therefore, the change in profitability during the period considered is not significant.

(410) As regards production and capacity of the Union industry, even though these did increase in absolute terms during the period considered, the Union industry was unable to fully take advantage of the increase in consumption, with the imports from Indonesia taking market share from the Union industry.

(411) The Indonesian exporting producer Wilmar noted that in recital 346 of the provisional Regulation the Commission provisionally concluded that there was no conclusive existence of material injury. Wilmar then stated that this was in contradiction to recital 363 of the provisional Regulation where the Commission concluded that the subsidised imports from Indonesia had a negative impact on the Union industry.

(412) The Commission saw no contradiction between the absence of material injury to the Union industry, and yet a clear negative impact on the Union industry, when analysing threat of injury.

(413) Following final disclosure Wilmar again stated their points referred to in recitals 408 and 411, which the Commission again rejects.

(414) The GOI also commented on this point after final disclosure. They again stated that they see no causal link between the imports from Indonesia and the performance of the Union industry. The Commission noted the GOIs restatement of its opinion but still considered that the previous analysis showed that imports from Indonesia are a threat of injury to the Union industry in the absence of measures.

(415) In the absence of further comments the Commission confirmed its conclusions set out in recital 365 of the provisional Regulation.

### 6.2. **Other known factors**

#### 6.2.1. *Imports from Argentina*

(416) Following provisional disclosure, both the GOI and Wilmar made comments regarding the effect of subsidised Argentinian imports of biodiesel on the Union industry. These comments suggested that the cause of the threat of injury to the Union industry was solely imports from Argentina.

(417) As the Commission already set out in recitals 368 to 370 of the provisional Regulation, these imports were part of a threat of injury to the Union industry during the investigation period, which is why the Commission imposed measures on these imports in February 2019, and accepted price undertakings.

(418) However, the fact that Argentinian imports were a threat of injury during the period considered does not mean that Indonesian imports were not also a threat of injury, in particular after the measures against imports from Argentina entered into force. In fact, when examining the threat of material injury in the near future, since there are already measures against imports of biodiesel from Argentina, such imports can no longer be among the threats to the Union industry.

(419) Therefore, the Commission separated and distinguished the effects which imports from Argentina may have on the Union industry from the effects of imports from Indonesia in the context of conducting the threat of material injury analysis ([48]).

(420) Following final disclosure Wilmar again restated their comments at provisional stage regarding imports from Argentina, calling the Commission's response 'cursory'. The Commission disagreed, noting that the effects of imports from Argentina are addressed in Section 6.2.1 of the provisional Regulation.

#### 6.2.2. *Imports from other third countries*

(421) Following provisional disclosure, the GOI stated that imports from China could be a significant factor in any future consideration of the cause of injury to the Union industry and noted both the increase in quantity of imports from China from 2017 to the investigation period of 25 % and that from 2016 to the investigation period the price of imports from China was below Union industry prices.

(422) The GOI further indicated that even though the prices of imports from China are at higher prices than those from Indonesia, this does not mean they cannot have a negative impact on the Union industry.

(423) They also noted that Chinese biodiesel uses a different feedstock (used cooking oil) than Indonesian biodiesel. Used cooking oil biodiesel has high greenhouse gas savings and is subject to the double-counting regime set out in the RED Directive. It therefore appears to be a preferable option for import to the EU.

(424) The Commission noted the existence of imports from China during the investigation period and examined their quantity and price in recital 372 of the provisional Regulation, noting that imports from China were in lower quantities than from Indonesia, and that the price of imports from China was higher than from Indonesia.

(425) The Commission noted that the Union price is a mix of various types of biodiesel sold within the Union, including sales with a double-counting premium and without. Chinese imports are also indeed of one type of biodiesel (made from used cooking oil) which attracts a double-counting premium.

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([48]) See Panel Report, *United States — Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R, adopted 22 January 2018, paragraphs 7.204-7.212.

(426) However in terms of volume, imports from China are smaller than those from Indonesia (with a market share of 1,7 % as opposed to 3,3 % for Indonesia) and Chinese imports, unlike imports from Indonesia, are also subject to the conventional customs duty of 6,5 %.

(427) The Commission has received no evidence that such imports are having or are likely to have a negative impact on the Union industry or any allegations of injury caused by imports from China. It is important to re-emphasise that prices of Chinese biodiesel are higher than prices of Indonesian biodiesel. In any event, even if the imports from China were to affect negatively the Union industry, these effects are not such that they would attenuate the causal link between the subsidised imports from Indonesia and the threat of injury found. Therefore, this claim was rejected.

6.2.3. *Imports from third countries after the investigation period*

(428) In their submission after provisional disclosure, Wilmar made an analysis of imports of biodiesel into the EU from third countries after the end of the investigation period and noted that imports from China increased, and that imports from Malaysia increased significantly at very sharply decreasing prices. They further noted that import prices from China and Malaysia were below the sales price of the Union industry.

(429) In Wilmar's view, these imports weaken and break the causal link on the threat of injury established in the provisional Regulation.

(430) Imports from third countries between October 2018 and June 2019 were as follows. The estimated market share for the 9 month period is based on the consumption for the investigation period.

*Table 6*

**Imports from third countries October 2018-June 2019**

| | Volume of imports (tonnes) | Estimated market share (%) | Average price (EUR) |
|---|---|---|---|
| Argentina | 667 678 | 5,7 | 673 |
| Indonesia | 581 086 | 5,0 | 655 |
| Malaysia | 405 482 | 3,5 | 727 |
| China | 203 961 | 1,7 | 796 |

*Source:* Surveillance 2

(431) Imports from Argentina were subject to countervailing measures during the latter part of the post-IP. While the quantities were somewhat higher than imports from Indonesia, Argentinian prices also exceeded Indonesian prices, despite being subject to a 6,5 % conventional customs duty. They can therefore not be considered as a price-setter during this period. Also, as indicated above, since there are already measures against imports of biodiesel from Argentina, such imports can no longer be among the threats to the Union industry.

(432) Following final disclosure, Wilmar again argued that the Commission should take Argentinian imports into account, given that the price of Argentinian biodiesel during the post-IP was below that of the Union industry.

(433) The Commission reiterated that the price of imports from Argentina increased after February 2019 when the measures on Argentinian imports came into force, and therefore the comparison of prices needs to take into account the fact that a price undertaking is in force.

(434) The Commission noted that the Chinese prices increased between the investigation period and post-IP. During the post-IP, they also exceeded the average price charged by the Union industry, despite being subject to a conventional customs duty of 6,5 %. In addition, their market share stabilised after the investigation period.

(435) Following final disclosure Wilmar again noted the imports from China and made a calculation to compare the landed price for Chinese biodiesel in 2018 (EUR 826 per MT) with the average sales price of the Union industry during the investigation period (EUR 794 per MT).

(436) As their calculations showed that the Chinese import price was above the average price of the Union industry, and that this is what would be expected given that the Chinese biodiesel would attract a double-counting premium, the Commission accepted that the calculation showed no price pressure from China.

(437) Whilst imports from Malaysia increased in quantity and decreased in price post-IP, the quantities remained below those of Indonesia, and the prices remained higher, despite being subject to a 6,5 % conventional customs duty. They can therefore not be considered as a price-setter during this period either.

(438) Following final disclosure Wilmar again noted the increase in quantity and decrease in price of imports from Malaysia. The Commission reiterated that the prices from Malaysia are higher than those from Indonesia and subject to a conventional customs duty.

(439) The import statistics show that although there are significant imports of biodiesel from Malaysia and China during the post-IP, the Commission remained of the opinion that they were neither in quantity nor in price such as to attenuate the causal link found between the threat of material injury and imports from Indonesia.

(440) Following final disclosure, the GOI noted that the prices of imports in Table 6 were not directly comparable, as the biodiesel from Argentina is pure SME, from Indonesia pure PME, and from China the biodiesel is made from used cooking oil ('UCOME').

(441) The GOI noted that to calculate price undercutting, the Commission had made an adjustment to the price of FAME0 biodiesel (Argentinian SME) to compare it to PME (Indonesian biodiesel).

