COMMISSION REGULATION (EC) No 194/2009

of 11 March 2009

imposing a provisional countervailing duty on imports of biodiesel originating in the United States of America

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community [1] ('the basic Regulation'), and in particular Article 12 thereof,

After consulting the Advisory Committee,

Whereas:

1. PROCEDURE

(1) On 13 June 2008, the Commission announced, by a notice ('notice of initiation') published in the *Official Journal of the European Union* [2], the initiation of an anti-subsidy proceeding ('AS investigation' or 'the investigation') with regard to imports into the Community of biodiesel originating in the United States of America ('USA' or 'country concerned').

(2) On the same day, the Commission announced by a notice published in the *Official Journal of the European Union* [3], the initiation of an anti-dumping proceeding with regard to imports into the Community of biodiesel originating in the USA and commenced a separate investigation ('AD proceeding').

(3) The AS investigation was initiated following a complaint lodged on 29 April 2008 by the European Biodiesel Board ('the complainant') on behalf of producers representing a major proportion, in this case more than 25 % of the total Community production of biodiesel. The complaint contained *prima facie* evidence of subsidisation of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of the AS investigation.

(4) Prior to the initiation of the proceeding and in accordance with Article 10(9) of the basic Regulation, the Commission notified the Government of the USA that it had received a properly documented complaint alleging that subsidised imports of biodiesel originating in the USA were causing material injury to the Community industry. The Government of the USA was invited for consultations with the aim of clarifying the situation as regards the contents of the complaint and arriving at a mutually agreed solution. The Government of the USA accepted the offer of consultations and consultations were subsequently held on 2 June 2008. During the consultations, no mutually agreed solution could be arrived at. However, due note was taken of comments made by the authorities of the USA highlighting that for some state programmes in the complaint, it was not always clear from the information contained therein that there were countervailable benefits to producers/exporters of biodiesel in the USA. Having examined the available information, it was decided to exclude the following state schemes from the scope of investigation even though they are listed in the notice of initiation: Florida renewable energy technology grants program, Texan new technology research and development program, Washington state energy freedom program (second part), Alabama alternative fuels and research development fund, North Dakota biodiesel sales equipment tax credit and Nebraska alternative fuel vehicle and refuelling infrastructure loans.

(5) The Commission officially advised exporters/producers in the USA, importers, suppliers, users and associations known to be concerned, the authorities of the USA, the complainant Community producers and other Community producers known to be concerned of the initiation of the proceeding. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation. All interested parties who so requested and showed that there were particular reasons why they should be heard were granted a hearing.

1.1. Sampling of exporters in the USA

(6) In view of the apparent large number of exporters/producers in the USA, sampling was provided for in the notice of initiation for the determination of subsidisation in accordance with Article 27 of the basic Regulation.

[1] OJ L 288, 21.10.1997, p. 1.
[2] OJ C 147, 13.6.2008, p. 10.
[3] OJ C 147, 13.6.2008, p. 5.

(7) In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, exporters/producers in the USA were requested to make themselves known within 15 days of the date of the initiation of the investigation and to provide basic information on their export and domestic sales, their precise activities with regard to the production, blending and trading of biodiesel and the names and activities of all their related companies involved in the production, blending and trading of the product concerned during the period 1 April 2007 to 31 March 2008 ('IP'), as also defined in recital (17) below.

(8) More than 50 companies identified themselves in the context of the sampling exercise and provided the requested information within the 15 day period. These companies accounted for more than 80 % of the total imports of biodiesel from the United States of America to the Community.

Selection of the sample of cooperating companies in the USA

(9) In accordance with Article 27(1)(b) of the basic Regulation, a sample was selected based on the largest representative volume of exports of the product concerned to the Community that could be reasonably investigated within the time available. In accordance with Article 27(2) of the basic Regulation, the companies who requested to be included in the sample, the professional association of biodiesel producers in the United States of America (the National Biodiesel Board) as well as the Government of the United States of America were consulted on the proposed sample. Based on the comments received from the interested parties, seven companies were originally chosen to constitute the sample. It has been provisionally decided, however, that one of the companies originally selected in the sample should be excluded therefrom in order to ensure parallelism with the sample chosen in the AD proceeding concerning imports of biodiesel from the USA. It is noted that said company was merely a trader of biodiesel in contrast with the other sampled companies who produce biodiesel. This company is, however, being granted individual examination, in accordance with Article 27(3) of the basic Regulation, and will have its own anti-subsidy duty established. The six companies that constitute the sample accounted for 50 % of the total export volumes from the USA during the IP based on US export statistics and accounted for 73 % of imports of biodiesel from the companies that made themselves known as explained in recital (8).

Individual examination of companies not selected in the sample

(10) Ten cooperating companies not selected in the sample requested the calculation of individual margins with a view to the application of Articles 27(3) and 15(3) of the basic Regulation. Questionnaires were sent to the companies concerned. Only one company replied to the questionnaire within the set deadline. However, the application was subsequently withdrawn.

1.2. **Sampling of Community producers**

(11) Regarding the Community producers, in accordance with Article 27 of the basic Regulation, a sample was selected after consultation of the complainant on the basis of the largest representative volume of production and sales within the Community as mentioned in recital (164) below. This selection also allowed for a certain geographical spread of producers in the Community. As a result, eleven Community producers were selected in the sample. The Commission sent questionnaires to the eleven companies selected. However, one producer originally considered for the sample had to be excluded as it failed to provide a meaningful questionnaire response. Hence, ten complete replies were received from the other companies within the set time limits. These ten producers selected in the sample were considered to be representative of the overall producers in the Community.

1.3. **Parties concerned by the proceeding**

(12) The Commission sent questionnaires to all parties known to be concerned and to all the other companies that made themselves known within the deadlines set out in the notice of initiation. Questionnaires were thus sent to the authorities of the USA, to the seven companies originally chosen in the sample of US companies, to the ten companies referred to in recital (10), to the 11 sampled Community producers, to 18 users as well as to 90 raw material suppliers.

(13) Questionnaire replies were received from the authorities of the USA, from the seven companies originally chosen in the sample of US companies as well as from one company requesting individual examination, referred to in recital (10) above, ten sampled Community producers, one user and six raw material suppliers.

(14) The Commission sought and verified all the information deemed necessary for a provisional determination of subsidisation, resulting injury and Community interest.

(15) Verification visits were carried out at the premises of the following authorities of the United States of America:

Federal authorities of the United States of America

— Department of the Treasury (DOT)

— Department of Agriculture (USDA)

— Office of the United States Trade Representative

State authorities

— Illinois State Authorities, Springfield

— Missouri State Authorities, Jefferson City

— North Dakota State Authorities, Bismarck

— Texas Comptroller of Public Accounts, Austin

— Texas Department of Agriculture, Austin

— Washington State Authorities, Olympia

(16) Verification visits were also carried out at the premises of the following companies:

(a) Producers located in the Community

— Biopetrol Industries AG, Schwarzheide, Germany

— Diester Group

— Diester Industries SAS, Paris, France

— Mannheim Bio Fuel GmbH, Mannheim, Germany

— Natural Energy West GmbH, Neuss, Germany

— Novaol Austria GmbH, Bruck an der Leitha, Austria

— Novaol Srl, Milan, Italy

— Ecomotion group

— Ecomotion GmbH, Sternberg, Germany

— Daka Biodiesel a.m.b.a, Løsning, Denmark

— GATE Global Alternative Energy Germany GmbH, Wittenberg and Halle, Germany

— Neochim SA, Feluy, Belgium

(b) Exporting producers in the USA

— Archer Daniels Midland Company, Decatur, Illinois

— Cargill Inc, Wayzata, Minnesota

— Green Earth Fuels of Houston LLC, Houston, Texas

— Imperium Renewables Inc., Seattle, Washington

— Peter Cremer North America LP, Cincinnati, Ohio

— Vinmar Overseas Limited, Houston, Texas

— World Energy Alternatives LLC, Boston, Massachusetts

(c) Related importers in the Community

— Cremer Energy GmbH, Hamburg, Germany

— Cargill NV, Ghent, Belgium

— ADM Europoort BV, Rotterdam, The Netherlands

— ADM Hamburg AG, Hamburg, Germany

— ADM International, Rolle, Switzerland

1.4. **Investigation period**

(17) The investigation of subsidisation and injury covered the period from 1 April 2007 to 31 March 2008 ('investigation period' or 'IP'). The examination of trends relevant for the assessment of injury covered the period from January 2004 to the end of the IP ('period considered').

2. **PRODUCT CONCERNED AND LIKE PRODUCT**

2.1. **Product concerned**

(18) In the notice of initiation, the product allegedly being subsidised was defined as fatty-acid monoalkyl esters and/or paraffinic gasoils from synthesis and/or hydrotreatment, of non-fossil origin (commonly known as 'biodiesel'), whether in pure form or in a blend, mainly but not exclusively used as renewable fuel originating in the USA ('the product concerned'), normally declared within CN codes 3824 90 91, ex 3824 90 97, ex 2710 19 41, ex 1516 20 98, ex 1518 00 91, ex 1518 00 99.

(19) According to the US Internal Revenue Code [4] (US. CODE), Title 26, Section 40A, point (d), the term biodiesel is defined as the monoalkyl esters of long chain fatty acids derived from plant or animal matter which meet (a) the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under section 211 of the Clean Air Act (42 U.S.C 7545), and, (b) the requirements of the American Society of Testing and Materials D6751.

(20) Based on market and publicly available information [5], all types of biodiesel and biodiesel blends (a mix of biodiesel with mineral diesel as explained in recital (22) below), which are produced and sold in the USA are considered to be biodiesel fuels and are part of a legislative package concerning energy efficiency and renewable energy and alternative fuels.

(21) The investigation showed that biodiesel produced in the USA, is predominantly 'fatty acid methyl ester' (FAME) derived from a wide range of vegetable oils which serve as a biodiesel feedstock [6]. The term 'ester' refers to the trans-esterification of vegetable oils, namely, the mingling of the oil with alcohol. The term 'methyl' refers to methanol; the most commonly used alcohol in the process, although ethanol can also be used in the production process, resulting in 'fatty acid ethyl esters'. The trans-esterification is a relatively simple chemical process but it requires the highest industrial standards to ensure a high quality of biodiesel.

(22) The investigation confirmed that biodiesel produced in the USA is generally blended by the producers with mineral diesel to produce various types of blends (here referred to as biodiesel blends or mixtures), which are then sold on the market to various types of customers. It also appeared that biodiesel was sold in its pure form to independent companies, which purchased or imported it for blending with mineral diesel. Blending biodiesel with mineral diesel is a relatively simple operation which may be accomplished for instance by mixing in tanks at the manufacturing point prior to delivery to a tanker truck or by a splash mixing in the tanker truck adding the desired percentages of biodiesel and mineral diesel or in-line mixing with the two components arriving at the tanker truck simultaneously.

(23) To clearly identify the various types of biodiesel blends or mixtures, there is an internationally recognised system known as the 'B' factor, which states the exact amount of biodiesel in any biodiesel blend: for instance, a blend containing 'X'% biodiesel would be labelled B'X', while pure biodiesel is referred to as B100, meaning 100 % biodiesel. In the USA, it was common to see 99 % [7] of biodiesel and 1 % mineral diesel (B99) being blended and sold on the market. Contrary to mineral diesel, pure biodiesel should be used relatively quickly and cannot be kept in stock for more than three to four months otherwise it would oxidise and become unfit for consumption. Blending biodiesel with mineral diesel allows a longer preservation of the fuel. The 1 % mineral diesel in the B99 is sufficiently toxic to retard mould of the biodiesel.

(24) The investigation showed that whilst biodiesel and the high-level biodiesel blends [8] are generally intended to be sold in the US market for further blending, the low-level biodiesel blends [9] are typically produced to be sold for consumption in the US market. Hence, there is a distinction between the market for high-level blends and the market for low-level blends in the USA.

