DECISIONS

COMMISSION IMPLEMENTING DECISION (EU) 2019/245

of 11 February 2019

accepting undertaking offers following the imposition of definitive countervailing duties on imports of biodiesel originating in Argentina

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union ([1]), and in particular Articles 13 and 15 thereof,

After consulting the Committee established by Article 15(1) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ([2]),

Whereas:

A. PROCEDURE

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

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

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

B. UNDERTAKING OFFERS

1. Undertaking Offers

(4) Following the final disclosure, all cooperating exporting producers, including their related companies, and together with the Argentine Chamber of Biofuels (Cámara Argentina de Biocombustibles, 'CARBIO') offered price undertakings in accordance with Article 13(1) of Regulation (EU) 2016/1037.

2. Evaluation of the Undertaking Offers

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

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

([1]) OJ L 176, 30.6.2016, p. 55.
([2]) OJ L 176, 30.6.2016, p. 21.
([3]) OJ C 34, 31.1.2018, p. 37.

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

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

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

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

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

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

(12) In particular, the European Biodiesel Board ('the EBB') advocated for a MIP equivalent to the export price(s) in the investigation period plus the amount of subsidisation/injury margins, possibly indexed to take into account the price evolution of the main raw material. The EBB submitted that only such a price level would ensure that the Argentine prices would not undercut Union prices. The Association of the German Biofuel Industry ('VDB') also submitted that the MIP should be calculated using the import price plus the countervailing duty. The Union for the Promotion of Oil and Protein Plants ('UFOP') supported this VDB claim. The European Farmers European Agri-Cooperatives ('COPA-Cogeca') noted the dramatic increase of the Union's import of Argentine biodiesel since the anti-dumping measures have relaxed and, together with the European Oilseed Alliance ('EOA'), recalled that Directive (EU) 2015/1513 of the European Parliament and of the Council ([4]) limits the production of European biofuel.

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

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

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

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

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

([4]) Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources (OJ L 239, 15.9.2015, p. 1).

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

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

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

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

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

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

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

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

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

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

(28) The EBB also stated that the fixed amounts added to the average quarterly soybean oil prices should not be defined before every shipment. The EBB's understanding of the fixed amount is not correct. The fixed amount is not defined before every shipment. In response to EBB's comments CARBIO explained that the fixed amount is predetermined at a fixed level and does not depend (or can be adjusted depending) on the behaviour of the Argentine exporting producers. The comment was therefore rejected.

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

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

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

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

(33) The EBB finally submitted that the undertakings should have clauses that allow for a review or withdrawal in case of changes in circumstances or breaches. The Commission confirmed that such clauses are indeed part of the undertaking offers. The undertaking offers stipulate that any change in circumstances which may occur during the implementation and the application of the undertakings from those prevailing at the time of their acceptance and which would have been relevant to the decision accepting the undertaking offers may give rise to the withdrawal of the acceptance of the undertakings. The definitive measures, including the appropriateness of the undertakings, are also subject to an interim review in accordance with the provisions of Article 19 of Regulation (EU) 2016/1037.

(34) Therefore, the Commission considered that the undertaking offers by the Argentine exporting producers are acceptable. The exporting producers offering the undertakings and CARBIO as well as all interested parties have been informed of the essential facts, considerations and obligations upon which the acceptance of the undertaking offers is based.

3. **Comments following information about Commission's intention to accept undertaking offers**

(35) Following information about the Commission's intention to accept the undertaking offers the EBB, VDB, UFOP, COPA-Cogeca, EOA, the European Association representing the vegetable oils and protein meal industry ('FEDIOL'), the Argentine exporting producers and CARBIO submitted comments.

(36) The EBB, VDB and UFOP requested to reduce the commitment put forward by the Argentine exporters and CARBIO not to issue more than 45 % of the export certificates per quarter to 25-30 % per quarter. According to them, this would spread exports throughout the year without concentrating imports on the Union market in certain quarters.

(37) The Commission noted that based on 2018 data, imports from Argentina were spread over the calendar year without concentration in any particular quarter, although with some increase in specific months. Therefore, the theoretical concentration of imports in any given quarter does not reflect the trade pattern prior to the imposition of measures. The Commission also noted that any significant change in the Argentine exporters' pattern of trade which would undermine the effect of the undertakings may lead to the withdrawal of acceptance of the undertakings by the Commission and to the full application of the countervailing duty. In any event, following the Union industry's comments, by means of a side letter the Argentine exporters and CARBIO submitted a new commitment not to issue export certificates within one quarter for more than 37 % of the annual level volume.