(442) The GOI presented data based on the same methodology showing that the comparable import price from Argentina during the investigation period was lower than the import price from Indonesia, and the comparable import price from China during the investigation period was in line with the import price from Indonesia.

(443) However, the calculation of the GOI overstated the magnitude of the adjustment by 30 %, and did not take the conventional customs duty applicable to imports from Argentina and China — but not applicable to Indonesian imports — into account.

(444) When correctly applying the adjustment, and correctly reflecting the conventional customs duty, the picture is quite different. The comparable import price from China significantly exceeds the import price from Indonesia, and the price difference between Argentinian imports and Indonesian imports is significantly reduced.

(445) The provisional Regulation already recognised that imports from Argentina were to a certain extent responsible for the negative development of some injury indicators of the Union industry, including the fact that the average import price from Argentina — even in absolute terms — was lower during the investigation period than the import price from Indonesia.

(446) The Argentinian prices in the post-IP do not fully reflect the imposition of the measures against them, since the measures were only imposed in February 2019, i.e. in the middle of the post-IP.

(447) Therefore, the price comparison as submitted by the GOI, does not attenuate the causal link between the imports from Indonesia and the threat of material injury. The fact that other factors may have contributed to rendering the domestic industry 'vulnerable' — i.e. more susceptible to future injury — does not preclude a finding of causal link between subject imports and a threat of future injury to the domestic industry ([49]).

([49]) See Panel Report, *United States — Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R, adopted 22 January 2018, paragraph 7.233.

6.2.4. *Export performance of the Union industry*

(448) The Commission received no comments on the exports of the Union industry.

6.2.5. *Price of raw materials (feedstock)*

(449) Following provisional disclosure, the GOI made comments regarding the financial situation of the Union industry and a link between this and the price of rapeseed oil in the Union. The GOI stated that prices of rapeseed were high throughout the period considered and this was the prime explanation why the Union industry failed to run large profits during this time.

(450) The biodiesel trader Gunvor also noted that rapeseed is an expensive raw material for biodiesel and that this was a likely cause of the financial situation of the Union industry.

(451) The Commission noted that the sampled biodiesel producers in the Union used a range of feedstock ([50]) to supply the demand across the Union and across the seasons. Therefore, the Commission did not see a direct correlation between rapeseed prices and the profits of the Union industry on the grounds that rapeseed is only one of the feedstock used by the Union industry to supply the Union market.

(452) The Commission noted its comments in recital 327 of the provisional Regulation that the unit cost of production of the Union industry followed the trend of prices during the period considered.

(453) However, the Commission also noted that in winter of 2018-2019 the price of rapeseed oil biodiesel ('RME') in the Union sharply increased, whereas the price of rapeseed oil itself remained stable. There is therefore no constant link between the price of rapeseed oil and the price of RME on the Union market.

(454) Following final disclosure, Wilmar contested this argument, saying that this was not reflected in Table 2 or elsewhere in the final disclosure document. Notably, such an increase of the sales price of RME should have an impact on the average sales price of the Union industry which remained stable, because RME is allegedly the most produced biodiesel in the Union.

(455) However, as stated in recital 296 of the provisional Regulation, FAME0 is the most common type of biodiesel sold by the sampled Union producers. Therefore, the average sales price is driven by FAME0, and also by the substantial quantities of PME and other blends sold by the sampled Union producers in addition to the price of RME. Indeed, the price increase for RME is fully reflected in the profitability figures, in particular for Q4 2018. It is also reflected to a certain extent in the average sales price which remained stable despite the price pressure exercised by the significant quantities of subsidised imports.

(456) Following final disclosure the GOI re-stated their argument that high rapeseed prices in the Union were the cause of lack of profitability during the period considered. The Commission rejected this argument for the reasons stated in recital 445.

(457) The Commission thus concluded that the prices of the raw materials used by the Union industry does not attenuate the causal link.

6.2.6. *Internal EU competition and performance differences between sampled Union producers*

(458) Following final disclosure Wilmar requested that the Commission considers internal competition between the Union producers. However, this claim has not been substantiated. Wilmar also claimed that the performance of a particular producer that is reflected in the microeconomic data may cause the overall results of the sample to be skewed.

(459) The representativity of the sample in terms of production in the Union mentioned in recital 265 of the provisional Regulation, and in terms of sales volume remained virtually unchanged throughout the period considered.

(460) The Commission therefore concluded that the sampled Union producers are representative of the entire Union industry and their microeconomic data is representative of the Union industry as a whole. The Commission further noted that the analysis of the situation of the Union industry is always conducted for the whole Union industry. The claim was therefore rejected.

([50]) The Commission has no precise information on the exact breakdown of feedstock used by the Union industry.

### 6.3. **Conclusion on causation**

(461) The Commission confirmed its conclusions on causation set out in recitals 377 to 380 of the provisional Regulation.

## 7. **UNION INTEREST**

### 7.1. **Interest of the Union industry**

(462) In the absence of comments, the Commission confirmed its conclusions set out in recitals 382 to 384 of the provisional Regulation.

### 7.2. **Interest of unrelated importers**

(463) Following provisional disclosure, the GOI noted that the measures would hit those importers with their own biodiesel blending facilities or biodiesel distribution outlets.

(464) Given the substantial imports of biodiesel from Malaysia, China and Argentina combined, on which there are no measures, or where there is a price undertaking in force, the Commission disagreed with this conclusion.

(465) In the absence of any further comments, the Commission confirmed its conclusions set out in recital 388 of the provisional Regulation.

### 7.3. **Interest of users**

(466) Following provisional disclosure, the GOI stated that imposition of measures on imports from Indonesia would create a monopoly for the Union industry on the Union market. This would increase biodiesel prices for the users.

(467) The Commission rejected those claims. Firstly a Union industry composed of so many competing companies is nowhere near a monopoly. Secondly, imports from Argentina, China and Malaysia are unaffected by the measures against Indonesia. Lastly, even with measures in force, the Union still receives significant imports of biodiesel from Argentina under the undertaking.

(468) The GOI states that affordable imports of biodiesel in sufficient quantities are of paramount importance to the Union. The Commission does not disagree with this statement, but noted that since the biodiesel content at the pump is normally no more than 10 %, the negative effect of price increase of biodiesel is only partially passed on to the consumer, and thereby insignificant.

(469) In its comments to final disclosure, Wilmar claims that the provisional Regulation did not consider the impact of the measures on the producers of diesel fuel.

(470) The producers of diesel fuel are the users of biodiesel, since they purchase the biodiesel before selling a blend of biodiesel and mineral diesel at the pump, as mentioned in recital 462. As no users cooperated in this investigation ([51]), this also means that no producers of diesel fuel cooperated in this investigation.

(471) In the absence of any further comments, the Commission confirmed its conclusions set out in recital 391 of the provisional Regulation.

### 7.4. **Trade distorting effects of subsidies and restoring effective competition**

(472) In the absence of any further comments, the Commission confirmed its conclusions set out in recital 393 of the provisional Regulation.

### 7.5. **Conclusion on Union interest**

(473) In summary, none of the arguments put forward by interested parties demonstrate that there are compelling reasons against the imposition of measures on imports of the product concerned.

([51]) Recital 389 of the provisional Regulation.

(474) In the absence of any further comments, the Commission confirmed its conclusions set out in recitals 394 to 395 of the provisional Regulation.

## 8. **REGISTRATION**

(475) Following provisional disclosure the EBB disagreed with the conclusion of the Commission that registration of imports was not warranted.

(476) The EBB opposed the reasoning of the Commission saying that Article 24(5) of the basic Regulation only requires the Union industry to provide 'sufficient evidence to justify registration of imports' and that there is no link between Article 24(5) and Article 16(4) in law. Article 16(4) sets out the conditions for retroactive collection of duties during the period of registration.

(477) Second, the EBB said that even if the criteria set out in Article 16(4) of the basic Regulation had to be complied with for registration to take place, the Commission is entitled to find 'critical circumstances where for the subsidised product in question injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from countervailable subsidies'.