(25) The complaint contained *prima facie* evidence that biodiesel and certain blends produced and sold in the USA and exported to the Community were affecting the economic situation of the complaining biodiesel producers in the Community. Consistent with the characteristics of the relevant US producers and domestic market, the definition of the product concerned intended to cover biodiesel also when incorporated into the relevant biodiesel blends. The definition of the product concerned as mentioned in the notice of initiation and in recital (18) above, should be clarified in order to identify the products which were intended to be covered by the investigation.

(26) The investigation showed that most of the biodiesel blends sold for direct consumption in the USA are B20, i.e. blends with 20 % biodiesel as explained in recital (22) above, which can be used for Energy Policy Act of 1992 (EPAct) [10] compliance, B6, B5 and B2. Publicly available information states that any diesel engine can operate on these blends with basically no modifications and keeping the warranty from car manufacturers. When used in low-level blends (between 2 % to 20 % of biodiesel) the performances of the mixture is similar to that of mineral diesel. When a biodiesel fuel above B20 is used in an engine, the user may experience a certain decrease in power, torque and fuel economy and the warranty of car manufacturers would generally not apply in case of damages caused to the engine.

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

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

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

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

[8] Basically, the blends from B99 down to B50.

[9] Basically, the blends from B2 up to B20.

[10] See Energy Policy Act of 1992.

(27) The investigation has shown that pure biodiesel and high-level blends are generally not used for direct consumption in the USA. The pure biodiesel is generally intended to be blended before it is sold on the market. These blends are ultimately used in the transport sector as a fuel in diesel-power engines of road vehicles such as cars, trucks, busses and also in trains. Biodiesel can also be used as a heating fuel in domestic, commercial or industrial boilers and as a fuel for generators to produce electricity. Tests are currently being conducted as to the possibility to use biodiesel blends in aircrafts.

(28) Hence, the product concerned by the investigation should be defined as fatty acid monoalkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', whether in pure form or in blends, which are above B20. In other words, the product concerned covers pure biodiesel (B100) originating in the USA and all blends above B20, namely blends which contain more that 20 % biodiesel originating in the USA ('the product concerned'). This threshold is considered to be appropriate to allow a clear distinction between the various types of blends which are available on the US market.

(29) It has been found that all types of biodiesel and the biodiesel in the blends covered by this investigation, despite possible differences in terms of raw material used for the production, or variances in the production process, have the same or very similar basic physical, chemical and technical characteristics and are used for the same purposes. The possible variations in the product concerned do not alter its basic definition, its characteristics or the perception that various parties have of it.

(30) The product concerned is falling within CN codes 3824 90 91, ex 3824 90 97, ex 2710 19 41, ex 1516 20 98, ex 1518 00 91, ex 1518 00 99.

2.2. **Like product**

(31) It was found that the products produced and sold on the domestic market of the USA, which are covered by this investigation, have similar basic physical, chemical and technical characteristics and uses as those exported from this country to the Community market. Similarly, the products manufactured by the Community industry and sold on the Community market have similar basic physical, chemical and technical characteristics and uses when compared to those exported to the Community from the country concerned.

(32) It has been claimed that certain users, in particular in Germany, are directly using pure biodiesel (B100) as a cheaper alternative to the use of mineral diesel or the usual blends used for direct consumption in the Community market. The examination of this claim showed that most of the sales made by the Community producers in the Community market were mainly intended to companies which were blending it with mineral diesel. The fact that certain fleet owners revert to B100 is rather an exception at the Community level. Rather than substituting mineral diesel, biodiesel is a complementary product on the Community market.

(33) This does not change the fact that the various types of the product concerned produced in the USA and exported to the Community are interchangeable with those produced and sold in the Community by Community biodiesel producers. There is no significant difference in the uses and the perception by operators and users in the market which are such as to alter the definition of the like product.

(34) One interested party alleged that the product concerned, in particular pure biodiesel, has different physical and chemical characteristics than the biodiesel produced in the Community. While the EC production of biodiesel would be based on rapeseed oil, US producers would use only soybean oil. Therefore these two types of product would not be interchangeable and would not directly compete with each other in the Community market. The interested party pointed in particular to the fact that the cold flow properties and the iodine values would be different.

(35) The Commission investigated this claim and found the following:

(a) The product concerned and the Community like product share very similar basic characteristics and are sold via similar or identical sales channels, namely to similar customers in the Community market;

(b) The product concerned and the Community like product both serve the same or very similar end-uses (see recital (27) above);

(c) As to the cold flow properties, it should be clarified that it refers to the Cold Filter Plugging Point (CFPP) which is the temperature at which a fuel will cause a fuel filter to plug due to fuel components, which have begun to crystallize or gel. The investigation revealed that the CFPP of the Community like product is lower than that of the biodiesel exported from the USA. However, this is a minor difference which can easily be compensated either by mixing different types of biodiesel or by using additives in pure biodiesel, in particular in winter time. The difference in CFPP practically does not play any role in most of the blends sold in the Community market.

(d) Regarding the iodine value which is a measurement for the stability of the fuel against oxidation, it was found that the values between rapeseed oil and soybean oil correlate to some extent: numbers range from 94 to 120 for rapeseed oil and from 117 to 143 for soybean oil. While the main feedstock used in the Community is rapeseed, it has to be noted that both Community and US producers use also a wide variety of feedstock to produce biodiesel. Often various types of biodiesel are mixed to obtain a more homogeneous product.

(36) Given that 'likeness' does not require that products are identical in all respects according to Article 1(5) of the basic Regulation, any minor variation in the various product types is not sufficient to change the overall finding of likeness between the product concerned and the Community like products.

(37) Therefore no differences were found between the various types of the product concerned and the Community like products sold on the Community market which would lead to the conclusion that the products produced and sold on the Community market is not a like product, sharing the same or very similar basic physical, chemical and technical characteristics as to the types of the product concerned produced in the USA and exported to the Community. It is therefore provisionally concluded that all types of biodiesel are considered to be alike within the meaning of Article 1(5) of the basic Regulation.

3. **SUBSIDISATION**

3.1. **Introduction**

(38) On the basis of the information contained in the complaint and the replies to the Commission's questionnaire, the following federal schemes, which allegedly involved the granting of subsidies, were investigated:

Federal Schemes

(a) Excise tax/Income tax credit

(b) Small Agri-biodiesel Producer Income tax credit

(c) The U.S. Department of Agriculture Bioenergy Program

(39) On the basis of the information contained in the complaint and the replies to the Commission's questionnaire, the following state schemes, which allegedly involved the granting of subsidies, were also investigated:

State Schemes

(a) Illinois

Illinois biodiesel tax exemption

(b) Missouri

Missouri qualified biodiesel producer incentive fund

(c) North Dakota

(i) North Dakota biofuels partnership in assisting community expansion loan Program

(ii) North Dakota biodiesel production equipment tax credit

(iii) North Dakota biodiesel income tax credit

(iv) North Dakota biodiesel equipment tax exemption

(d) Texas

(i) Texas ethanol and biodiesel blend tax exemption

(ii) Texas fuel ethanol and biodiesel production incentive program

(e) Washington

(i) Washington State energy freedom program

(ii) Washington State biofuels production tax exemption

(iii) Washington state biofuels retail tax exemption

(iv) Washington State biofuels tax deduction

(40) In regard to the other state schemes listed in point 3 of the notice of initiation, as explained in recital (4) above, some of them were excluded from the investigation following pre-initiation consultations with the Government of the United States of America. In respect of the remaining state schemes, the companies in the sample and the company referred to in recital (9) that has been granted individual examination stated that they had not received any benefits thereunder during the IP and no evidence was found to the contrary. It was therefore provisionally decided that there were no grounds to further investigate these schemes in this investigation.

FEDERAL SCHEMES

3.2. **Excise tax/Income tax credit**

(a) *Legal basis*

(41) Title 26, Section 40A of the US Code (U.S.C.) is the legal basis for a tax credit scheme for biodiesel blenders, retailers and end-users. It provides for the following biodiesel fuel credits:

(i) the biodiesel mixture credit;

(ii) the biodiesel credit;

(iii) the small agri-biodiesel producer credit.

(42) The small agri-biodiesel producer income tax credit is a tax credit which applies only to small agri-biodiesel producers. This scheme is dealt with in recitals (64) to (72) below.

(43) Section 202(a) of the Energy and Improvement and Extension Act 2008 provides that the tax credits mentioned in recital (41) above are available until 31 December 2009.

(b) *Eligibility*

(44) In order to be eligible for the biodiesel mixture credit referred to under (i) in recital (41) above, a company must create a mixture of biodiesel and diesel fuel, which mixture is sold as a fuel or for use as a fuel. The person claiming the incentive must obtain a certification from the producer or importer of the biodiesel that identifies the product and the percentage of biodiesel and agri-biodiesel in the product. This credit takes the form of an excise tax credit or, if a company's excise tax liability is less than the total excise tax credit, the company may then claim the residual credit as a refundable income tax credit. A refundable income tax credit is a credit against the taxpayer's income taxes or a direct payment. It is refundable because the excess credit can be disbursed to the taxpayer as a direct cash payment if the credit is greater than the individual's tax liability.

(45) The biodiesel credit referred to under (ii) in recital (41) above is a non-refundable income tax credit for retailers or end-users of neat (pure) biodiesel. The neat biodiesel credit is available only to the person who places the gallon of neat biodiesel into the fuel tank of a vehicle or uses it as fuel. It should be noted that also biodiesel producers, producing their own biodiesel, would be able to receive this credit. Thus to claim the credit, the biodiesel producer must be acting as either a retailer (putting the gallon of biodiesel into the end-user's gas tank) or an end-user (e.g. putting the biodiesel into his own vehicles).

(c) *Practical implementation*

(46) In regard to the biodiesel credit with respect to unmixed (neat) biodiesel, the retailer (or a biodiesel producer acting as a retailer) or end user of unblended biodiesel can claim USD 1,00 per gallon for unmixed (neat) agri-biodiesel or USD 0,50 per gallon for other unmixed (neat) biodiesel as a non-refundable general business income tax credit. A non-refundable general business credit is a credit against the business's income tax. It is non-refundable because, if the business's credits are greater than its tax liability, the excess credit cannot be disbursed to the business as a direct cash payment.

(47) The investigation revealed that none of the companies in the sample or the company granted individual examination as referred to in recital (9) availed themselves of the biodiesel credit with respect to unmixed (neat) biodiesel. Consequently, this part of the scheme (biodiesel credit) is not further evaluated in the context of the present investigation.

(48) All the investigated companies received tax credits under the biodiesel mixture credit for biodiesel mixtures sold for use as fuel.

(49) Biodiesel that is mixed with mineral diesel fuel is entitled to a biodiesel mixture excise tax or income tax credit. The credit prevailing during the investigation period was USD 1 per gallon of unmixed agri-biodiesel ([11]), or USD 0,50 ([12]) for each gallon of other unmixed biodiesel, used in the fuel mixture. Thus the final tax credit for the blended fuel depends on the proportion of biodiesel it contains. The minimum requirement, and what is the most common practice, is to add 0,1 % mineral diesel to 99,9 % biodiesel (this blended product is referred to as B99 in the USA), as this ensures that the maximum tax credit is obtained. The proportion of biodiesel in a blended product qualifies for the tax credit (e.g. 100 gallons of B99 will contain 99,9 gallons of biodiesel and be eligible for a tax credit of USD 99,90). The conversion of biodiesel from a pure product (B100) to a mixed product (B99) is a simple process. It implies the addition of 0,1 % of mineral diesel into pure biodiesel and does not entail a major transformation of the product concerned. It is the activity of blending that triggers the eligibility for the credit.