(38) The EBB claimed that the validity of the undertaking export certificates should be shortened and limited to the quarter in which the undertaking certificates are issued. The exporting producers revised their undertaking offers as a result and shortened the validity of the export certificates from four to three months. They committed to issuing the export certificates, as a general rule, as close as possible after the issuance of the corresponding commercial invoice and in any event not later than 3 months after the date of that invoice. Therefore, that claim was rejected.

(39) The Commission considered that CARBIO's and the exporting producers' commitment not to issue export certificates for more than 37 % of the annual level within one quarter reduces the risk that the Argentine exports of biodiesel will be concentrated in a specific period. Therefore, the claim concerning the possible concentration of imports is addressed.

(40) The EBB proposed the inclusion of a new clause in the undertaking offers which would clarify CARBIO's and the exporter's commitment not to undermine the objectives of the undertaking offers. The Commission confirmed that it is a general obligation of exporters and CARBIO to respect the terms of the undertakings and not to undermine their effects.

(41) The EBB, VDB and UFOP in particular, requested a weekly or monthly established MIP instead of a quarterly established one as proposed in the undertaking offers. According to them, such a weekly or monthly established MIP would limit the arbitrage possibilities for the Argentine exporters in a very volatile and fluctuating market.

(42) The Commission carefully examined that request and concluded that an established MIP on a quarterly basis ensures a better and a proper enforceability and implementation of the undertaking offers whilst not compromising the effectiveness of the remedy for the Union industry.

(43) The EBB claimed that the level of the MIP within the annual level should be set at an adequate level as a MIP within 10 % (or even 5 %) market share is a price setter in a commodity market. The Commission noted that the EBB has not substantiated this claim but stated in general that that would be the case for any commodity market. Further, the EBB claimed that CARBIO expressly acknowledged that the MIP would never be at non-injurious level by stating that the duty is set at such a high level that it is unrealistic to consider that the Argentine exporters would be able to make any exports subject to the payment of the duty throughout the duration of the undertaking offers.

(44) The Commission noted that it assessed the undertaking offers in their entirety and considers that the combination of the MIP with the proposed annual level plus the *ad valorem* duty applicable to imports of the product concerned exceeding that annual level removes the effects of injurious subsidization.

(45) The EBB alleged that the soybean oil price to be used to calculate the MIP was distorted through the GOA's intervention as allegedly acknowledged by the Commission in the Regulation imposing definitive measures on biodiesel in 2013.

(46) Recital 36 of Council Implementing Regulation (EU) No 1194/2013 ([5]) stated clearly that the reference price published by the GOA reflects the level of international prices. Recital 38 of that Regulation states that the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system.

(47) The EBB made reference to the reasons the Commission used to reject the undertaking offers submitted back in 2013 by the Indonesian exporting producers of biodiesel and asked the Commission to explain why those reasons no longer apply.

(48) The Commission noted that each undertaking offer is assessed on its own merits at the point in time it is received in light of the circumstances of the case. The Commission received undertaking offers from all the Argentine exporting producers and assessed these offers on their own merits, with regard to all the elements put forward therein and the findings made in the current investigation.

(49) On the basis of that assessment and taking into account all elements of the offers the Commission proposed the acceptance of the undertaking offers from the Argentine exporting producers and CARBIO.

(50) The EBB claimed that because of the cross compensation risks, the Argentine exporting producers should not be allowed to sell 5 % of other products originating in Argentina. The Commission noted that it has identified and assessed the risks of cross-compensation in light of the circumstances of this case and the entirety of commitments. That claim is thus rejected.

([5]) Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia (OJ L 315, 26.11.2013, p. 2).

(51) The EBB claimed that the undertaking offers should include a possibility of a review, including at the Commission's own initiative. The Commission noted that the impact of changes in circumstances on the undertakings might be assessed in the future in the light of possible changes in circumstances. The possibility of a review, mentioned in the undertaking offers, is in line with applicable provisions of Regulation (EU) 2016/1037. That claim is rejected.

(52) The EBB, VDB and COPA-Cogeca expressed fears that the Argentine exporting producers might not handle the undertakings in a fair and transparent way because of the history of the case. The Commission noted that the undertaking offers stipulate that the acceptance of the undertakings by the Commission is based on trust and any action which would harm the relationship of trust established with the Commission shall justify the withdrawal of the undertakings. That claim was therefore rejected.