(478) The EBB stated that Article 2(d) of the basic Regulation allows the Commission to read 'threat of injury' where 'injury' is written in the Regulation.

(479) The Commission disagreed with the EBB's allegations, given that Article 16(4) makes clear that the Commission has to find 'injury which is difficult to repair'. 'Injury which is difficult to repair' refers to a situation where, absent the retroactive collection of duties, the material injury suffered by the Union industry may be aggravated because of massive imports before measures can be adopted. This is not the case where the findings in an investigation are based on threat of material injury.

(480) Thus, the Commission considered that a 'threat of injury which is difficult to repair' does not fall within Article 16(4) of the basic Regulation.

(481) The Commission therefore confirmed the findings of the provisional Regulation in recitals 403 and 404.

## 9. **DEFINITIVE COUNTERVAILING MEASURES**

(482) In view of the conclusions reached with regard to subsidisation, injury, causation and Union interest, definitive countervailing duties should be imposed to prevent the materialisation of the imminent threat of material injury caused to the Union industry by the subsidised imports from Indonesia.

### 9.1. **Level of countervailing measures**

(483) Article 15(1), subparagraph 3 of the basic Regulation states that the amount of the countervailing duty shall not exceed the amount of countervailable subsidies established.

(484) Article 15(1), subparagraph 4 then states that '*Where the Commission, on the basis of the information submitted, can clearly conclude that it is not in the Union's interest to determine the amount of measures in accordance with the third subparagraph, the amount of the countervailing duty shall be less if such lesser duty would be adequate to remove the injury to the Union industry*'.

(485) No such information has been submitted to the Commission, and therefore the level of the countervailing measures will be set with reference to Article 15(1), subparagraph 3.

(486) Following final disclosure, the exporting producer Wilmar noted the absence of an explicit injury margin analysis. In particular, Wilmar argued that the determination whether the amount of measures should be at the level of countervailable subsidies has to be made on the basis of all information submitted by the interested parties.

(487) All information submitted by interested parties has been taken into account when making this determination. While there are indeed a limited number of parties in the Union who expressed their opposition to the countervailing measures in general, they provided no information why it would not be in the Union interest to impose countervailing duties at the level of countervailable subsidies.

(488) In particular, Article 31(7) requires that for the Union interest analysis, information shall be taken into account only where it is supported by actual evidence which substantiates its validity. An unsubstantiated statement of opposition to the imposition of countervailing measures is therefore only of very limited relevance in this respect.

(489) Given that the definitive measures in this case will be based on the amount of countervailable subsidies established, the level of the injury margin is not relevant. Therefore, the test set out in Article 15(1), subparagraph five is not applicable.

### 9.2. **Price undertaking offers**

(490) One Indonesian exporting producer ('the applicant') submitted a voluntary price undertaking offer in accordance with Article 13 of the basic Regulation. The Commission analysed the undertaking offer and considered that its acceptance would be impractical for the following reasons.

(491) The minimum import price ('MIP') proposed was inappropriate, as it was not sufficient to offset the amount of countervailable subsidies. According to Article 13.1 third paragraph of the basic Regulation, the price increase within the price undertaking shall not be higher than necessary to offset the amount of countervailable subsidies.

(492) The annual level, i.e. the annual limit of imports subject to undertaking proposed by the applicant, covered total exports of biodiesel from Indonesia and was binding for other Indonesian exporters not having submitted an undertaking offer. The offer did not mention how the annual level would be controlled so as to ensure its observance.

(493) The Commission found the annual level of imports at the MIP excessive. It exceeded the market share of Indonesian biodiesel imports during the investigation period. Together with the lack of a quarterly cap on imports the annual level proposed highly increased the risk that high level of imports would enter the Union market during certain months.

(494) The Commission noted that the applicant has a very complex structure and uses complex sales channels. Even under the additional commitment put forward concerning sales channels it would increase the likelihood of circumvention and cross-compensation and would make an effective monitoring impracticable.

(495) The Commission sent the applicant a letter, setting out the reasons to reject the undertaking offer and giving the applicant the opportunity to comment. The Commission received comments from the applicant with regard to the MIP, the annual level and risks of cross-compensation, also in the context of the EBB's additional comments on the initial undertaking offer. Together with its comments, the applicant also revised certain elements of the undertaking offer outside the applicable deadline.

(496) In its comments, the applicant did not agree with the Commission's conclusion that the MIP is not sufficient to offset the amount of countervailable subsidies. The applicant did not change the methodology of calculating the proposed MIP. The Commission maintained its findings and therefore rejected the claim.

(497) The applicant further clarified that the annual level set in the undertaking offer would solely cover imports into the Union of products produced or traded by the applicant. It also proposed to reduce the annual level and introduce a quarterly cap on the use of the annual level.

(498) The Commission welcomed the explanation with regard to the annual level and noted that the annual level, as explained by the applicant, was binding only for the applicant. This was among reasons for the Commission to consider the level to be excessive, as the annual level proposed exceeded the market share of imports of all Indonesian biodiesel exporters during the investigation period, whereas the level was intended for only one exporter — the applicant. The newly proposed level was lower that the annual level set in the undertaking offer, but still remained at a very high level since it was close to the total level of imports of biodiesel from Indonesia during the investigation period. The Commission also notes that the revised offer also did not mention how the annual level would be controlled so as to ensure its observance. The Commission maintained its findings and therefore rejected the claim.

(499) In its comments, the applicant disagreed with the Commission's finding with regard to the applicant's complex structure and complex sales channels. The applicant did not propose any additional commitment than those included in the undertaking offer. The Commission maintained its findings and therefore rejected the claim.

(500) The Commission considered the monitoring of the undertaking impracticable and unworkable for the reasons set out in recitals 490 to 499 above and therefore rejected the final offer.

### 9.3. **Definitive measures**

(501) Definitive countervailing measures should be imposed on imports of biodiesel originating in Indonesia in accordance with the rules in Article 15(1) of the basic Regulation, which states that the definitive duty shall correspond to the total amount of countervailable subsidies established.

(502) On the basis of the above, the definitive countervailing duty rates, expressed on the CIF Union border price, customs duty unpaid, are as follows:

| Company | Countervailing duty |
|---|---|
| PT Ciliandra Perkasa | 8,0 % |
| PT Intibenua Perkasatama and PT Musim Mas (Musim Mas Group) | 16,3 % |
| PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo (Permata Group) | 18,0 % |
| PT Wilmar Nabati Indonesia and PT Wilmar Bioenergi Indonesia (Wilmar Group) | 15,7 % |
| All other companies | 18,0 % |

(503) The individual company countervailing duty rates specified in this Regulation were established on the basis of the findings of this investigation. Therefore, they reflect the situation found during that investigation with respect to those companies. Those duty rates (as opposed to the countrywide duty applicable to 'all other companies') are thus exclusively applicable to imports of the product concerned originating in Indonesia and produced by those companies. Imported products concerned produced by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, cannot benefit from those rates and shall be subject to the duty rate applicable to 'all other companies'.

(504) A company may request the continued application of those individual duty rates despite subsequently changing its name or the name of one of its entities. The request must be addressed to the Commission. The request must contain all the relevant information enabling the company to demonstrate that the change does not affect the right of the company to benefit from the individual duty rate which applies to it. If the change of name of the company does not affect its right to benefit from the duty rate which applies to it, a notice informing about the change of name will be published in the *Official Journal of the European Union*.

(505) Should developments after the investigation period lead to a change in circumstances of a lasting nature, appropriate action in accordance with Article 19 of the basic Regulation may be taken.

(506) In view of Article 109 of Regulation (EU, Euratom) 2018/1046 ([52]), 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.

([52]) 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).

### 9.4. **Release of the provisional duties**

(507) Article 16(2) of the basic Regulation states that it is for the Commission to decide what proportion of the provisional duty is to be definitively collected.