([11]) In the U.S.C., the term *agri-biodiesel* refers to a biodiesel derived solely from virgin vegetable oils, including esters derived from corn, soybeans, sunflower seeds, cotton seeds, canola, crambe, rapeseeds, safflowers, flaxseeds, rice bran, and mustard seeds, and from animal fats. The investigation showed that more than 98 % of the biodiesel exported from the USA to the Community in the IP was agri-biodiesel.

([12]) The credit of USD 0,50 per gallon has been increased to USD 1,00 per gallon by the Energy Improvement and Extension Act of 2008 (effective from 1 January 2009).

(50) The producers of biodiesel can claim the incentive when they are themselves performing a blending activity. The producer must blend the neat biodiesel with mineral diesel fuel. In terms of entitlement to the incentive, there are no differences between blended biodiesel destined for domestic sale and sale for export.

(51) Companies that do not produce but rather purchase pure biodiesel and blend it into a biodiesel mixture are also entitled to the tax credit. Such companies must obtain a certificate from the producer (and if applicable any intervening resellers) of the biodiesel in which the producer effectively certifies not to have claimed the tax credit. This certificate is transferable entitling the holder to a USD 1 per neat biodiesel gallon tax credit.

(52) The incentive can be claimed either as a credit against excise or income tax liability or as a direct cash payment. The total amount of the incentive remains the same (USD 1 per gallon) whether the incentive is claimed as an excise tax credit, an income tax credit, a direct payment to the taxpayer, or any combination of the foregoing.

(53) During the period of investigation, most of the companies received direct payments based on the quantity of biodiesel blended while others received both a tax reduction (in the sense that the biodiesel mixture credit partly was used to offset an excise or income tax liability) and a direct payment. For the concerned companies, the tax liabilities were small compared to the amount of biodiesel mixture credit claimed; consequently, most of the incentive was received as a direct payment and a smaller amount as a tax reduction.

(54) The U.S.C. provides that the biodiesel mixture credit will not be granted unless the company (blender) that makes the mixture of biodiesel and mineral diesel obtains a certificate ('Certificate for Biodiesel') from the producer of the biodiesel in which the producer certifies, *inter alia*, the quantity of biodiesel to which the certificate relates and whether the biodiesel is agri-biodiesel or biodiesel other than agri-biodiesel. If a company that produces biodiesel subsequently blends that biodiesel with mineral diesel and claims the tax credit, that company will provide the Certificate for Biodiesel with the required documentation to make a claim for credit. A person that receives a Certificate for Biodiesel, and subsequently sells the biodiesel without producing a biodiesel mixture, is to provide the Certificate for Biodiesel to the purchaser as well as providing a 'statement of biodiesel reseller'. In other words, the company that blends the mixture and claims the tax credit may obtain the Certificate for Biodiesel either directly from the producer of the biodiesel or indirectly from a biodiesel reseller. Thus, this certificate is transferable entitling the holder to a USD 1 per gallon tax credit for the number of gallons of biodiesel used by the claimant in producing any biodiesel mixture.

(55) The investigation revealed that there was a clear price difference between pure biodiesel (B100) and blended biodiesel (B99). Though the only difference between the two types of products is the addition of 0,1 % mineral diesel fuel to create B99, sales of B100 were in the region of USD 1 per gallon more expensive than B99. The US biodiesel market appeared to be very transparent. The economic operators on the biodiesel market in the United States of America know that the biodiesel blenders receive a USD 1 per gallon tax credit. For some of the sampled companies, invoices for sales of B100 on the domestic market indicated the price of the product as well as the blender's credit, i.e. the credit was effectively sold to the purchaser of B100. On this basis, it is considered that all biodiesel is subsidised through this tax credit.

(d) *Conclusion*

(56) The biodiesel mixture credit has to be regarded as a fiscal incentive whether or not it is given as a cash payment or has to be offset against tax liabilities.

(57) This scheme is considered to be a subsidy in the sense of Article 2(1)(a)(i) and Article (2)(1)(a)(ii) of the basic Regulation as the scheme provides a financial contribution by the Government of the United States of America in the form of direct grants (cash payments) and revenue foregone which is otherwise due (tax offset). The incentives confer a benefit on the companies receiving them.

(58) The scheme is limited to companies that are involved in the biodiesel industry and is therefore considered to be specific under Article 3(2)(a) of the basic Regulation and therefore countervailable.

(e) *Calculation of the subsidy amount*

(59) The biodiesel mixture credit was granted by reference to the quantities of biodiesel used in a blend, i.e. USD 1 per gallon as all the companies concerned used agri-biodiesel. The amount of benefit in the IP has been calculated on the basis of USD 1 per gallon of neat biodiesel sold in the IP, whether sold as pure biodiesel (B100) or in a blend. In order to establish the benefit, the addition of mineral diesel in the blend was taken into account when calculating the amount of subsidy.

(60) One of the sampled biodiesel producers indirectly received benefits under this scheme as it used a factoring system to cash the biodiesel credit to which it was entitled. The blending was outsourced to an unrelated company which claimed the credit and then paid cash to the company concerned less a factoring fee.

(61) The amount of subsidy has been allocated over the total sales of the product concerned in the IP.

(62) Traded products have been excluded from the above calculation.

(63) The amount of countervailable subsidies obtained under this scheme, expressed *ad valorem*, for the investigated companies, ranged from 28,4 % to 41,1 %.

3.3. **Small Agribiodiesel Producer Income tax credit**

(a) *Legal basis*

(64) Title 26, U.S.C., Section 40A also provides for a small agri-biodiesel producer income tax credit.

(b) *Eligibility*

(65) This scheme is only available to small producers of neat agri-biodiesel. Any mixer, blender, or trader who purchases but does not produce biodiesel is not eligible for the credit. A small producer is any person whose production capacity is not more than 60 million gallons of agri-biodiesel per year. The small agri-biodiesel producer can claim a USD 0,10 non-refundable general business income tax credit for each gallon of agri-biodiesel produced. The qualified production of a producer may not exceed 15 million gallons in any taxable year. For the producer to claim the credit, the agri-biodiesel must be used as a fuel, sold for use as a fuel, or used to create a mixture of biodiesel and diesel fuel that is used as a fuel or sold for use as a fuel.

(c) *Practical implementation*

(66) Claims for the non-refundable general business income tax credits are made annually when the claimant is making its income tax return. The credit for each gallon of biodiesel produced by the claimant during the relevant tax year, up to a maximum of 15 million gallons, is offset against the claimant's liability for corporate income tax. If the claimant's tax liability is less than the amount of credit claimed, the excess amount can be carried forward to subsequent tax years.

(67) During the investigation period, one of the companies in the sample availed itself of the scheme. The company used the credit to reduce its income tax liability.

(d) *Conclusion*

(68) This scheme is considered to be a subsidy in the sense of Article (2)(1)(a)(ii) of the basic Regulation as the scheme provides a financial contribution by the Government of the United States of America in the form of revenue foregone which is otherwise due. The incentive confers a benefit on the companies receiving them.

(69) The scheme is limited to companies that produce biodiesel and is therefore considered to be specific under Article 3(2)(a) of the basic Regulation and therefore countervailable.

(e) *Calculation of the subsidy amount*

(70) The subsidy amount was calculated on the basis of the amount of income tax reduction for the fiscal tax year ending during the period of investigation.

(71) The amount of subsidy (numerator) has then been allocated over the total sales of the product concerned during the IP.

(72) The company concerned obtained subsidies from this scheme during the investigation period of 0,4 %.

3.4. **The US Department of Agriculture Bioenergy Program**

(a) *Legal basis*

(73) The US Department of Agriculture ('USDA') Bioenergy Program was originally authorized and funded by the USDA's Commodity Credit Corporation ('CCC') under its general authority under Section 5 of the CCC Charter Act, codified in the U.S. Code (Title 15, Chapter 15, Subchapter II, Section 714c(e)). This statute sets forth the exclusive purposes for which the CCC is authorized by law to use its general powers. Specifically, the scheme was based on the authority in section 5(e) of the Act, which authorizes the CCC to:

'*Increase the domestic consumption of agricultural commodities (other than tobacco) by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, marketing facilities, and uses for such commodities.*'

(74) The CCC published a final rule that established regulations for the scheme, which were codified in the Code of Federal Regulations as 7 C.F.R. § 1424.

(75) As originally conceived, the CCC used Section 5(e) funding for the scheme only up to fiscal year 2002 ([13]). However, in 2002, the US Congress specifically authorized and funded the continuation of the scheme up to and including fiscal year 2006.

(76) The scheme was in operation from 1 December 2000 to June 2006. It was administered by USDA's Farm Service Agency (FSA).

([13]) Fiscal years for the purpose of the Bioenergy Program ran from 1 October to 30 September of the following year.

(b) *Eligibility*

(77) When the program was in operation, all commercial bioenergy producers were eligible to participate. Producers were required to provide evidence of production, as well as evidence of the purchase and use of agricultural commodities related to that production. In particular, biodiesel producers were required to produce and sell biodiesel commercially.

(78) The statute defined 'biodiesel' as a monoalkyl ester meeting an appropriate standard of the American Society for Testing and Materials. To be eligible, a producer had to meet certain requirements with regard to the keeping of records and to provide required information, as well as granting permission to CCC to verify such information. The relevant regulations set forth the details of the procedures to be followed for signing up for the program, applications for payments and reporting procedures that recipients were required to follow in order to be eligible for payments.

(79) The 2002 statute established that eligible commodities that could be used to produce bioenergy (either biodiesel or fuel grade ethanol) included:

— Whet, corn, grain sorghum, barley, oats, rice, soybeans, sunflower see, rapeseed, canola, safflower, flaxseed, mustard, crambe, sesame seed, and cottonseed;

— A cellulosic commodity, such as hybrid poplar or switch grass;

— Fats, oils, greased (whether or not recycled) derived from agricultural products; and

— Any animal by-product, other than fats, oils and greases, that it's determinated to be used to produce bioenergy.

(80) According to the authorities of the United States of America, most of the biodiesel producers who received incentives under this scheme used soybeans.

(81) All commercial biodiesel producers were eligible to participate, provided they followed the application and reporting procedures described above. The government did not exercise any discretion besides ensuring that the eligibility criteria were met.

(c) *Practical implementation*

(82) In each fiscal year biodiesel producers could sign up for the scheme by submitting the relevant forms. After signing up, biodiesel producers submitted quarterly applications for payment of incentives. The biodiesel producers had to provide documentation of their net purchases of eligible commodities and net production of biodiesel during the relevant periods.

(83) The scheme provided payments to biodiesel producers based on a combination of their base biodiesel production and increased biodiesel production in the corresponding period of the prior fiscal year. For fiscal year 2006, companies only received incentives from increased biodiesel production. Based on each recipient's biodiesel production and increased biodiesel production from eligible agricultural commodities, USDA calculated the payments amount as set forth in the regulations.

(84) As the scheme was terminated in June 2006, none of the companies in the sample or the company referred to in recital (9) that has been granted individual examination received incentives under this scheme during the period of investigation. When the scheme was in operation, three of the sampled companies received payments in the period from 2002 to 2006. One company received direct payments from the FSA. Another company received indirect payments under this scheme, as a company that benefited from this scheme passed some of the amounts received to a company in the sample as a profit-sharing agreement due to tolling arrangements between the two companies. A third company only received a small amount in fiscal year 2006.

(d) *Conclusion*

(85) It was found that incentives were provided under this scheme to certain biodiesel producers over a number of years based on their production of biodiesel and there was clearly a financial contribution from the Government of the USA in the form of grants which were specific to the biodiesel industry. The subsidies are, however, considered to be recurring and considered to be expensed each particular year; consequently, no benefit was received during the period of investigation.

(86) It was also found that the scheme was re-introduced for the fiscal year 2009 (October 2008-September 2009). However, given that the period of investigation runs from April 2007 to March 2008, there are no grounds to countervail any benefits that might accrue under the re-introduced scheme.