(53) The VDB claimed that because of the structure of the proposed undertakings it could lead to a breach of EU competition law. The Commission noted that undertakings as form of measures are specifically provided for in Regulation (EU) 2016/1037. Furthermore, contrary to the VDB's allegation, the undertaking offers do not fix selling prices between the companies offering the undertakings at the level of the MIP, but introduce a floor price level below which imports cannot take place within the annual level covered by the undertakings. That claim is thus rejected.

(54) The VDB claimed that given the negative experience the Commission had with a similarly structured undertaking concerning solar panels, it seems probable that the proposed undertaking offers would be ineffective. The Commission noted that each undertaking offer is assessed on its own merits at the point in time it is received in light of the circumstances of the case. The Commission carefully assessed the undertakings offered and concluded that they could be accepted. The Commission took into account the entirety of the commitments made, among those for example, CARBIO's active role, and the safety net in the form of the annual level. That claim was therefore rejected.

4. **Implementation and withdrawal**

(55) Whenever, under Article 13(9) of the Regulation (EU) 2016/1037, the Commission withdraws its acceptance of an undertaking following a breach by referring to particular transactions and declares the relevant undertaking invoices to be invalid, a customs debt is incurred at the time of acceptance of the declaration for release into free circulation.

(56) At the time of acceptance of the declaration for release into free circulation, importers should be aware, as a normal trade risk, that a customs debt may become due, even if an undertaking offered by the manufacturer from whom they were buying, directly or indirectly, had been accepted by the Commission.

(57) Under Article 24(7) of Regulation (EU) 2016/1037, customs authorities should inform the Commission immediately whenever indications of a breach of the undertaking are found.

(58) All interested parties, including the Union industry, are invited to provide the Commission with any necessary information that may be useful for monitoring purposes. Such information may include, in particular, any relevant and representative data for the soybean oil price and the MIP that may facilitate the monitoring of the undertakings by the Commission.

(59) In the event of a breach or withdrawal of the undertakings or in case of withdrawal of acceptance of the undertakings by the Commission, the definitive countervailing duty imposed in accordance with Article 15(1) of Regulation (EU) 2016/1037 is to automatically apply under Article 13(9) of that Regulation.

HAS ADOPTED THIS DECISION:

Article 1

The undertakings offered by the exporting producers listed below together with the Argentine Chamber of Biofuels (Cámara Argentina de Biocombustibles, 'CARBIO'), in connection with the anti-subsidy proceedings concerning imports of biodiesel originating in Argentina, are hereby accepted.

Country	Company	Sales Channel	TARIC additional code
Argentina	Aceitera General Deheza S.A.	Produced and sold by Aceitera General Deheza S.A. to the first independent customer in the Union acting as an importer.	C493
	Bunge Argentina S.A.	Produced and sold by Bunge Argentina S.A. or produced by Bunge Argentina S.A. and sold by Bunge Agritrade S.A., Uruguay, to the first independent customer in the Union acting as an importer	C494
	LDC Argentina S.A.	Produced and sold by LDC Argentina S.A. or produced by LDC Argentina S.A. and sold by Louis Dreyfus Company Suisse S.A., Switzerland, to the first independent customer in the Union acting as an importer.	C495
	Molinos Agro S.A.	Produced and sold by Molinos Agro S.A. or produced by Molinos Agro S.A and sold by Molinos Overseas Commodities S.A., Uruguay, to the first independent customer in the Union acting as an importer.	C496
	Oleaginosa Moreno Hermanos S.A.C.I.F. y A	Produced and sold by Oleaginosa Moreno Hermanos S.A.C.I.F. y A to the first independent customer in the Union acting as an importer.	C497
	Vicentin S.A.I.C.	Produced and sold by Vicentin S.A.I.C. or produced by Vicentin S.A.I.C. and sold by Vicentin S.A.I.C. Sucursal, Uruguay, to the first independent customer in the Union acting as an importer.	C498
	Cargill S.A.C.I.	Produced and sold by Cargill S.A.C.I or produced by Cargill S.A.C.I. and sold by Cargill International S.A., Switzerland, to the first independent customer in the Union EU acting as an importer.	C491
	COFCO International Argentina S.A.	Produced and sold by COFCO International Argentina S.A. or Produced by COFCO International Argentina S.A. and sold by Cofco Resources S.A., Switzerland, to the first independent customer in the Union acting as an importer.	C490

Article 2

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

Done at Brussels, 11 February 2019.

For the Commission

The President

Jean-Claude JUNCKER