(508) Article 16(2) further states that in a case of threat of material injury, provisional duties are not to be collected unless it is found that the threat of material injury, in the absence of provisional measures, has developed into material injury.

(509) Given the findings of this case, the provisional amounts shall be released and not collected as set out in Article 16(2) of the basic Regulation.

(510) 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 of the European Parliament and of the Council ([53]),

HAS ADOPTED THIS REGULATION:

*Article 1*

1. A definitive countervailing duty is imposed on imports of fatty-acid mono-alkyl esters and/or paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin, in pure form or as included in a blend, currently falling under CN codes ex 1516 20 98 (TARIC codes 1516 20 98 21, 1516 20 98 29 and 1516 20 98 30), ex 1518 00 91 (TARIC codes 1518 00 91 21, 1518 00 91 29 and 1518 00 91 30), ex 1518 00 95 (TARIC code 1518 00 95 10), ex 1518 00 99 (TARIC codes 1518 00 99 21, 1518 00 99 29 and 1518 00 99 30), ex 2710 19 43 (TARIC codes 2710 19 43 21, 2710 19 43 29 and 2710 19 43 30), ex 2710 19 46 (TARIC codes 2710 19 46 21, 2710 19 46 29 and 2710 19 46 30), ex 2710 19 47 (TARIC codes 2710 19 47 21, 2710 19 47 29 and 2710 19 47 30), 2710 20 11, 2710 20 15, 2710 20 17, ex 3824 99 92 (TARIC codes 3824 99 92 10, 3824 99 92 12 and 3824 99 92 20), 3826 00 10 and ex 3826 00 90 (TARIC codes 3826 00 90 11, 3826 00 90 19 and 3826 00 90 30) and originating in Indonesia.

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

| Company | Definitive countervailing duty | TARIC additional code |
|---|---|---|
| PT Ciliandra Perkasa | 8,0 % | B786 |
| PT Intibenua Perkasatama and PT Musim Mas (Musim Mas Group) | 16,3 % | B787 |
| PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo (Permata Group) | 18,0 % | B788 |
| PT Wilmar Nabati Indonesia and PT Wilmar Bioenergi Indonesia (Wilmar Group) | 15,7 % | B789 |
| All other companies | 18,0 % | C999 |

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

*Article 2*

The amounts secured by way of the provisional countervailing duty under Implementing Regulation (EU) 2019/1344 shall be definitively released.

*Article 3*

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

([53]) 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).

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

Done at Brussels, 28 November 2019.

*For the Commission*
*The President*
Jean-Claude JUNCKER

# COMMISSION IMPLEMENTING REGULATION (EU) 2019/2093

## of 29 November 2019

## amending Regulation (EC) No 333/2007 as regards the analysis of 3-monochloropropane-1,2-diol (3-MCPD) fatty acid esters, glycidyl fatty acid esters, perchlorate and acrylamide

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (Official Controls Regulation) ([1]), and in particular Article 34(6) thereof,

Whereas:

(1) Commission Regulation (EC) No 333/2007 ([2]) lays down the methods of sampling and analysis to be used for the official control of the levels of certain contaminants in foodstuffs.

(2) The maximum allowed levels for 3-monochloropropane-1,2-diol (3-MCPD) fatty acid esters, glycidyl fatty acid esters and perchlorate in foodstuffs have been established by Commission Regulation (EC) No 1881/2006 ([3]). Commission Regulation (EU) 2017/2158 ([4]) establishes mitigation measures and benchmark levels for the reduction of the presence of acrylamide in certain categories of foodstuffs.

(3) Regulation (EC) No 333/2007 establishes specific performance criteria to be met by the validated methods of analysis for contaminants in food, applied by the relevant European laboratories. Consequently, it is appropriate to lay down specific performance criteria in Regulation (EC) No 333/2007, with which the method of analysis for controlling the maximum levels of 3-MCPD fatty acid esters, glycidyl fatty acid esters, perchlorate and acrylamide in foodstuffs has to comply.

(4) The European Union Reference Laboratories in the field of Contaminants in Feed and Food have elaborated a guidance document on the estimation of the Limit of Detection (LOD) and Limit of Quantification (LOQ) for measurements in the field of contaminants in feed and food ([5]). Consequently, it is appropriate to adapt the definitions contained in Regulation (EC) No 333/2007 and related to the limit of detection and the limit of quantification.

(5) Regulation (EC) No 333/2007 should therefore be amended accordingly.

(6) Regulation (EU) 2017/625 applies with effect from 14 December 2019. Therefore this Regulation should start to apply from the same date.

(7) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

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([1]) OJ L 95, 7.4.2017, p. 1.

([2]) Commission Regulation (EC) No 333/2007 of 28 March 2007 laying down the methods of sampling and analysis for the control of the levels of trace elements and processing contaminants in foodstuffs (OJ L 88, 29.3.2007, p. 29).

([3]) Commission Regulation (EC) No 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs (OJ L 364, 20.12.2006, p. 5).

([4]) Commission Regulation (EU) 2017/2158 of 20 November 2017 establishing mitigation measures and benchmark levels for the reduction of the presence of acrylamide in food (OJ L 304, 21.11.2017, p. 24).

([5]) Guidance Document on the Estimation of LOD and LOQ for Measurements in the Field of Contaminants in Feed and Food, JRC Technical Reports EUR 28099 EU (2016). Available at: http://publications.jrc.ec.europa.eu/repository/bitstream/JRC102946/eur%2028099%20en_lod%20loq%20guidance%20document.pdf

HAS ADOPTED THIS REGULATION:

*Article 1*

Regulation (EC) No 333/2007 is amended as follows:

(1) in Article 1, paragraph 1 is replaced by the following:

'1. Sampling and analysis for the control of the levels of lead, cadmium, mercury, inorganic tin, inorganic arsenic, 3-monochloropropane-1,2-diol (3-MCPD), 3-MCPD fatty acid esters, glycidyl fatty acid esters, polycyclic aromatic hydrocarbons (PAH) and perchlorate listed in Sections 3, 4, 6 and 9 of the Annex to Regulation (EC) No 1881/2006 and for the control of the levels of acrylamide in accordance with Commission Regulation (EU) 2017/2158 (*) shall be carried out in accordance with the Annex to this Regulation.

(*) Commission Regulation (EU) 2017/2158 of 20 November 2017 establishing mitigation measures and benchmark levels for the reduction of the presence of acrylamide in food (OJ L 304, 21.11.2017, p. 24).';

(2) the Annex is amended in accordance with the Annex to this Regulation.

*Article 2*

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

It shall apply from 14 December 2019.

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

Done at Brussels, 29 November 2019.

*For the Commission*
*The President*
Jean-Claude JUNCKER

*ANNEX*

The Annex to Regulation (EC) No 333/2007 is amended as follows:

(1) in point C.3.1, Definitions, the definitions of 'LOD' and 'LOQ' are replaced by the following:

"'LOD"= Limit of detection, smallest measured content, from which it is possible to deduce the presence of the analyte with reasonable statistical certainty.