STATE SCHEMES

Introduction

Four of the state schemes that were investigated were not used by any of the companies in the sample nor the company granted individual examination. In these circumstances, these schemes have not been further analysed. These schemes are: North Dakota biodiesel equipment tax exemption; Washington State energy freedom program; Washington state biofuels retail tax exemption and Washington State biofuels tax deduction.

3.5. **Illinois biodiesel tax exemption**

(87) In the state of Illinois, 'sales tax' is comprised of two separate but complementary taxes. A retailer of tangible personal property ([14]) incurs a Retailers' Occupation Tax ('ROT') liability and the purchaser of tangible personal property incurs a corresponding Use Tax liability.

(88) The legal basis for the ROT is 35 Illinois Compiled Statutes ('ILCS'), Chapter 120, Section 2 while the basis for the Use Tax is 35 ILCS, Chapter 105, Section 3-45. In accordance with the former provisions, '*a tax is imposed upon persons engaged in the business of selling at retail tangible personal property…*'. The latter provisions state that retailers '*shall collect the tax from users by adding the tax to the selling price of tangible property, when sold for use, …*'.

(89) The rate of ROT during the IP was 6,25 % of gross receipts from sales of tangible personal property made in the course of business, plus any applicable local taxes in counties in Illinois (35 ILCS, Chapter 120, Section 2-10).

(90) The rate of Use Tax during the IP was 6,25 % of either the selling price or the fair market value, if any, of the tangible personal property, plus any applicable local taxes in counties in Illinois (35 ILCS, Chapter 105, Section 3-10).

(91) In effect, a company that would collect the Use Tax on its sales would pay this tax to the Illinois Department of Revenue as ROT.

(a) *Legal basis*

(92) In regard to the imposition of ROT on biodiesel and biodiesel blends, 35 ILCS, Chapter 120, Section 2-10 provides that the proceeds of sales made on or after 1 July 2003 and on or before 31 December 2013 shall,

(i) for blends with no less than 1 % and no more than 10 % biodiesel, only be liable for the tax on 80 % of the proceeds, and

(ii) for 100 % biodiesel and biodiesel blends containing more than 10 % but no more than 99 % biodiesel, not be liable to ROT.

(93) In regard to the imposition of the Use Tax on biodiesel and biodiesel blends, the same partial/full exemptions apply as for the ROT above (35 ILCS, Chapter 105, Section 3-10).

([14]) *"Tangible personal property"* is not defined in Illinois legislation but is taken to be any physical property.

(94) Exemptions from ROT and the Use Tax are also provided for in the above mentioned legislation for proceeds from sales of other products.

(b) *Eligibility*

(95) Anyone that is a retailer or purchaser of biodiesel fuel is eligible to claim the exemptions mentioned in recitals (92) and (93) above.

(c) *Practical implementation*

(96) The exemption provisions mentioned in recitals (92) and (93) above provide that the Use Tax is not collected on retail sales of biodiesel/biodiesel blends. By virtue of the fact that retail sales of biodiesel/biodiesel blends are exempt from Use Tax, companies that sell biodiesel/biodiesel blends (including producers/blenders) to retailers are not liable to pay ROT on their sales of biodiesel/biodiesel blends.

(d) *Conclusions*

(97) It is clear that the exemption from the Use Tax and the ROT is triggered by retail sales of biodiesel/biodiesel blends. In this regard, the benefit from the exemptions is therefore received by consumers of the product. In these circumstances, in accordance with Article 1(1) of the basic Regulation, no countervailing duty may be imposed for the purpose of offsetting this subsidy as it was not granted, directly or indirectly, for the manufacture, production, export or transport of the product concerned.

(98) One of the sampled cooperating companies did not collect the Use Tax on its sales of biodiesel/biodiesel blends to retailers and consequently did not pay ROT on these sales. However, in light of the conclusions reached in recital (97) above, no countervailable benefit is considered to have accrued to this company.

3.6. **Missouri qualified biodiesel producer incentive fund**

(a) *Legal basis*

(99) In 2002, under Missouri State Law ('RSMo') (Chapter 142, Section 142.031), the 'Missouri Qualified Biodiesel Producer Incentive Fund' ('the Fund') was established. The purpose of the Fund is to '*…provide economic subsidies to Missouri qualified biodiesel producers…*'.

(100) Each fiscal year (which runs from 1 July of one year to 30 June of the following year) the Missouri Department of Agriculture makes available to Missouri Qualified Biodiesel Producers ('MQBPs') all monies appropriated to the Fund by the Missouri legislature and signed into law by the Governor of Missouri.

(b) *Eligibility*

(101) As at the start of the IP (1 April 2007), a MQBP was a facility that produced biodiesel and

(i) was registered with the United States Environmental Protection Agency ('USEPA') and

(ii) was at least fifty-one percent owned by agricultural producers who were residents of the state of Missouri and who were actively engaged in agricultural production for commercial purposes; or

(iii) at least eighty percent of the feedstock used by the facility originated in the state of Missouri. Feedstock means a Missouri agricultural product as defined in section 348.400 RSMo. This latter definition includes, *inter alia*, agricultural and vegetable products, either in their natural or processed states, that had been produced, processed, or otherwise had value added to it in the state of Missouri.

(102) These eligibility criteria were amended, effective from 28 August 2007, by replacing (iii) above with the following and adding an additional condition ((iv) below):

(iii) at least eighty percent of the feedstock used by the facility originated in the state of Missouri. Feedstock means an agricultural, horticultural, viticultural, vegetable, aquacultural, livestock, forestry, or poultry product either in its natural or processed state.

(iv) met all of the following:

— had registered with the Missourian Department of Agriculture by 1 September 2007;

— had begun construction of the facility before 1 November 2007; and

— had begun production of biodiesel before 1 March 2009.

(c) *Practical implementation*

(103) To obtain a grant from the fund, an MQBP must be, *inter alia*, licensed. A license is issued to a MQBP when it fulfils the above-mentioned criteria and provides additional information to the state of Missouri Department of Agriculture ('MDA') including the company's USEPA number, federal employer identification number, etc. The licence takes effect from the date all requested information has been received and approved by the MDA and expires when the MQBP has received sixty months of grants or no longer complies with the eligibility provisions.

(104) Once a licence has been issued, a MQBP may apply for a producer incentive grant by requesting a monthly grant application form from the MDA, Qualified Biodiesel Producer Incentive Fund. To obtain a producer incentive grant for a particular month, a MQBP must complete the prescribed grant application form.

(105) The MQBP must submit the completed grant application form to the MDA no later than fifteen days following the last day of the month for which the grant is sought. Applications submitted after this deadline are automatically rejected.

(106) The amount of each monthly grant is calculated by first determining the number of gallons of qualified biodiesel produced from Missouri agricultural products in the preceding month of the fiscal year, as certified by the MDA. That number is then multiplied by the per gallon credit established in Section 142.031, RSMo (state law) and Title 2 of the Code of State Regulations ('CSR') 110-2.010. Each MQBP shall be eligible for a total grant in any fiscal year equal to USD 0,30 per gallon for the first fifteen million gallons of qualified biodiesel produced from Missouri agricultural products in the fiscal year, plus USD 0,10 per gallon for the next fifteen million gallons of qualified biodiesel produced from Missouri agricultural products in the fiscal year. All such qualified biodiesel produced by a MQBP in excess of thirty million gallons in a fiscal year shall not be applied to the computation of a grant.

(107) If available monies are insufficient to pay all MQBPs the maximum monthly grant allowed by law, available monies will be apportioned so that each MQBP receives a share of monies proportionate to the eligible biodiesel production of all MQBPs for that month.

(108) The MDA strives to pay all grants for a particular month within thirty days of receipt and approval of the grant application form.

(d) *Conclusions*

(109) This scheme is considered to a subsidy in the sense of Article 2(1)(a)(i) of the basic Regulation as the scheme provides a financial contribution by the government of the state of Missouri ([15]) in the form of direct grants. The grants confer a benefit on the companies receiving them.

([15]) The term 'government' for the purposes of this regulation is interpreted in accordance with Article 1(3), second paragraph, of the basic Regulation which provides that *'The term "government" is defined, for the purposes of this Regulation as a government or any public body within the territory of the country of origin or export'*.

(110) The scheme is limited to biodiesel producers and is therefore considered to be specific under Article 3(2)(a) of the basic Regulation and therefore countervailable.

(e) *Calculation of the subsidy amount*

(111) One of the sampled cooperating exporters benefited from this scheme in the IP. The amount of the grants received in the IP has been allocated over the total sales of the product concerned during the IP. The amount of countervailable subsidies obtained under this scheme, expressed *ad valorem*, for this company was 3,8 %.

3.7. **North Dakota biofuels partnership in assisting community expansion (PACE) loan Program**

(112) The Biofuels PACE scheme, which became effective from July 2007, was preceded by the Biodiesel partnership in assisting community expansion loan scheme ('Biodiesel PACE' which was in place from July 2005 until June 2007).

(a) *Legal basis*

(113) The Biodiesel PACE scheme was established by the North Dakota legislature with the establishment of the North Dakota Century Code ('N.D.C.C.') 6-09.17 'Biodiesel Partnership in Assisting Community Expansion' in 2005. Under this Code, a biodiesel partnership in assisting community expansion fund ('the fund') was established.

(114) In 2007, following the passing of Senate Bill No 2180, the above mentioned North Dakota Century Code 6-09.17 was amended and the Biodiesel PACE scheme was modified with effect from July 2007 and was renamed the Biofuels PACE scheme.

(b) *Eligibility*

(115) Under the Biodiesel PACE scheme, a biodiesel production facility was eligible for funding from the fund.

(116) A 'biodiesel production facility' was defined as 'a corporation, limited liability company, partnership, individual or association involved in production of diesel fuel containing at least five percent biodiesel meeting the specification adopted by the American society for testing and materials'.

(117) Funding took the form of an interest rate buy down (reduction in interest rate charged) on loans made by a lead (commercial) financial institution in participation with the Bank of North Dakota. The latter bank is a North Dakotan state institution. Recipients of loans could receive an interest buy down of 5 % below the note rate. An individual biodiesel production facility could qualify for a total maximum of USD 400 000 of interest buy down funds per loan.

(118) The Biofuels PACE scheme, was established to buy down the interest rate on loans to biodiesel and ethanol production facilities, livestsock operations, biofuels retailers and grain handling facilities. Biodiesel production facilities that meet the relevant criteria are eligible for this scheme.

(c) *Practical implementation*

(119) Monies in the fund are used to reduce the borrower's interest rate on loans made by a local lender and the Bank of North Dakota (BND), which is a public entity owned by the state of North Dakota. The loan is handled through a local lending institution — bank, savings and loan, credit union, or farm credit services — which will request the participation of BND. The local lending institutions may be either public or private institutions. Together with the borrower, the lender and BND establish the terms and conditions of the loan, including the interest rate. The lead lender then requests that the fund be used to buy down the interest rate. In effect, the application process is made by a lead lender (typically a private bank) to the BND.

(120) A company pays the reduced interest repayments to the lead lender. The lead lender will then receive from the BND (out of the fund), the difference between the repayment that would normally be due on the basis of 'normal' interest rate and the reduced amount paid by the company.

(121) The implementation of both the Biodiesel PACE and the Biofuels PACE is as outlined in the preceding two recitals.

(d) *Conclusions*

(122) In regard to the Biodiesel PACE and the Biofuels PACE, there is a financial contribution by the state authorities of North Dakota as the authorities make payments to a funding mechanism (the biodiesel partnership in assisting community expansion fund or the biofuels partnership in assisting community expansion fund). Said fund is used to finance part of the interest repayments due by a company on loans. Eligibility funding from both schemes is limited to, *inter alia*, biodiesel manufacturers. In these circumstances, both schemes are specific under Article 3(2)(a) of the basic Regulation. There is a benefit to companies availing from this scheme in the form of reduced interest repayments.

