

Transition review of the EU anti-dumping and countervailing measures applicable to imports of biodiesel originating in the United States of America (TD0004 & TS0005)

Diamond Green Diesel

Arguments relating to the product scope of the investigations

Executive summary

Diamond Green Diesel ("DGD") hereby requests the exclusion of "renewable diesel" from the product scope of the current review investigations on the basis that "biodiesel" and "renewable diesel" cannot be considered as "like" within the meaning of The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019¹.

This submission demonstrates that "renewable diesel" has different physical, chemical and technical characteristics when compared to "biodiesel". "Renewable diesel" is produced by hydro-processing fats and oils which produces alkanes, identical to some of the compounds found in conventional diesel fuel. "Biodiesel" is produced through esterification of fats and oil which produces fatty methyl esters ("FAME"). Due to different production processes and chemical characteristics of both products, "renewable diesel" can be stored for a longer period of time. Moreover, "renewable diesel" is considered an advanced biofuel that will appeal to the more environmentally-friendly consumers compared to "biodiesel". The consumers concerned with engine performance and durability will also prefer "renewable diesel".

"Renewable diesel" is substantially more expensive than "biodiesel". For example, [CONFIDENTIAL: This information is only available upon the payment of a subscription fee and is subject to copyrights].

Finally, it would be against the UK's interests to maintain protective measures on "renewable diesel" in light of the UK's ambitious climate targets of achieving 'Net Zero' carbon emissions by 2050.

1. INTRODUCTION

On 10 July 2009 the EU imposed definitive anti-dumping² and countervailing³ duties on imports of biodiesel originating in the United States of America ("U.S."). These measures were extended by Council Implementing Regulation (EU) No 444/2011⁴ and Council Implementing Regulation (EU) No 443/2011⁵, following an anti-circumvention investigation, to imports of biodiesel consigned from Canada, whether declared as originating in Canada or not. The measures currently in force are

¹ As amended by the Trade Remedies (Amendment) (EU Exit) Regulations 2019, the Trade Remedies (Amendment) (EU Exit) Regulations 2020, and the Trade Remedies (Amendment) (EU Exit) (No. 2) Regulations 2020.

² Council Regulation (EC) No 599/2009 of 7 July 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America, 10.7.2009, OJ L 176/26.

³ Council Regulation (EC) No 598/2009 of 7 July 2009 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America, 10.7.2009, OJ L 176/1.

⁴ Council Implementing Regulation (EU) No 444/2011 of 5 May 2011 extending the definitive anti-dumping duty imposed by Regulation (EC) No 599/2009 on imports of biodiesel originating in the United States of America to imports of biodiesel consigned from Canada, whether declared as originating in Canada or not, and extending the definitive anti-dumping duty imposed by Regulation (EC) No 599/2009 to imports of biodiesel in a blend containing by weight 20 % or less of biodiesel originating in the United States of America, and terminating the investigation in respect of imports consigned from Singapore, 15.5.2011, OJ L 122/12.

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

imposed by Commission Implementing Regulation (EU) 2015/1518⁶ and Commission Implementing Regulation (EU) 2015/1519⁷, following an expiry review investigation initiated on 10 July 2014⁸. These measures were set to expire on 16 September 2020.

On 11 August 2020, the UK Secretary of State for International Trade published two notices to initiate a transition review of the EU anti-dumping and anti-subsidy measures concerning biodiesel from the U.S.⁹

The product subject to the transition reviews is defined as: *“fatty-acid mono-alkyl esters (FAME) and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as ‘biodiesel’, in pure form or in a blend containing by weight more than 20 % of fatty-acid monoalkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin and originating in the U.S. and consigned from Canada”*. The customs classification of the product provided for information purposes are:

- ex 1516 20 98;
- ex 1518 00 91;
- ex 1518 00 99;
- ex 2710 19 43;
- ex 2710 19 46;
- ex 2710 19 47;
- ex 2710 20 11;
- ex 2710 20 16;
- ex 3824 99 92;
- ex 3826 00 10; and
- ex 3826 00 90.

2. SCOPE OF THE UK TRANSITION REVIEWS

Pursuant to the Guidance document on transition reviews ("Guidance"), the UK Department for International Trade ("DIT") may find the original scope as published in the Notice of Determination is not appropriate for a UK-specific measure.¹⁰ DIT may therefore amend, if appropriate, the description of the goods concerned in the review.

In accordance with DIT's Guidance¹¹, the following non-exhaustive list of criteria are taken into account to assess whether goods are "like":

⁶ Commission Implementing Regulation (EU) 2015/1518 of 14 September 2015 imposing a definitive anti-dumping duty on imports of biodiesel originating in the United States of America following an expiry review pursuant to Article 11(2) of Council Regulation No 1225/2009, 15.9.2015, OJ L 239/69.

⁷ Commission Implementing Regulation (EU) 2015/1519 of 14 September 2015 imposing definitive countervailing duties on imports of biodiesel originating in the United States of America following an expiry review pursuant to Article 18 of Council Regulation No 597/2009, 15.9.2015, OJ L 239/99.