"LOQ"= Limit of quantification, lowest content of the analyte which can be measured with reasonable statistical certainty.';

(2) in point C.3.3.1, Performance criteria, point (b) is replaced by the following:

'(b) Performance criteria for methods of analysis for 3-monochloropropane-1,2-diol (3-MCPD), 3-MCPD fatty acid esters and glycidyl fatty acid esters:

— Performance criteria for methods of analysis for 3-MCPD in foods specified in point 4.1 of the Annex to Regulation (EC) No 1881/2006

*Table 6a*

| Parameter | Criterion |
|---|---|
| Applicability | Foods specified in point 4.1 of the Annex to Regulation (EC) No 1881/2006 |
| Specificity | Free from matrix or spectral interferences |
| Field blanks | Less than LOD |
| Repeatability ($RSD_r$) | 0,66 times $RSD_R$ as derived from (modified) Horwitz equation |
| Reproducibility ($RSD_R$) | as derived from (modified) Horwitz equation |
| Recovery | 75-110 % |
| Limit of Detection (LOD) | ≤ 5 μg/kg (on dry matter basis) |
| Limit of Quantification (LOQ) | ≤ 10 μg/kg (on dry matter basis) |

— Performance criteria for methods of analysis for 3-MCPD in foods specified in point 4.3 of the Annex to Regulation (EC) No 1881/2006

*Table 6b*

| Parameter | Criterion |
|---|---|
| Applicability | Foods specified in point 4.3 of the Annex to Regulation (EC) No 1881/2006 |
| Specificity | Free from matrix or spectral interferences |
| Field blanks | Less than LOD |
| Repeatability ($RSD_r$) | 0,66 times $RSD_R$ as derived from (modified) Horwitz equation |
| Reproducibility ($RSD_R$) | as derived from (modified) Horwitz equation |
| Recovery | 75-110 % |
| Limit of Detection (LOD) | ≤ 7 μg/kg |
| Limit of Quantification (LOQ) | ≤ 14 μg/kg |

— Performance criteria for methods of analysis for 3-MCPD fatty acid esters, expressed as 3-MCPD, in foods specified in point 4.3 of the Annex to Regulation (EC) No 1881/2006

*Table 6c*

| Parameter | Criterion |
|---|---|
| Applicability | Foods specified in point 4.3 of the Annex to Regulation (EC) No 1881/2006 |
| Specificity | Free from matrix or spectral interferences |
| Repeatability ($RSD_r$) | 0,66 times $RSD_R$ as derived from (modified) Horwitz equation |
| Reproducibility ($RSD_R$) | as derived from (modified) Horwitz equation |
| Recovery | 70-125 % |
| Limit of Detection (LOD) | Three tenths of LOQ |
| Limit of Quantification (LOQ)<br>for foods specified in 4.3.1 and 4.3.2 | ≤ 100 µg/kg in oils and fats |
| Limit of Quantification (LOQ)<br>for foods specified in 4.3.3 and in 4.3.4 with a fat content < 40 % | ≤ two fifths of the ML |
| Limit of Quantification (LOQ)<br>for foods specified in 4.3.4 with a fat content ≥ 40 % | ≤ 15 µg/kg fat |

— Performance criteria for methods of analysis for glycidyl fatty acid esters, expressed as glycidol, in foods specified in point 4.2 of the Annex to Regulation (EC) No 1881/2006

*Table 6d*

| Parameter | Criterion |
|---|---|
| Applicability | Foods specified in point 4.2 of the Annex to Regulation (EC) No 1881/2006 |
| Specificity | Free from matrix or spectral interferences |
| Repeatability ($RSD_r$) | 0,66 times $RSD_R$ as derived from (modified) Horwitz equation |
| Reproducibility ($RSD_R$) | as derived from (modified) Horwitz equation |
| Recovery | 70-125 % |
| Limit of Detection (LOD) | Three tenths of LOQ |
| Limit of Quantification (LOQ)<br>for foods specified in 4.2.1 and 4.2.2 | ≤ 100 µg/kg in oils and fats |
| Limit of Quantification (LOQ)<br>for foods specified in 4.2.3 with a fat content < 65 % and in 4.2.4 with a fat content < 8 % | ≤ two fifths of the ML |
| Limit of Quantification (LOQ)<br>for foods specified in 4.2.3 with a fat content ≥ 65 % and in 4.2.4 with a fat content ≥ 8 % | ≤ 31 µg/kg fat' |

(3) in point C.3.3.1, Performance criteria, point (d), 'Notes to the performance criteria' is replaced by the following:

'(d) Performance criteria for methods of analysis for acrylamide:

*Table 8*

| Parameter | Criterion |
|---|---|
| Applicability | All foods |
| Specificity | Free from matrix or spectral interferences |
| Field blanks | Less than Limit of Detection (LOD) |
| Repeatability ($RSD_r$) | 0,66 times $RSD_R$ as derived from (modified) Horwitz equation |
| Reproducibility ($RSD_R$) | as derived from (modified) Horwitz equation |
| Recovery | 75-110 % |
| Limit of Detection (LOD) | Three tenths of LOQ |
| Limit of Quantification (LOQ) | For foods with benchmark levels < 125 µg/kg: ≤ two fifths of the benchmark level, however not required to be lower than 20 µg/kg<br>For foods with benchmark level ≥ 125 µg/kg: ≤ 50 µg/kg' |

(4) in point C.3.3.1, Performance criteria, the following points (e) and (f) are added:

'(e) Performance criteria for methods of analysis for perchlorate:

*Table 9*

| Parameter | Criterion |
|---|---|
| Applicability | All foods |
| Specificity | Free from matrix or spectral interferences |
| Repeatability ($RSD_r$) | 0,66 times $RSD_R$ as derived from (modified) Horwitz equation |
| Reproducibility ($RSD_R$) | as derived from (modified) Horwitz equation |
| Recovery | 70-110 % |
| Limit of Detection (LOD) | Three tenths of LOQ |
| Limit of Quantification (LOQ) | ≤ two fifths of the ML |

(f) Notes to the performance criteria:

The Horwitz equation (*) (for concentrations $1,2 \times 10^{-7} \leq C \leq 0,138$) and the modified Horwitz equation (**) (for concentrations $C < 1,2 \times 10^{-7}$) are generalised precision equations which are independent of analyte and matrix but solely dependent on concentration for most routine methods of analysis.

Modified Horwitz equation for concentrations $C < 1{,}2 \times 10^{-7}$:

$$RSD_R = 22\ \%$$

where:

— $RSD_R$ is the relative standard deviation calculated from results generated under reproducibility conditions $[(s_R/\bar{x}) \times 100]$

— C is the concentration ratio (i.e. 1 = 100g/100g, 0,001 = 1 000 mg/kg). The modified Horwitz equation applies to concentrations $C < 1{,}2 \times 10^{-7}$.

Horwitz equation for concentrations $1{,}2 \times 10^{-7} \leq C \leq 0{,}138$:

$$RSD_R = 2C^{(-0{,}15)}$$

where:

— $RSD_R$ is the relative standard deviation calculated from results generated under reproducibility conditions $[(s_R/\bar{x}) \times 100]$

— C is the concentration ratio (i.e. 1 = 100g/100g, 0,001 = 1 000 mg/kg). The Horwitz equation applies to concentrations $1{,}2 \times 10^{-7} \leq C \leq 0{,}138$.

(*) W. Horwitz, L.R. Kamps, K.W. Boyer, J.Assoc.Off.Analy.Chem.,63, 1980, 1344-1354.
(**) M. Thompson, Analyst, 125, 2000, 385-386.'

(5) in point C.3.3.2., 'Fitness-for-purpose' approach, the words 'Table 8' are replaced by the words 'Table 10'.

# COMMISSION IMPLEMENTING REGULATION (EU) 2019/2094

## of 29 November 2019

## amending Implementing Regulation (EU) No 540/2011 as regards the extension of the approval periods of the active substances benfluralin, dimoxystrobin, fluazinam, flutolanil, mancozeb, mecoprop-P, mepiquat, metiram, oxamyl and pyraclostrobin

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC ([1]), and in particular the first paragraph of Article 17 thereof,

Whereas:

(1) Part A of the Annex to Commission Implementing Regulation (EU) No 540/2011 ([2]) sets out the active substances deemed to have been approved under Regulation (EC) No 1107/2009.

(2) The approval period of the active substances dimoxystrobin, mancozeb, mecoprop-P, metiram, oxamyl and pyraclostrobin was extended until 31 January 2020 by Commission Implementing Regulation (EU) 2018/1796 ([3]).

(3) The approval period of the active substances benfluralin, fluazinam, flutolanil and mepiquat was extended until 29 February 2020 by Commission Implementing Regulation (EU) 2019/168 ([4]).

(4) Applications for the renewal of the approval of those substances were submitted in accordance with Commission Implementing Regulation (EU) No 844/2012 ([5]).

(5) Due to the fact that the assessment of those substances has been delayed for reasons beyond the control of the applicants, the approvals of those active substances are likely to expire before a decision has been taken on their renewal. It is therefore necessary to extend their approval periods.