(e) *Calculation of the subsidy amount*

(123) One company availed of benefits under the Biodiesel PACE in the IP. However, the benefit to the company was considered to be negligible being less than 0,1 %.

3.8. **North Dakota biodiesel production equipment tax credit**

(a) *Legal basis*

(124) The legal basis for North Dakota's corporate tax is contained in the North Dakota Constitution Article X, §3, and N.D.C.C. §57-38-30. The tax credit under this scheme, which is available for biodiesel retrofitting of equipment, is based upon N.D.C.C. §57-38-30.6.

(b) *Eligibility*

(125) The taxpayer must be a corporation subject to North Dakota income tax.

(c) *Practical implementation*

(126) The income tax credit is applied against the tax liability in the amount of ten percent per year for five years of the direct costs incurred by a taxpayer after 31 December 2002. Costs are the taxpayer's direct costs to adapt or add equipment to retrofit an existing facility or adapt a new facility within the state for the purpose of producing or blending diesel fuel containing at least 2 % biodiesel fuel volume.

(d) *Conclusions*

(127) This scheme is limited to taxpayers that engage in adapting or adding equipment to retrofit an existing facility or adapting a new facility within the state for the purpose of producing or blending diesel fuel containing at least 2 % biodiesel fuel volume. The scheme is therefore specific under Article 3(2)(a) of the basic Regulation. This scheme is considered to a subsidy in the sense of Article 2(1)(a)(i) of the basic Regulation as government revenue that is otherwise due (corporate income tax) is foregone or not collected. The reduced tax liability of the company confers a benefit.

(e) *Calculation of the subsidy amount*

(128) One company availed of this scheme in the IP. However, the benefit to the company was considered to be negligible being less than 0,1 %.

3.9. **North Dakota biodiesel income tax credit**

(a) *Legal basis*

(129) The tax credit for blending of biodiesel fuel is based upon N.D.C.C. §57-38-01.22.

(b) *Eligibility*

(130) The taxpayer must be subject to North Dakota income tax and retain a current license through the State Tax Commissioner's Office as a fuel supplier who blends biodiesel fuel according to N.D.C.C. §57-43.2-05(1).

(c) *Practical implementation*

(131) A taxpayer is entitled to a credit against tax liability of USD 0,05 per gallon of blended biodiesel fuel, provided the biodiesel is at least 5 % by volume (B5).

(d) *Conclusions*

(132) This scheme is considered to be a subsidy in the sense of Article 2(1)(a)(i) of the basic Regulation as government revenue that is otherwise due (corporate income tax) is foregone or not collected. The reduced tax liability of the company confers a benefit.

(e) *Calculation of the subsidy amount*

(133) One company availed of this scheme in the IP. However, the benefit to the company was considered to be negligible being less than 0,1 %.

3.10. **Texas ethanol and biodiesel blend tax exemption**

(134) According to the Texan Code, motor fuels including diesel fuel are subject to a state excise tax. The state tax paid on diesel fuel is required by law to be added to the selling price in each subsequent sale so that the tax is ultimately paid by the person using or consuming the fuel. Biodiesel is treated as a separate product under Texan state law. It is not a taxable product. This implies that producers of biodiesel do not have to collect any tax from the purchaser on behalf of and remit to the State Taxing Authority. It was concluded that biodiesel producers do not derive a benefit from the Texas ethanol and biodiesel blend tax exemption and that, to the extent that Texan law decides not to tax a particular product would benefit anyone in the state, such benefit accrues to the end consumer. In these circumstances, this scheme is considered not to be countervailable.

3.11. **Texas fuel ethanol and biodiesel production incentive program**

(a) *Legal basis*

(135) Chapter 16 of Texan Agriculture Code; Rules for Fuel Ethanol and Biodiesel incentive Program; and Guidelines for Fuel Ethanol and Biodiesel Incentive Program.

(b) *Eligibility*

(136) The scheme provided grants for eligible companies producing ethanol and biodiesel. A producer seeking to receive a grant was required to submit an application establishing that:

1. the plant is capable of producing fuel ethanol or biodiesel;

2. the producer has made a substantial investment in the plant: and

3. the plant is a permanent fixture in Texas.

(c) *Practical implementation*

(137) The scheme established that producer that paid a fee of USD 0,032 per gallon of biodiesel produced in a registered plant was entitled to receive USD 0,20 for each gallon of biodiesel produced in each registered plant until the 10th anniversary of the date production from the plant begins.

(138) A registered plant was required to submit monthly production reports and a quarterly report certified by a Certified Public Accountant. When the quarterly report was submitted, the plant would also pay a fee of USD 0,032 per gallon. The amount of this paid fee would be multiplied 5,25 times such that a USD 0,20 per gallon incentive was then paid to the plant. The production limit to receive the incentive was the first 18 million gallons annually per plant.

(139) The scheme became effective in September 2003 but the first payments under this scheme were not made until June 2006 because no funds were appropriated until fiscal year September 2005 to August 2006. The scheme has not been operational since 31 August 2007, as the Texan Legislature ceased funding the scheme as of the 2008-09 appropriations biennium (September 2007 to August 2009). In legal terms, the scheme still exists in Texas. Moreover, it was established that one of the companies concerned enjoyed benefits under this scheme during the period of investigation.

(d) *Conclusion*

(140) This scheme is considered to a subsidy in the sense of Article 2(1)(a)(i) of the basic Regulation as the scheme provides a financial contribution by the government of the state of Texas in the form of direct grants. The grants confer a benefit on the companies receiving them in accordance with Article 2(2) of the basic Regulation. The scheme is limited, *inter alia*, to biodiesel producers and is therefore considered to be specific under Article 3(2)(a) of the basic Regulation and therefore countervailable.

(e) *Calculation of the subsidy amount*

(141) One company availed of this scheme in the IP. The subsidy amount was calculated on the basis of the amount of payments received during the investigation period. Fees necessarily incurred to obtain the subsidy were deducted from the payments received to arrive at the subsidy amount as numerator, pursuant to Article 7(1)(a) of the basic Regulation.

(142) The amount of subsidy has then been allocated over the total sales of biodiesel made by the company concerned during the IP as the appropriate denominator.

(143) The company concerned obtained subsidies from this scheme during the investigation period of 0,3 %.

3.12. **Washington State biofuels production tax exemption**

(144) The state of Washington provides tax reductions from the Business and Occupation tax ('B&O tax') and tax exemption from the property tax and leasehold excise tax.

(145) The state of Washington does not have a system of corporate income tax. Rather, businesses are liable to a Business and Occupation tax ('B&O tax') which is imposed on manufacturing activities. The normal tax rate imposed on manufacturing activities is 0,484 % unless otherwise specified in Washington state legislation.

(146) In regard to the property tax, the applicable rate is determined by many overlapping jurisdictions and varies among local taxing jurisdictions within the State of Washington. However, the state-wide average is approximately 1,2 % of fair market value.

(147) The leasehold excise tax is a tax imposed in lieu of property tax when exempt property, such as public port property, is used by a non-exempt entity, such as a for profit business. The rate is 12,84 % of the contract rental price.

(a) *Legal basis*

(148) Under the Revised Code of Washington (RCW) Chapter 82.04.260(1)(e), the B&O tax rate for manufacturers of pure biofuels, including biodiesel, is reduced from 0,484 % to 0,138 %. This reduced rate is applicable until 1 July 2009.

(149) In regard to the property tax and leasehold excise tax exemptions, RCW Chapter 84.36.635 and RCW Chapter 82.29A.135 provide that qualifying real and personal property is exempt from property tax and leasehold excise tax.

(b) *Eligibility*

(150) All three of the above mentioned tax reductions/exemptions apply to biofuel manufacturers. The reductions/exemptions are available state-wide, with no limitations other than the eligibility requirement.

(151) In regard to the eligibility for the B&O tax reduction, as stated above, manufacturers of biodiesel are eligible.

(152) In regard to the property tax and leasehold excise tax exemptions, as stated above, qualifying real and personal property is exempt from property tax and leasehold excise tax. Qualifying real and personal property must be used primarily for manufacturing pure biofuels. Qualifying property includes buildings, machinery and equipment, other personal property and land associated with the manufacture of biofuels, but not the land used to grow crops. The buildings and equipment must be new and cannot have existed before July of 2003.

(c) *Practical implementation*

(153) To avail of the reduced rate of B&O tax that is applicable to biodiesel manufacturers, an eligible company simply reports the value of sales of such products on the relevant tax return.

(154) Application for the property tax and leasehold excise tax exemptions must be made by 1st November of each year. Application for property tax exemption is made through the local county assessor. Application for leasehold excise tax exemption is made through the Department of Revenue.

(d) *Conclusions*

(155) This scheme is considered to be a subsidy in the sense of Article 2(1)(a)(i) of the basic Regulation as the scheme provides a financial contribution by the government of the state of Washington as government revenue that is otherwise due (B&O tax) is foregone or not collected. The reduced tax liability of a company using this scheme confers a benefit. The reduced B&O tax rate that is applicable to biofuels manufacturers is specific as it is limited to manufacturers of biofuels, including biodiesel, and certain other specified activities and is therefore considered to be countervailable.

(156) None of the sampled companies availed of benefits under the property tax exemption. In these circumstances, no conclusions are drawn on this tax exemption. One company availed of benefits under the leasehold excise tax exemption but the amount of benefit was less than 0,1 % and hence considered to be negligible. In these circumstances, no conclusions are drawn on this tax exemption.

(e) *Calculation of the subsidy amount*

(157) One company availed of benefits under the reduced B&O tax scheme during the IP. The subsidy amount was calculated by applying the reduced rate of B&O tax to the sales turnover of biodiesel produced by the company in the IP. The amount of subsidy, when expressed as a percentage of the total sales volume of biodiesel in the IP was 0,7 %.

3.13. **Amount of countervailable subsidies**

(158) The amount of countervailable subsidies in accordance with the provisions of the basic Regulation, expressed *ad valorem*, for the investigated companies ranges between 29,1 % and 41,1 %.

(%)

SCHEME / COMPANY	Biodiesel Mixture Credit	Small Agri-biodiesel Producer Income tax credit	Missouri qualified biodiesel producer incentive fund	Texas fuel ethanol and biodiesel production incentive program	Washington State biofuels production tax exemption	Total
Archer Daniels Midland Company	31,3		3,8			35,1
Cargill Inc.	34,1	0,4				34,5
Green Earth Fuels of Houston LLC	38,7			0,3		39,0
Imperium Renewables Inc.	28,4				0,7	29,1
Peter Cremer North America LP	41,0					41,0
Vinmar Overseas Limited	41,1					41,1
World Energy Alternatives LLC	37,6					37,6

(159) In accordance with Article 15(3) of the basic Regulation, the subsidy margin for the cooperating companies not included in the sample, calculated on the basis of the weighted average subsidy margin established for the cooperating companies in the sample, is 36,0 %.

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

4. **COMMUNITY INDUSTRY**

4.1. **Community production and standing**

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

(162) Based on this information it was found that overall Community production was around 5 400 thousand tonnes during the IP. Three companies belonging to the same group were found to be related to exporting producers in the USA and the group was also itself importing significant quantities of the product concerned from its related exporters in the USA. Therefore, these companies were excluded from the notion of Community production within the meaning of Article 9(1) and Article 10(8) of the basic Regulation. As a consequence, the production volume on the basis of which standing was established was in the range of 4 200 to 4 600 thousand tonnes.

(163) It was established that the companies that supported the complaint and agreed to co-operate in the investigation represented more than 60 % of the Community production of biodiesel during the IP indicated in recital (162). The company referred in recital (165) below which failed to co-operate with the investigation was not considered as a supporter of the complaint. It is concluded that the complaint and the investigation are supported by a major proportion of Community production within the meaning of Article 9(1) and Article 10(8) of the basic Regulation.

4.2. **Sampling**

(164) Because of the large number of Community producers, it was decided to resort to sampling to establish the existence of material injury. Sampling forms were sent to all potential producers of the like product in the Community. Initially more than 40 companies provided meaningful information to the sampling forms and agreed to cooperate with the proceeding. The three companies mentioned in recital (162) were not considered for the sampling exercise for the reasons mentioned in that recital.

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

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

5. **INJURY**

(167) As mentioned in recital (17) above, the examination of the trends concerning the assessment of injury covered the period from January 2004 to the end of the IP. However the investigation showed that the Community industry was practically starting up in 2004. It was, thus, considered more appropriate to make an analysis based on trends for the period 2005 to the IP ('period analysed'). The information collected regarding 2004 is nevertheless also presented in the assessment that follows.

5.1. **Community consumption**

Table 1

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

(168) Community consumption was established on the basis of volume of the overall Community production on the Community market of all Community producers, as ascertained in recital (162) above, minus their exports plus imports from the country concerned by this investigation and imports from other third countries.

(169) As to the volumes of imports from the USA, the following sources of information were available:

— the Eurostat data for the different CN codes under which the product was classified;

— the USA export statistics;

— other statistical information of confidential nature on imports provided by interested parties.

(170) However, analysis of this information showed that the Eurostat data could not be used for the purpose of assessing consumption since until the end of 2007 there was no distinct CN code available for the customs classification of the various types of the product concerned. Imports of the product concerned were classified under a number of codes which also contained import data of other products. Hence, it was considered more appropriate to use the US exports statistics for establishing reliable imports and consumption figures and import trends. In using this source of information, account was taken of the shipment time needed for the goods to arrive from the USA to the Community and thus the export statistics were adjusted by one month in order to take account of this time-lag.

(171) With regard to imports from other countries and exports of the Community producers, in view of the limitation regarding the use of Eurostat data described above, the investigation relied on the data reported in the complaint.

(172) Based on the above, it was found that Community consumption of biodiesel increased by 107 % between 2005 and 2007 and then slightly decreased in the IP by one percentage point. Overall, consumption more than doubled over the period analysed.

(173) The increase in demand was mainly due to the incentives taken by Member States to promote the use of bio-fuels following the adoption of Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of bio-fuels or other renewable fuels for transport ([16]) and Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity ([17]).

([16]) OJ L 123, 17.3.2003, p. 42.
([17]) OJ L 283, 31.10.2003, p. 51.

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

Table 2

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

Source: USA export statistics.

(174) Import volumes from the USA increased significantly from around 11 500 tonnes in 2005 to around 1 137 000 tonnes in the IP.

(175) During the period analysed, the subsidised imports from the USA continuously increased their share of the Community market from 0,4 % in 2005 to 17,2 % in the IP. Therefore, there has been a significant increase in subsidised imports both in absolute terms and in relative terms compared to the Community consumption over that period.

(176) *Splash and dash* is a term used by biodiesel operators to describe a pattern by which biodiesel of allegedly foreign origin is transhipped to the Community via the USA where it is mixed with basically a drop (0,01 % of the final blend) of conventional diesel in order for the blender to avail himself of a subsidy in the USA.

(177) US parties have claimed that *splash and dash* explains the surge of US imports into the Community market, as it allegedly represented 40 % of US imports during the IP. These parties have also claimed that because the investigation was initiated against imports of biodiesel originating in the USA, the quantities concerned by the *splash and dash* should be separated from the injury analysis and treated as imports from other third countries.

(178) On the other hand the complainant argued that imports of *splash and dash*, if any, would at most represent 10 % of the US export volumes, and would thus be insignificant and not alter the findings that large quantities of subsidised imports from the USA entered the Community market, in particular during the IP.

(179) The investigation has shown that the US export statistics do not allow one to distinguish between any biodiesel exported under the alleged *splash and dash* process and the other US exports recorded in their 'Exports' chapter. In the same statistics there were hardly any quantities found to be declared under the 'Re-Exports' chapter. The US authorities also stated that all quantities included in their 'Exports' chapter are products deemed to be originating in the USA.

(180) Moreover, most of the US companies investigated declared that it was not possible to differentiate the quantities exported to the Community or sold on the domestic market between the quantities produced or sourced in the USA and those exported under the *splash and dash* process.

(181) Also, it was found in the case of the investigated companies in the USA that all the exports of biodiesel were declared, both upon exportation by the US exporters and upon importation by the related importers in the Community, as US origin biodiesel.

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

5.3. **Prices of the subsidised imports and price undercutting**

5.3.1. *Unit selling price*

Table 3

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

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

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

(184) Average prices for imports from the USA fluctuated during the period considered and overall showed an increase of 7 % between 2005 and the IP.

5.3.2. *Price undercutting*

(185) For the purposes of analysing price undercutting, the weighted average sales prices of the sampled Community producers charged to unrelated customers on the Community market, adjusted to an ex-works level, were compared to the corresponding weighted average prices of the imports from the USA, established on a cif basis for the sampled exporting producers in the USA. An adjustment for the customs duties, post-importation costs and for the differences in feedstock (see next recital) used for the production of biodiesel was applied where appropriate.

(186) The investigation identified different types of the product concerned in particular based on the feedstock used in the production process. Whilst the main feedstock used in the Community is rapeseed, the US producers use other feedstock such as soybeans, canola, palm, etc. Given that feedstock is by far the main raw material for the production of the product concerned, it was considered that an adjustment for feedstock difference should be granted. This adjustment was thus calculated to correspond to the market value of the difference between the relevant types of the product concerned compared to the type of products produced from rapeseed. In this way both the weighted average sales prices of the Community industry and the weighted average price of the imports concerned were compared on the same feedstock basis, namely rapeseed.

(187) Based on the above methodology, the difference between the US and Community prices, expressed as a percentage of the Community industry's weighted average ex-works price, i.e. the price undercutting margin, was found to range from 18,9 % to 33,0 %.

5.4. **Economic situation of the Community industry**

(188) In accordance with Article 8(5) of the basic Regulation, the examination of the impact of subsidised imports on the Community industry included an evaluation of all economic indicators established for the Community industry over the period analysed.

5.4.1. *Production capacity, production and capacity utilisation*

Table 4

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

Source: Questionnaire replies of the sampled Community producers.

(189) In line with the increased consumption, the production capacity of the sampled Community producers continuously increased during the period analysed. It increased by 42 % between 2005 and 2006 followed by a further increase of 68 % in 2007 and a further increase of 15 % between 2007 and the IP. It marked an overall increase of 174 % over the period analysed. The increase in production capacity resulted from new investments in anticipation of the growth in demand.

(190) Indeed the Community industry growth in production capacity has to be seen against the background of a Community bio-fuels and other renewable fuels consumption target of 5,75 %, set by Directive 2003/30/EC, which is calculated on the basis of energy content of all petrol and diesel, for transport purposes, placed on the Community market by 31 December 2010. Moreover, in March 2007, the European Council endorsed a 10 % binding minimum target to be achieved by all Member States for the share of bio-fuels in the overall Community transport petrol and diesel consumption by 2020 ([18]). This target would increase the Community consumption of bio-fuels to around 33 million tonnes of oil equivalent by that year. The production capacity in the whole Community in 2006 was estimated at 6 million tonnes only. In view of the above, it is understandable that Community producers invested in additional capacities in anticipation of the growth in demand.

(191) Production of the like product by the Community industry increased also continually to reach an overall increase of 148 % over the period analysed.

(192) As a result of the relative slower pace in the increase of production volumes *vis-à-vis* the increase of production capacity, the capacity utilisation of the Community industry decreased by 9 % over the period analysed.

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

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

Table 5

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

Source: Questionnaire replies of the sampled Community producers.

(193) In line with the evolution of consumption, the volume of sales made by the Community industry on the Community market increased steadily, recording an overall increase of 143 % during the period analysed. During the same period the Community industry increased also its market share by 4,5 percentage points.

(194) Average sales prices of the Community industry in the Community market increased by 23 % over the period analysed. The increase in prices was justified in view of the increase of costs of raw materials and other inputs.

5.4.3. *Growth*

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

5.4.4. *Stocks*

Table 6

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

Source: Questionnaire replies of the sampled Community producers.

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

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

Table 7

	2004	2005	2006	2007	IP
Profitability	9,3 %	18,3 %	18,0 %	5,7 %	5,7 %
Index 2005=100	*51*	*100*	*98*	*31*	*31*
Investments in EUR 000	19 497	70 885	237 115	140 014	131 358
Index 2005=100	*28*	*100*	*335*	*198*	*185*
Return on investments	92 %	114 %	108 %	23 %	23 %
Index 2005=100	*80*	*100*	*95*	*20*	*20*
Cash flow in EUR 000	24 113	131 211	213 560	167 042	180 602
Index 2005=100	*18*	*100*	*163*	*127*	*138*

Source: Questionnaire replies of the sampled Community producers.

(197) Profitability of the sampled Community producers was established by expressing the net pre-tax profit of the sales of the like product in the Community market as a percentage to the turnover of these sales. Over the period analysed the profitability of the sampled Community producers decreased from a profit of 18,3 % in 2005 to 5,7 % in the IP. This represents a drop of 12,6 percentage points over the period analysed.

(198) The level of investments in the production of biodiesel made by the sampled Community producers increased by 235 % between 2005 and 2006. This increase was related to the expansion of production capacity in anticipation of an increasing demand in the Community. In this regard it is noted that in most cases investments are planned for at least two years before a biodiesel plant becomes fully operational. The same producers continued to invest in 2007 and in the IP yet at a much lower pace. This period coincides with the surge of subsidised imports in the Community market.

(199) The sampled Community producers' return on investment, which expresses their pre-tax result as a percentage of the average opening and closing net book value of the assets employed in the production of biodiesel followed the negative trend in profitability. The actual decline was however more dramatic as it decreased by 91 percentage points over the period analysed. It is considered that the deterioration of the return on investments is a clear indication of the deterioration of the economic situation of the Community industry.

(200) The trend of the cash flow, which is the ability of the industry to self-finance the activities, has shown an increase of 38 % over the period analysed. Despite the fall in profitability over the same period, this indicator shows a positive trend mainly due to the increase in the depreciation costs which are included for establishing the level of cash flow. Another reason was that the fall in profits in absolute terms, over the period considered was not as pronounced as the fall in turnover. Between 2006 and the IP, however, cash flow has shown a decrease of 15 % signifying a downturn in the latter part of the period analysed when subsidised imports were more present in the Community market.

5.4.6. *Employment, productivity and wages*

Table 8

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

Source: Questionnaire replies of the sampled Community producers.

(201) In line with the increase in production and sales volumes, employment of the Community industry increased by 178 % in the period analysed. It is noted that the biodiesel industry is a capital intensive industry not requiring a large labour force in the production process.

(202) Average wages decreased by 6 % over the period analysed. This is explained by the fact that the additional workforce enrolled by the Community industry for expanding production towards the end of the period analysed required less qualification.

(203) Productivity decreased by 11 % between 2005 and the IP.

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

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

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

(205) The analysis of data pertaining to the Community market suggested that Community producers other than those included in the sample and the ones mentioned in recital (162) lost considerable market share over the period analysed on the sales of their own produced biodiesel on the Community market. The loss in market share by these producers is estimated to be above 20 percentage points over the period analysed.

(206) From the information provided by the complainant, it appeared that many of these companies either ceased or reduced their biodiesel activity and were not able to adequately cooperate with the investigation.

(207) Moreover, a number of companies that submitted information in the framework of the sampling exercise indicated that they had to downsize production and staff in view of the cheap imports from the USA. Similar comments were made by other producers which were ready to start production but which had to delay their entering into the market because of the surge of low-priced imports from the USA, in particular during the IP.