(6) In view of the aim of the first paragraph of Article 17 of Regulation (EC) No 1107/2009, as regards cases where the Commission is to adopt a Regulation providing that the approval of an active substance referred to in the Annex to this Regulation is not renewed because the approval criteria are not satisfied, the Commission is to set the expiry date at the same date as before this Regulation or at the date of the entry into force of the Regulation providing that the approval of the active substance is not renewed, whichever date is later. As regards cases where the Commission is to adopt a Regulation providing for the renewal of an active substance referred to in the Annex to this Regulation, the Commission will endeavour to set, as appropriate under the circumstances, the earliest possible application date.

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([1]) OJ L 309, 24.11.2009, p. 1.

([2]) Commission Implementing Regulation (EU) No 540/2011 of 25 May 2011 implementing Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances (OJ L 153, 11.6.2011, p. 1).

([3]) Commission Implementing Regulation (EU) 2018/1796 of 20 November 2018 amending Implementing Regulation (EU) No 540/2011 as regards the extension of the approval periods of the active substances amidosulfuron, bifenox, chlorpyrifos, chlorpyrifos-methyl, clofentezine, dicamba, difenoconazole, diflubenzuron, diflufenican, dimoxystrobin, fenoxaprop-p, fenpropidin, lenacil, mancozeb, mecoprop-p, metiram, nicosulfuron, oxamyl, picloram, pyraclostrobin, pyriproxyfen and tritosulfuron (OJ L 294, 21.11.2018, p. 15).

([4]) Commission Implementing Regulation (EU) 2019/168 of 31 January 2019 amending Implementing Regulation (EU) No 540/2011 as regards the extension of the approval periods of the active substances abamectin, Bacillus subtilis (Cohn 1872) Strain QST 713, Bacillus thuringiensis subsp. Aizawai, Bacillus thuringiensis subsp. israeliensis, Bacillus thuringiensis subsp. kurstaki, Beauveria bassiana, benfluralin, clodinafop, clopyralid, Cydia pomonella Granulovirus (CpGV), cyprodinil, dichlorprop-P, epoxiconazole, fenpyroximate, fluazinam, flutolanil, fosetyl, Lecanicillium muscarium, mepanipyrim, mepiquat, Metarhizium anisopliae var. Anisopliae, metconazole, metrafenone, Phlebiopsis gigantea, pirimicarb, Pseudomonas chlororaphis strain: MA 342, pyrimethanil, Pythium oligandrum, rimsulfuron, spinosad, Streptomyces K61, thiacloprid, tolclofos-methyl, Trichoderma asperellum, Trichoderma atroviride, Trichoderma gamsii, Trichoderma harzianum, triclopyr, trinexapac, triticonazole, Verticillium albo-atrum and ziram (OJ L 33, 5.2.2019, p. 1).

([5]) Commission Implementing Regulation (EU) No 844/2012 of 18 September 2012 setting out the provisions necessary for the implementation of the renewal procedure for active substances, as provided for in Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market (OJ L 252, 19.9.2012, p. 26).

(7) Implementing Regulation (EU) No 540/2011 should therefore be amended accordingly.

(8) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS REGULATION:

*Article 1*

The Annex to Implementing Regulation (EU) No 540/2011 is amended in accordance with the Annex to this Regulation.

*Article 2*

This Regulation shall enter into force on the twentieth 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 November 2019.

*For the Commission*
*The President*
Jean-Claude JUNCKER

*ANNEX*

Part A of the Annex to Implementing Regulation (EU) No 540/2011 is amended as follows:

(1) in the sixth column, expiration of approval, of row 57, Mecoprop-P, the date is replaced by '31 January 2021';

(2) in the sixth column, expiration of approval, of row 81, Pyraclostrobin, the date is replaced by '31 January 2021';

(3) in the sixth column, expiration of approval, of row 114, Mancozeb, the date is replaced by '31 January 2021';

(4) in the sixth column, expiration of approval, of row 115, Metiram, the date is replaced by '31 January 2021';

(5) in the sixth column, expiration of approval, of row 116, Oxamyl, the date is replaced by '31 January 2021';

(6) in the sixth column, expiration of approval, of row 128, Dimoxystrobin, the date is replaced by '31 January 2021';

(7) in the sixth column, expiration of approval, of row 187, Flutolanil, the date is replaced by '28 February 2021';

(8) in the sixth column, expiration of approval, of row 188, Benfluralin, the date is replaced by '28 February 2021';

(9) in the sixth column, expiration of approval, of row 189, Fluazinam, the date is replaced by '28 February 2021';

(10) in the sixth column, expiration of approval, of row 191, Mepiquat, the date is replaced by '28 February 2021'.

# COMMISSION IMPLEMENTING REGULATION (EU) 2019/2095

## of 29 November 2019

## operating deduction from the Atlantic salmon fishing quota available to Poland in 2019 on account of overfishing in 2018

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Union control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 ([1]), and in particular Article 105(1), (2) and (3) thereof,

Whereas:

(1) The fishing quota for Atlantic salmon in Union waters of Subdivisions 22-31 (SAL/3BCD-F) has been allocated to Poland for the year 2018 by Council Regulation (EU) 2017/1970 ([2]).

(2) This fishing quota for the year 2018 was increased by 1369 specimen following application of the year-to-year flexibility set up by Article 15(9) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council ([3]). The increase, corresponding to 10 % of the permitted landings for the year 2017, was calculated on the basis of the remaining unused quantities after catch declarations. During inspection missions carried out in Poland in accordance with Regulation (EC) No 1224/2009 during 2018 the Commission detected misreported and under-reported catch data revealing that the 2017 Polish quota for Atlantic Salmon in Union waters of Subdivisions 22-31 had been exhausted. Therefore, the year-to-year flexibility from year 2017 to year 2018 under Article 15(9) of Regulation (EC) No 1380/2013 had been unduly granted and the corresponding quantities should be deducted accordingly from the 2018 quota.

(3) The Commission also detected further inconsistencies in the Polish data about Atlantic salmon fishery in Union waters of Subdivisions 22-31 for the year 2018 by cross-checking the data recorded and reported during inspected and non-inspected fishing trips. These inconsistencies in catch composition reporting were corroborated by several audit and verification missions conducted in Poland during 2018 and 2019 in accordance with Regulation (EC) No 1224/2009. These audit reports were duly communicated to and discussed with Poland.

(4) The evidence gathered allowed the Commission to establish that the quota for Atlantic salmon in Union waters of Subdivisions 22-31 allocated to Poland in the year 2018 by Council Regulation (EU) 2017/1970 was exceeded by 2 160 pieces of salmon. Pursuant to Article 105(1) of Regulation (EC) No 1224/2009, when the Commission has established that a Member State has exceeded the fishing quotas which have been allocated to it, the Commission is to operate deductions from future fishing quotas of that Member State.

(5) Article 105(2) and (3) of Regulation (EC) No 1224/2009 provides that such deductions have to be operated in the following year or years by applying the respective multiplying factors as set out therein.

(6) A multiplying factor equal to 1,00 should apply in accordance with Article 105(2) of Regulation (EC) No 1224/2009 as the amount of overfishing as quantified by the Commission is less than 100 tonnes,

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([1]) OJ L 343, 22.12.2009, p. 1.

([2]) Council Regulation (EU) 2017/1970 of 27 October 2017 fixing for 2018 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Baltic Sea and amending Regulation (EU) 2017/127 (OJ L 281, 31.10.2017, p. 1).

([3]) Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ L 354, 28.12.2013, p. 22).

HAS ADOPTED THIS REGULATION:

*Article 1*

The fishing quota for Atlantic salmon in Union waters of Subdivisions 22-31 allocated to Poland for the year 2019 by Council Regulation (EU) 2018/1628 ([4]) shall be reduced as set out in the Annex to this Regulation.

*Article 2*

This Regulation shall enter into force on the seventh 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 November 2019.

*For the Commission*
*The President*
Jean-Claude JUNCKER

([4]) Council Regulation (EU) 2018/1628 of 30 October 2018 fixing for 2019 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Baltic Sea and amending Regulation (EU) 2018/120 as regards certain fishing opportunities in other waters (OJ L 272, 31.10.2018, p. 1).

*ANNEX*

DEDUCTION FROM ATLANTIC SALMON FISHING QUOTA AVAILABLE TO POLAND IN 2019 FOR STOCKS WHICH HAVE BEEN OVERFISHED

| Mem-ber State | Species code | Area code | Species name | Area name | Initial quota 2018 (in pieces) | Permitted landings 2018 (Total adapted quantity in pieces) (1) | Total catches 2018 (quantity in pieces) | Quota con-sumption related to permitted landings | Overfishing related to permitted landing (quantity in pieces) | Multiplying factor (3) | Additional Multiplying factor (4), (5) | Deductions to apply in 2019 (quantity in pieces) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| PL | SAL | 3BCD-F | Atlantic sal-mon | Union waters of subdivisions 22-31 | 5 729 | 15 739 (2) | 17 899 | 113,72 % | 2 160 | 1,00 | / | 2 160 |

(1) Quotas available to a Member State pursuant to the relevant fishing opportunities Regulations after taking into account exchanges of fishing opportunities in accordance with Article 16(8) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council (OJ L 354, 28.12.2013, p. 22), quota transfers from 2017 to 2018 in accordance with Article 4(2) of Council Regulation (EC) No 847/96 (OJ L 115, 9.5.1996, p. 3) and with Article 15(9) of Regulation (EU) No 1380/2013 or reallocation and deduction of fishing opportunities in accordance with Articles 37 and 105 of Regulation (EC) No 1224/2009.

(2) This amount includes a reduction of 1369 pieces of salmon corresponding to the year-to-year flexibility unduly granted in 2018 under Article 15(9) of Regulation (EU) No 1380/2013 after detection of mis-reported and under-reported catch data for 2017.

(3) As set out in Article 105(2) of Regulation (EC) No 1224/2009. Deduction equal to the overfishing * 1,00 shall apply in all cases of overfishing equal to, or less than, 100 tonnes.

(4) As set out in Article 105(3) of Regulation (EC) No 1224/2009 and provided that the extent of overfishing exceeds 10 %.

(5) Letter 'A' indicates that an additional multiplying factor of 1,5 has been applied due to consecutive overfishing in the years 2016, 2017 and 2018. Letter 'C' indicates that an additional multiplying factor of 1,5 has been applied as the stock is subject to a multiannual plan.

# DECISIONS

## POLITICAL AND SECURITY COMMITTEE DECISION (CFSP) 2019/2096

**of 28 November 2019**

**on the appointment of the EU Mission Force Commander of the European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) and repealing Decision (CFSP) 2019/948 (EUTM Mali/2/2019)**

THE POLITICAL AND SECURITY COMMITTEE,

Having regard to the Treaty on European Union, and in particular Article 38 thereof,

Having regard to Council Decision 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) ([1]), and in particular Article 5 thereof,

Whereas:

(1) Pursuant to Article 5(1) of Decision 2013/34/CFSP, the Council authorised the Political and Security Committee (PSC) to take decisions concerning the political control and strategic direction of EUTM Mali, including decisions on the appointment of subsequent EU Mission Force Commanders for EUTM Mali.

(2) On 29 May 2019, the PSC adopted Decision (CFSP) 2019/948 ([2]) appointing Brigadier General Christian HABERSATTER as the EU Mission Force Commander of EUTM Mali.

(3) On 22 October 2019, Portugal proposed the appointment of Brigadier General João Pedro RATO BOGA DE OLIVEIRA RIBEIRO to succeed Brigadier General Christian HABERSATTER as the EU Mission Force Commander of EUTM Mali as from 12 December 2019.

(4) On 29 October 2019, the EU Military Committee supported that recommendation.

(5) A decision on the appointment of Brigadier General João Pedro RATO BOGA DE OLIVEIRA RIBEIRO as the EU Mission Force Commander of EUTM Mali as from 12 December 2019 should be taken.

(6) Decision (CFSP) 2019/948 should therefore be repealed.

(7) In accordance with Article 5 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications. Consequently, Denmark is not participating in the adoption of this Decision and is neither bound by it nor subject to its application,

HAS ADOPTED THIS DECISION:

*Article 1*

Brigadier General João Pedro RATO BOGA DE OLIVEIRA RIBEIRO is hereby appointed as the EU Mission Force Commander of the European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) as from 12 December 2019.

*Article 2*

Decision (CFSP) 2019/948 is hereby repealed.

([1]) OJ L 14, 18.1.2013, p. 19.

([2]) Political and Security Committee Decision (CFSP) 2019/948 of 29 May 2019 on the appointment of the EU Mission Force Commander of the European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) and repealing Decision (CFSP) 2018/1791 (EUTM Mali/1/2019) (OJ L 152, 11.6.2019, p. 72).

*Article 3*

This Decision shall enter into force on 12 December 2019.

Done at Brussels, 28 November 2019.

*For the Political and Security Committee*
*The Chairperson*
S. FROM-EMMESBERGER

# COUNCIL DECISION (EU) 2019/2097

## of 2 December 2019

## appointing a member and an alternate member, proposed by Romania, of the Committee of the Regions

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 305 thereof,

Having regard to the proposal of the Romanian Government,

Whereas:

(1) On 26 January 2015, 5 February 2015 and 23 June 2015, the Council adopted Decisions (EU) 2015/116 ([1]), (EU) 2015/190 ([2]) and (EU) 2015/994 ([3]) appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2015 to 25 January 2020. On 3 April 2017, by Council Decision (EU) 2017/665 ([4]), Mr Gheorghe CATRINOIU was replaced by Mr Emil BOC as an alternate member.

(2) A member's seat on the Committee of the Regions has become vacant following the end of the terms of office of Mr Gheorghe FALCĂ.

(3) An alternate member's seat has become vacant following the appointment of Mr Emil BOC as a member of the Committee of the Regions,

HAS ADOPTED THIS DECISION:

*Article 1*

The following are hereby appointed to the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2020:

(a) as a member:

— Mr Emil BOC, *Mayor of Cluj-Napoca*,

and

(b) as an alternate member:

— Mr Daniel Ștefan DRĂGULIN, *Mayor of Călărași*.

*Article 2*

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 2 December 2019.

*For the Council*
*The President*
M. OHISALO

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([1]) Council Decision (EU) 2015/116 of 26 January 2015 appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2015 to 25 January 2020 (OJ L 20, 27.1.2015, p. 42).

([2]) Council Decision (EU) 2015/190 of 5 February 2015 appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2015 to 25 January 2020 (OJ L 31, 7.2.2015, p. 25).

([3]) Council Decision (EU) 2015/994 of 23 June 2015 appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2015 to 25 January 2020 (OJ L 159, 25.6.2015, p. 70).

([4]) Council Decision (EU) 2017/665 of 3 April 2017 appointing five members and nine alternate members, proposed by Romania, of the Committee of the Regions (OJ L 94, 7.4.2017, p. 40).

# COMMISSION IMPLEMENTING DECISION (EU) 2019/2098

## of 28 November 2019

## on temporary animal health requirements for consignments of products of animal origin for human consumption originating in and returning to the Union following a refusal of entry by a third country

*(notified under document C(2019)8092)*

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2002/99/EC of 16 December 2002 laying down the animal health rules governing the production, processing, distribution and introduction of products of animal origin for human consumption ([1]), and in particular the third indent of point 5 of Article 8 thereof,

Whereas:

(1) Directive 2002/99/EC lays down the general animal health rules governing the introduction into the Union of products of animal origin intended for human consumption from third countries. More particularly, it provides for the adoption by the Commission of rules concerning certain types of introduction of those products. The animal health rules laid down in that Directive do not affect, and are applied in parallel with, the rules on veterinary checks laid down in Council Directive 97/78/EC ([2]).