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

5.5. **Conclusion on injury**

(209) In the context of a growing demand, the investigation showed that the situation of the sampled Community producers improved with regard to volume indicators such as production (+150 %), production capacity (+174 %) and sales volume (+143 %) over the period analysed. The sampled Community producers also increased their market share from 25,3 % in 2005 to 29,8 % during the IP, namely a modest increase of 4,5 percentage points. Employment and investments also increased in view of the increasing demand for biodiesel in the Community market during that period. However, because the production volume did not follow the market growth, the utilisation of production capacity fell by 9 % and productivity decreased by 11 % over the period analysed.

(210) The main indicators related to the financial situation of the sampled Community producers worsened during the period analysed. Profitability decreased from around 18 % in 2005 and 2006 to below 6 % during the IP. Notwithstanding their ability to self finance their activities, in particular because of the increase in cash flow, the return on investments declined dramatically by 80 % during the IP.

(211) The investigation also showed that the sampled Community producers experienced a sharp increase in their costs between 2005 and 2007 (+ 36 %) and between 2005 and the IP (+ 42 %), because of increases in the feedstock prices (mainly rapeseed and soy bean oil), which represent close to 80 % of the full costs of biodiesel. These cost increases could not be fully passed on to customers on the Community market.

(212) In the light of the foregoing it can be concluded that the Community industry as a whole has suffered material injury within the meaning of Article 8(5) of the basic Regulation.

6. **CAUSALITY**

6.1. **Introduction**

(213) In accordance with Article 8(6) and Article 8(7) of the basic Regulation, it was examined whether the subsidised imports originating in the USA have caused injury to the Community industry to a degree that enables it to be classified as material. Known factors other than the subsidised imports, which could at the same time be injuring the Community industry, were also examined to ensure that possible injury caused by these other factors was not attributed to the subsidised imports.

6.2. **Effect of the subsidised imports**

(214) The investigation showed that low-priced subsidised imports from the USA significantly increased in terms of volume, namely by 100 times, during the period analysed. This resulted in a significant increase in their market share by 16,8 percentage points, from 0,4 % in 2005 to 17,2 % in the IP. In order to demonstrate the significance of the impact that the surge of the subsidised imports from the USA had on the Community, it is noted that an increase in market share of 16,8 percentage points was achieved within a period of 15 months.

(215) At the same time, despite the significant increase in consumption, the Community industry, in its core market, was only able to gain around 4,5 percentage points of market share during the period analysed. The investigation showed that this was exclusively at the expense of other Community producers which ceased to produce or which downsized production in the period analysed.

(216) The average prices of the subsidised imports increased by 7 % between 2005 and the IP, but were significantly lower than those of the Community industry during the same period. Hence, the prices of the subsidised imports significantly undercut Community industry prices with an average undercutting margin of 25 % during the IP.

(217) The pressure exercised by the surge of low-priced subsidised imports on the Community market did not allow the Community industry to set its sales prices in line with market conditions and the cost increases. Indeed, in the IP the average prices of feedstock used by the Community industry to produce biodiesel, were 25 % higher than in 2006. The Community industry was only able to pass to its customers a price increase limited to 4 % while its full costs increased by 20 % over the same period. It is noteworthy that the price of the main feedstock used by the US producers, namely soybean oil, also increased markedly over the same period. However, as shown in recital (211) above these increases in costs were not reflected in the prices of the subsidised imports.

(218) In order to further demonstrate the causal link between the surge of low-priced subsidised imports from the USA and the injury suffered by the Community industry, the situation on the Community market in the period 2005 to 2006, when subsidised imports were not present, was compared to the situation prevailing in the market between 2006 to the IP, when the surge of low-priced subsidised imports took place.

(219) In the period from 2005 to 2006, when subsidised imports were absent from the Community market, consumption increased by around 1,8 million tonnes. All the producers in the Community could prepare their business plans with a perspective of a fast growing and healthy market. In that period prices increased by 19 % and the Community industry achieved profits as high as 18,3 %. In 2007 and during the IP, the situation changed dramatically. Low-priced subsidised imports from the USA started to penetrate the market. Although the market continued to expand by 1,6 million tonnes, most of this market increase (over 1 million tonnes) was taken by the subsidised imports from the USA. The Community industry only gained modest market share, its main costs to produce biodiesel significantly increased by around 25 % but its average sales price increased only by around 4 % in the same period. Accordingly, its overall economic and financial situation deteriorated during the IP as profits were significantly reduced to less than 6 % on turnover.

(220) Based on the above, it is provisionally concluded that the low-priced subsidised imports from the USA, which significantly undercut the prices of the Community industry during the IP and which also significantly increased in volume, have had a determining role in the material injury suffered by the Community industry, which is reflected in particular in the deterioration of its financial situation during the IP.

6.3. **Effect of other factors**

6.3.1. *Imports from other third countries*

Table 9

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

Source: Information provided by the complainant.

(221) Import volumes from third countries could not be accurately assessed in the investigation for the reasons explained in recital (171) above. Thus, the data of the table above is based on estimates provided by the complainant.

(222) The imports from third countries not concerned by this investigation increased from about 30 000 tonnes in 2005 to 147 812 tonnes during the IP. This resulted in a moderate market share increase of 1,3 percentage points over the same period. It was therefore provisionally concluded that imports from other third countries cannot have made more than negligible contribution to the injury suffered by the Community industry.

6.3.2. *Development of demand*

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

6.3.3. *Public Policy Decisions*

(224) One interested party alleged that the reintroduction of energy taxes in Germany for biodiesel ([19]), would have negatively influenced the economic situation of Community producers supplying that particular Member State.

(225) The investigation revealed that indeed pure bio-fuels used in Germany have benefitted from a tax incentive since 1999 which was reduced as of 1 August 2006. However, on 1 January 2007 a mandatory blending requirement was introduced ([20]) fixing the biodiesel quota to 4,4 % calculated on the basis of energy content of all petrol and diesel placed on the German market for transport purposes. Operators that fail to fulfil this quota have to pay a fine of EUR 0,60 per litre of biodiesel for which they fall short of the quota. To a large extent this mandatory blending requirement appears to have compensated the alleged sales losses and to have counterbalanced the reduction in incentives. Indeed, the investigation has shown that the sales volumes of the sampled Community producers supplying the German market rose by 68 % between 2006 and the IP.

(226) Based on the above, it is considered that decisions taken by public authorities in the Community cannot break the casual link between the subsidised imports and the material injury suffered by the Community industry.

6.3.4. *Idle production capacity of Community producers*

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

(228) In this regard it is noted that the investigation focused on the situation of the Community producers. Even if it is a fact that the production capacity of the Community industry increased (+ 189 %) relatively more than the demand (+ 106 %), it is noteworthy that the main cost drivers in the biodiesel production are the variable costs. Indeed, as mentioned in recital (211) above, raw material for the production of biodiesel represents 80 % of full costs. The further examination of this claim showed that the share of the fixed costs in the production and sales of biodiesel represented only 6 % of the overall costs. Hence, any alleged impact of increased fixed costs, as a result of unused capacity, cannot explain the significant deterioration in the financial situation of the Community industry during the IP.

(229) In addition, it is noteworthy that as mentioned in Table 4 above, the capacity utilisation rate of the sampled Community producers was 80 % during the IP. Hence, the alleged over capacity in the Community was not evidenced in the case of the sampled Community producers.

(230) On the basis of the above, it is considered that any negative impact the idle production capacity may have had on the Community industry was not such as to break the causal link between the subsidised imports and the injury suffered by the Community industry.

6.3.5. *Increased demand for feedstock and increasing prices*

(231) One interested party claimed that the increased demand for rapeseed and rapeseed oil led to high raw material prices in the Community. The fact that Community producers rely on rapeseed oil as the main raw material would explain why they may have suffered more than other producers using other vegetable oils such as soybean oil or palm oil to produce biodiesel.

(232) It is firstly noted that the investigation revealed that the sampled Community producers were not relying solely on rapeseed oil for their production of biodiesel but also other vegetable oils (soybean, palm, sunflower) and occasionally animal fat.

([19]) The 'Energiesteuergesetz' entered into force on 1 August 2006 imposing a tax of EUR 0,09 per litre B100.

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

(233) Moreover, it is indeed acknowledged in recital (211) above that the Community industry faced a significant increase in its raw material (feedstock) costs over the period analysed. However, this development has to be seen against a general increase in prices of agricultural products worldwide and it is noted in this respect that the price increase for soybean oil (the main feedstock used by the producers in the country concerned) was more pronounced over the same period. Accordingly, all types of biodiesel were affected by feedstock price increase.

(234) In a market governed by effective competition, it should be expected that producers would be able to recover the costs increases and pass it on to the market. However, the investigation showed that it was the pressure exercised by the surge of low-priced subsidised imports on the Community market which did not allow the Community producers to set their sales prices in line with market conditions and the cost increases. As mentioned also the main feedstock used by the US producers, namely soybean oil, marked a pronounced price increase in the period analysed. However, these increases in costs in the USA were not reflected in the prices of the subsidised imports in the Community market.

(235) Against this background the raw material price increase cannot break the casual link between the subsidised imports and the injury suffered by the Community industry.

6.3.6. *Price development of mineral diesel*

(236) One interested party argued that because of a strong correlation between mineral diesel prices and biodiesel prices, the increase of the biodiesel prices, which was sharper than the increase of the mineral diesel prices, especially in Germany, would have caused a drop in sales for the producers supplying the market of this Member State.

(237) It is firstly noted that the party in question did not provide any information to substantiate its claim. Moreover, contrary to what was suggested by this party, the investigation revealed that the Community industry had increased its sales and market share over the period analysed. In addition, since crude oil prices are quoted on a world-wide basis, sales of the product concerned should have been affected in the same manner as the sales of biodiesel produced in the Community.

(238) On the basis of the above, this argument had to be rejected.

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

(239) One interested party claimed that the location of any biodiesel producer would be an important element in terms of competitiveness and uses Germany as an example to demonstrate that landlocked locations of biodiesel producers would have to bear high transportation costs since all big customers, in particular refineries and their blending facilities are located at the coast.

(240) The investigation showed that only a small number of Community industry producers were located in landlocked locations. Moreover, for certain of these producers it was found that refineries existed also in landlocked locations close to these producers. For others the investigation revealed that any disadvantage for landlocked biodiesel producers in terms of being far away from their customers (blenders, refineries) was compensated by being close to crushing mills and/or feedstock providers.

(241) On the basis of the above, the claim that the location of plant in landlocked locations is causing material injury to the Community industry was rejected.

6.3.8. *Producers related to the US exporters*

(242) It should be noted that the impact of the imports from the USA by the three companies referred to in recital (162) has been taken into account in the analysis of the effect of subsidised imports from the USA made in recitals (214) to (220) above. As far as their sales of own produced biodiesel are concerned, the investigation did not point to a different pricing or behaviour than that of the sampled Community producers, in particular during the IP.

6.4. **Conclusion on causation**

(243) The above analysis has demonstrated that there was a substantial increase in the volume and market share of the low-priced subsidised imports originating in the USA between 2005 and the IP. At the same time, it was found that these imports were significantly undercutting the price of the Community industry during the IP.

(244) The various findings of the investigation and the analysis carried out, for the period 2005 and 2006 compared to the period 2007 to the IP, showed that there was a clear coincidence in time between the surge of the low-priced imports from the USA and the significant deterioration of the economic situation of the Community industry, in particular during the IP.

(245) Based on the above analysis, which has properly distinguished and separated the effects of all known factors on the situation of the Community industry from the injurious effects of the subsidised imports, it was provisionally concluded that the subsidised imports from the USA have caused material injury to the Community industry within the meaning of Article 8(6) of the basic Regulation.