(2) Directive 97/78/EC lays down rules governing the organisation of veterinary checks on consignments of products of animal origin entering the Union from third countries, including products falling within the scope of Directive 2002/99/EC. Article 15 of Directive 97/78/EC provides that Member States are to authorise the re-importation of such products where they have been refused by a third country, subject to certain conditions. Those conditions include certification requirements, and they are intended to protect public and animal health.

(3) Regulation (EU) 2017/625 of the European Parliament and of the Council ([3]) repealed Directive 97/78/EC with effect from 14 December 2019. That Regulation established a new legal framework for official controls and other official activities to verify the correct application of Union agri-food chain legislation. It lays down rules concerning, inter alia, official controls on consignments of products of animal origin entering the Union, including food. In addition, Regulation (EU) 2016/429 of the European Parliament and of the Council ([4]) repealed Directive 2002/99/EC with effect from 21 April 2021. Regulation (EU) 2016/429 lays down rules for the prevention of animal diseases, including rules for the entry into the Union of products of animal origin. The rules laid down in those two Regulations are applied in parallel, but while the rules laid down in Regulation (EU) 2017/625 are horizontal in nature, those laid down in Regulation (EU) 2016/429 are more sector-specific as they concern animal health.

(4) Supplementary rules have now been established by Commission Delegated Regulation (EU) 2019/2074 ([5]) under Regulation (EU) 2017/625 for the performance of official controls on consignments of animals and goods originating from and returning to the Union following a refusal of entry by a third country. Those supplementing

([1]) OJ L 18, 23.1.2003, p. 11.

([2]) Council Directive 97/78/EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries (OJ L 24, 30.1.1998, p. 9).

([3]) Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (Official Controls Regulation) (OJ L 95, 7.4.2017, p. 1).

([4]) Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health (Animal Health Law) (OJ L 84, 31.3.2016, p. 1).

([5]) Commission Delegated Regulation (EU) 2019/2074 of 23 September 2019 supplementing Regulation (EU) 2017/625 of the European Parliament and of the Council as regards rules on specific official controls on consignments of certain animals and goods originating from, and returning to the Union following a refusal of entry by a third country (OJ L 316, 6.12.2019, p. 6).

rules aim to verify compliance of the returning consignments with, inter alia, animal health requirements and refer to those requirements as set out in Union animal health rules. That Delegated Regulation applies from 14 December 2019, in line with the date of application of Regulation (EU) 2017/625.

(5) Commission acts for the implementation of Directive 2002/99/EC currently do not lay down specific animal health requirements for the re-entry into the Union of products of animal origin, which have been exported from the Union and have been refused entry by a third country. Therefore animal health requirements specific for the re-entry into the Union of consignments of products of animal origin destined for human consumption, which have been exported from the Union and have been refused entry by third countries should be laid down to provide legal certainty as regards the animal health requirements applicable to those consignments, and to mitigate potential animal health risks after 14 December 2019, following the repeal of Directive 97/78/EC.

(6) In particular, the unloading, storage and re-loading of these products in third countries should not lead to risks for the spread and introduction into the Union of pathogens of certain listed animal diseases referred to in Annex I to Directive 2002/99/EC.

(7) In addition to the original documents issued by the competent authority of the Member State of export, it should also be permissible to verify the origin of consignments of products of animal origin for human consumption on the basis of the electronic equivalent of the original official certificate submitted in the information management system for official controls referred to in Article 131 of Regulation (EU) 2017/625 (IMSOC) and established by Commission Implementing Regulation (EU) 2019/1715 ([6]).

(8) A consignment of products of animal origin for human consumption which has been returned to the Union following refusal of entry by a third country should be allowed to be transported to a place of destination in the Union, where the competent authority of the place of destination in the Union has agreed to receive that consignment.

(9) It is necessary to ensure that consignments of products of animal origin for human consumption which have been returned to the Union following a refusal of entry by a third country arrive at their place of destination in the Union. Therefore, the procedural requirements laid down in Commission Delegated Regulation (EU) 2019/1666 ([7]) should apply to the monitoring of the transport and arrival of such consignments, from the border control post of arrival into the Union to the establishment at the place of destination.

(10) The animal health requirements laid down in this Implementing Decision should apply until 21 April 2021, as Regulation (EU) 2016/429 and the Commission Delegated Regulation on animal health rules for the entry into the Union, movement and handling after the entry of certain animals, germinal products and products of animal origin from third countries or territories, apply from that date.

(11) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS DECISION:

*Article 1*

1. The competent authority at the border control post shall authorise the entry into the Union of consignments of products of animal origin defined in Article 2(4) of Council Directive 2002/99/EC originating in and returning to the Union following a refusal of entry by a third country where the following requirements are fulfilled:

   (a) the consignment is accompanied by the original official certificate or document issued by the competent authority of the Member State of export, or its electronic equivalent submitted in the information management system for official controls referred to in Article 131 of Regulation (EU) 2017/625 (IMSOC) and established by Implementing Regulation (EU) 2019/1715 or an authenticated copy thereof;

([6]) Commission Implementing Regulation (EU) 2019/1715 of 30 September 2019 laying down rules for the functioning of the information management system for official controls and its system components ('the IMSOC Regulation') (OJ L 261, 14.10.2019, p. 37).

([7]) Commission Delegated Regulation (EU) 2019/1666 of 24 June 2019 supplementing Regulation (EU) 2017/625 of European Parliament and the Council as regards conditions for monitoring the transport and arrival of consignments of certain goods from the border control post of arrival to the establishment at the place of destination in the Union (OJ L 255, 4.10.2019, p. 1).

(b) the consignment is accompanied by a declaration from the competent authority of the place of destination in the Union confirming that it agrees to receive the consignment and indicating the place of destination for its return to the Union;

(c) the consignment is accompanied by one of the following documents indicating the reason for the refusal of entry by the third country, where applicable the place and date of unloading, storage and re-loading in the third country, and the following information:

(i) in the case of containers or packages with an intact original seal, a declaration by the operator responsible for the consignment confirming that the transport has taken place under conditions appropriate for the type of products of animal origin and the contents of the consignment were not altered during the transport; or

(ii) an official declaration of the competent authority or other public authority of the third country confirming that the requirements of point (d) have been complied with;

(d) where the products of animal origin were unloaded in a third country, the competent authority or other public authority of the third country has attested that:

(i) the products of animal origin did not undergo any handling other than the unloading, storage and re-loading in the third country;

(ii) effective measures were put in place to avoid the contamination of the products of animal origin with disease agents which cause transmissible animal diseases listed in Annex I to Directive 2002/99/EC during the unloading, storage and re-loading in the third country;

(iii) the place of any unloading, storage and re-loading in the third country was not subject to animal health movement restrictions due to transmissible animal diseases listed in Annex I to Directive 2002/99/EC during the unloading, storage and re-loading in the third country.

2. By way of derogation from paragraph 1(a), in cases where the documentation referred to in that provision was not issued by the competent authority of the Member State of export, the origin of the consignment shall be authenticated in another way based on documented evidence presented by the operator responsible for the consignment.

3. The competent authority at the border control post shall monitor the transport to and arrival at the place of the destination of the consignment of the products of animal origin in accordance with Articles 2 and 3 of Commission Delegated Regulation (EU) 2019/1666.

*Article 2*

This Decision shall apply from 14 December 2019 to 21 April 2021.

*Article 3*

This Decision is addressed to the Member States.

Done at Brussels, 28 November 2019.

*For the Commission*
Vytenis ANDRIUKAITIS
*Member of the Commission*

## CORRIGENDA

### Corrigendum to Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety

*(Official Journal of the European Union L 138 of 26 May 2016)*

On page 145, Annex III, second paragraph, point 11, third indent:

| | | |
|---|---|---|
| *for:* | '— | that maintenance tasks are performed in accordance with the maintenance orders and to issue the notice to return to operation that includes eventual restrictions of use;', |
| *read:* | '— | that maintenance tasks are performed in accordance with the maintenance orders and to issue the notice to return to operation including possible restrictions on use;'. |

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