7. COMMUNITY INTEREST

7.1. Preliminary remark

(246) In accordance with Article 31 of the basic Regulation, the Commission examined whether, despite the conclusion on injurious subsidisation, compelling reasons existed for concluding that it was not in the Community interest to adopt measures in this particular case. The determination of the Community interest was based on an appreciation of all the various interests involved, including those of the Community industry, the importers, the raw material suppliers and the users of the product concerned.

7.2. Interest of the Community industry

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

(247) As mentioned above, the Community industry suffered material injury caused by subsidised imports originating in the USA. Not taking measures would most likely lead to a continuation of the negative trend of the financial situation of the Community industry. The situation of the Community industry was particularly marked by a decrease in profitability of 12,6 percentage points between 2005 and the IP due to insufficient price increases. Indeed, in view of the downwards trend in profitability, it is most likely that the financial situation of the Community industry will deteriorate further in the absence of any measures. This would ultimately lead to cuts in production and more closures of production sites, which would therefore threaten employment and investments in the Community.

(248) It is considered that the imposition of measures would restore fair competition on the market. It should be noted that the Community industry's downwards trend in profitability is the result of its difficulty in competing with the subsidised, low-priced, imports originating in the USA. The imposition of anti-subsidisation measures would likely put the Community industry in the position to maintain its profitability at levels considered necessary for this capital intensive industry.

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

7.3. Interest of unrelated importers/traders in the Community

(250) Around 25 unrelated importers/traders in the Community were contacted upon initiation. However no cooperation was received from these parties.

(251) In these circumstances, it was provisionally not possible to precisely assess the possible impact of the measures on importers.

7.4. Interest of users

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

(253) Cooperation was obtained from only one user company. This user submitted a questionnaire response by which it stated that it is in favour of putting an end to the flows of cheap USA imports, because they create distortions of competition in the Community which causes injury to the companies in charge of manufacture and sale of diesel, since certain competitors that do not refrain from buying this cheap priced product have an unfair competition advantage when compared to those that refrain from doing so. It also claimed that measures would allow the restarting of ester production factories (in particular in Germany) and/or will allow projects of creating new esterification factories in the Community to continue. As the European ester is made traditionally of rapeseed (raw material of better quality than the palm or soya used for the production of B99), the augmentation in the number of producers in Europe would therefore mean more products of better quality that would result in a drop in the prices of the ester, for the consumer's final benefit.

(254) One user's association, representing the interests of Shippers in one Member State claimed that the imposition of measures would have an adverse effect on the activity of its members. It alleged that diesel is responsible for 20 to 25 % of the costs of the transport sector and that given the low profitability of the sector (0-5 %), the price of diesel is determinant for the survival of thousands of companies. These allegations could not, however, be verified as no replies to the users questionnaire were received from individual members of the association in question.

(255) In these circumstances, it was provisionally concluded that, on the basis of the information provided, the effect of countervailing measures would appear to be mixed and thus no clear conclusion can be made regarding the existence of compelling reasons, in the interest of users, not to adopt measures in this particular case.

7.5. **Interest of suppliers of raw materials**

(256) Six suppliers replied to the questionnaire. Four supported the imposition of anti-subsidisation measures by submitting that, if anti-subsidisation measures are not to be imposed, the long-term presence of the Community industry would be at risk. Should this happen, there would be a clear negative impact on their situation.

(257) Two others that were related to exporting producers of biodiesel in the USA, submitted that possible measures would not be of significant impact as they would result to a shift in trade flows (switch to imports from countries not covered by the measures).

(258) On the basis of the above, it could be concluded that the imposition of measures would overall have a positive effect on the situation of raw material suppliers.

7.6. **Competition and trade distorting effects**

(259) One interested party alleged an incoherence of the present proceeding with international and Community policy decisions to promote bio-fuels production and sales related to environmental protection and decrease in the dependency from mineral fuels.

(260) In this regard it has to be noted that Article 31 of the basic Regulation requires that special consideration shall be given to the need to eliminate trade distorting effects of injurious subsidisation and to restore effective competition. Against this background, general considerations on environmental protection and supply of mineral diesel cannot be taken into account in the analysis and at the same time cannot justify unfair trade practices.

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

7.7. **Conclusion on Community interest**

(262) The imposition of measures on imports of biodiesel originating in the USA would clearly be in the interests of the Community industry. It would allow the Community industry to grow and to recover from the injury caused by the subsidised imports. If, however, no measures were to be imposed, it is likely that the economic situation of the Community industry would continue to deteriorate and more operators would go out of business. Furthermore, while no clear conclusions could be made with regard to users and importers, the imposition of measures was also expected to be in the interests of raw material suppliers.

(263) In view of the above, it was provisionally concluded that there were no compelling reasons of Community interest against the imposition of countervailing duties in the present case.

8. **PROPOSAL FOR PROVISIONAL ANTI-SUBSIDY MEASURES**

8.1. **Injury elimination level**

(264) In view of the conclusions reached with regard to subsidisation, injury, causation and Community interest, provisional anti-subsidisation measures should be imposed in order to prevent further injury being caused to the Community industry by the subsidised imports.

(265) The level of any countervailing measures should be sufficient to eliminate the injury to the Community industry caused by the subsidised imports, without exceeding the subsidy margins found. When calculating the amount of duty necessary to remove the effects of injurious subsidisation it was considered that any measures should allow the Community industry to obtain a profit before tax that could be reasonably achieved under normal conditions of competition, i.e. in the absence of subsidised imports.

(266) For this purpose a profit margin of 15 % on turnover could be regarded as an appropriate level which the Community industry could have expected to obtain in the absence of injurious subsidisation based on the performance of the Community industry over the first part of the period considered (2004, 2005 and 2006) and considered reasonable for guaranteeing the productive investment on a long-term basis for this newly established industry.

(267) The necessary price increase was then determined on the basis of a comparison of the weighted average import price, as established for the price undercutting calculations, with the non-injurious price of the like product sold by the Community industry on the Community market. The non-injurious price has been obtained by adjusting the sales prices of the sampled Community producers by the actual profit/loss made during the IP and by adding the above mentioned profit margin. Any difference resulting from this comparison was then expressed as a percentage of the total cif import value.

(268) The company granted individual examination referred to in recital (9) above failed to provide meaningful information regarding its export sales to the Community and the resales of its related importer in the Community. The company was requested to provide certain information to correct the shortcomings in the information submitted by the company in its questionnaire response. The Commission also informed the company that, if the requested information was not provided, in accordance with Article 28 of the basic Regulation the deficient information provided in its questionnaire response may be disregarded as it was causing undue difficulties in arriving at accurate findings for this company.

(269) The company was informed about the consequences of its partial co-operation and given an opportunity to comment. However, no response was received within the time limits set for this purpose.

(270) Consequently, the injury elimination level for this company was provisionally set at the level of the highest injury margin found for the sampled companies.

8.2. **Provisional measures**

(271) In the light of the foregoing, it is considered that, in accordance with Article 12(1) of the basic Regulation, provisional countervailing measures should be imposed at the level of the subsidy margin found, but should not be higher than the injury margin calculated in accordance with the lesser duty rule.

(272) On the basis of the above, countervailing duty rates have been established by comparing the injury elimination margins and the subsidy margins. Consequently, the proposed countervailing duties are as follows:

Company	Injury margin	Subsidy margin	Countervailing duty rate
Archer Daniels Midland Company	54,6 %	35,1 %	35,1 %
Cargill Inc.	58,9 %	34,5 %	34,5 %
Green Earth Fuels of Houston LLC	39,8 %	39,0 %	39,0 %
Imperium Renewables Inc.	41,6 %	29,1 %	29,1 %
Peter Cremer North America LP	69,9 %	41,0 %	41,0 %
Vinmar Overseas Limited	69,9 %	41,1 %	41,1 %
World Energy Alternatives LLC	41,7 %	37,6 %	37,6 %
Co-operating non sampled companies	51,4 %	36,0 %	36,0 %

(273) In view of the fact that that the countervailing duty will apply to blends containing by weight more than 20 % of biodiesel, in proportion to their biodiesel content, it is considered appropriate for the effective implementation of the measures by the customs authorities of the Member States to determine the duties as fixed amounts on the basis of the biodiesel content.

(274) The individual company countervailing duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the country-wide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in the country concerned and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation with its name and address, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.

9. **DISCLOSURE**

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

HAS ADOPTED THIS REGULATION:

Article 1

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

2. The rate of the provisional countervailing duty applicable to the products described in paragraph 1 and manufactured by the companies listed below, shall be as follows:

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

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

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

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

Article 2

1. Without prejudice to Article 30 of Regulation (EC) No 2026/97, interested parties may request disclosure of the essential facts and considerations on the basis of which this Regulation was adopted, make their views known in writing and apply to be heard orally by the Commission within 16 days of the date of entry into force of this Regulation.

2. Pursuant to Article 31(4) of Regulation (EC) No 2026/97, the parties concerned may comment on the application of this Regulation within one month of the date of its entry into force.

Article 3

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

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

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

Done at Brussels, 11 March 2009.

For the Commission
Catherine ASHTON
Member of the Commission

ANNEX

US co-operating exporting producers not sampled

Company Name	City	TARIC additional code
AC & S Inc.	Nitro	A941
Alabama Clean Fuels Coalition Inc.	Birmingham	A940
Amereco	Phoenix	A941
BioPur Inc.	Bethlehem	A941
Central Iowa Energy LLC	Newton	A940
Chesapeake Custom Chemical Corp.	Ridgeway	A940
Delta BioFuels Inc.	Natchez	A940
East Fork Biodiesel LLC	Algona	A940
Ecogy Biofuels LLC	Tulsa	A940
ED&F Man Biofuels Inc.	New Orleans	A940
Freedom Biofuels Inc.	Madison	A940
Freedom Fuels LLC	Mason City	A941
Fuel Bio	Elizabeth	A940
FUMPA Bio Fuels	Redwood Falls	A940
Galveston Bay Biodiesel LP (BioSelect Fuels)	Houston	A940
GeoGreen Fuels LLC	Houston	A940
Griffin Industries Inc.	Cold Spring	A940
Huish Detergents Inc.	Salt Lake City	A940
Incobrasa Industries Ltd.	Gilman	A940
Independence Renewable Energy Corp.	Perdue Hill	A940
Innovation Fuels Inc.	Newark	A940
Integrity Biofuels	Morristown	A941
Iowa Renewable Energy LLC	Washington	A940
Johann Haltermann Ltd.	Houston	A940
Lake Erie Biofuels LLC	Erie	A940
Louis Dreyfus Agricultural Industries LLC	Wilton	A940
Middletown Biofuels LLC	Blairsville	A940
Musket Corporation	Oklahoma City	A940
Natural Biodiesel Plant LLC	Hayti	A941
Nova Biofuels Clinton County LLC	Clinton	A940
Organic Fuels Ltd.	Houston	A940

Company Name	City	TARIC additional code
Owensboro Grain Company LLC	Owensboro	A940
Pacific Biodiesel Inc.	Kahului	A941
Peach State Labs Inc.	Rome	A940
Philadelphia Fry-O-Diesel Inc.	Philadelphia	A940
Piedmont Biofuels Industrial LLC	Pittsboro	A941
Prairie Pride	Deerfield	A941
RBF Port Neches LLC	Houston	A940
REG Ralston LLC	Ralston	A940
Riksch BioFuels LLC	Crawfordsville	A940
Sanimax Energy Inc.	DeForest	A940
Southeast BioDiesel LLC	Charlotte	A941
Soy Solutions	Milford	A940
SoyMor Biodiesel LLC	Albert Lea	A940
Stepan Company	Northfield	A941
Trafigura AG	Stamford	A940
U.S. Biofuels Inc.	Rome	A940
United Oil Company	Pittsburgh	A940
Vitol Inc.	Houston	A940
Western Dubque Biodiesel LLC	Farley	A940
Western Iowa Energy LLC	Wall Lake	A940
Western Petroleum Company	Eden Prairie	A940
Yokaya Biofuels Inc.	Ukiah	A941