⁸ Notice of Initiation of an expiry review of the anti-dumping measures applicable to imports of biodiesel originating in the United States of America, 10.7.2014, OJ C 217/14; Notice of Initiation of an expiry review of the countervailing measures applicable to imports of biodiesel originating in the United States of America, 10.7.2014, OJ C 217/25.

⁹ Notice of Initiation of Transition Review No. 0004, Anti-dumping duties on biodiesel originating in the United States of America and consigned from Canada, 11 August 2020; Notice of Initiation of Transition Review No. 0005, Anti-subsidy amounts on biodiesel originating in the United States of America and consigned from Canada, 11 August 2020.

¹⁰ <https://www.gov.uk/government/publications/the-uk-trade-remedies-investigations-process/how-we-carry-out-transition-reviews-into-eu-measures>

¹¹ UK DIT Guidance states: *In some cases, we may find the original scope as published in the Notice of Determination is not appropriate for a UK-specific measure.*

We may need to amend the description of the goods concerned in the review and the period of investigation. For reviews of countervailing amounts, we may also amend the subsidies described in the scope, for instance, to include subsidies which were not in effect when the EU undertook its analysis. We will also consider whether the proposed revision may prejudice the interests of any interested party or contributor. <https://www.gov.uk/government/publications/the-uk-trade-remedies-investigations-process/how-to-make-an-application-for-a-trade-remedies-investigation>

- physical likeness, such as physical characteristics
- commercial likeness, including competition and distribution channels
- functional likeness, such as end-use or if the goods can be substituted for each other
- similarities in production, such as method and inputs
- other relevant characteristics

The DIT Guidance on “like goods” is based on Article 2.6 of the WTO Anti-Dumping Agreement (“ADA”). A “like product” shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of the such a product, another product which although not alike in all respects has characteristics closely resembling those of the product under consideration.

Relevant factors for the determination of “likeness” in the context of the General Agreement on Tariffs and Trade (“GATT”) are the following:

- The examination of likeness should be done on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a “similar” products.¹²
- The physical quality and characteristics, end-uses, tariff classification and internal taxes and regulations.¹³
- The product’s end-use in a given market, consumers’ tastes and habits, and the product’s properties, nature and quality.¹⁴

The assessment made by the European Commission in the context of the original 2008 anti-dumping and countervailing investigations concerned imports of biodiesel from the U.S. It is worth noting that the European Commission did not specifically examine whether “renewable diesel” and “biodiesel” can be considered like products.¹⁵ Once the measures were in place, the question of whether it was appropriate to have “renewable diesel” included in the scope of the measures was not further examined.

3. RENEWABLE DIESEL IS NOT “LIKE” BIODIESEL

DGD will demonstrate below that “renewable diesel” cannot be considered “like” “biodiesel” on the basis of different physical, chemical and technical characteristics as well as different consumer perceptions and sales prices between both products.

3.1 Different physical, chemical and technical characteristics and different production methods

“Renewable diesel” does not have the same physical characteristics as “biodiesel”.

¹² Appellate Body Report, DS10, *Japan – Alcoholic Beverages II*, p. 20.

¹³ Panel Report, DS371, *Thailand - Cigarettes (Philippines)*, paras. 7.425-7.451.

¹⁴ Appellate Body Report, DS31, *Canada – Periodicals*, p. 21-22.

¹⁵ For example, the European Commission assessed whether pure biodiesel (B100) and blends with mineral diesel were considered “like products” by assessing the products’ basic physical, chemical and technical characteristics, as well as sales channels and end-uses. The Commission found that the various possible blend variations did not alter the basic definition, its characteristics or the perception that various parties have of the product but this assessment was limited to biodiesel in pure form and biodiesel in blended form. It did not include blends of other products such as renewable diesel. Commission Regulation (EC) No 194/2009 of 11 march 2009 imposing provisional countervailing duty on imports of biodiesel originating in the United States of American 13.3.2009, OJ L 67, p. 50, recital 35.

"Biodiesel" is produced by esterification of the triglyceride, with methanol resulting in FAME and glycerol. 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, resulting in FAME. "Renewable diesel" is produced by hydrogenation, i.e. treatment with hydrogen, of the triglycerides/fatty acids resulting in a hydrocarbon diesel fuel. Hydrogenation uses hydrogen rather than methanol as catalyst to trigger the chemical reaction. FAME and hydrocarbon diesel fuel are different types of fuel to use with compression ignition engines.

According to the European diesel standard EN590, "biodiesel" contains oxygen and is limited to a maximum of 7% blend by volume¹⁶. "Renewable diesel" contains no oxygen since the hydrogenation process removes all oxygen from vegetable oils. It therefore has no limitations in the EN590 standard. "Renewable diesel" is a pure hydrocarbon, whereas "biodiesel" contains 11% oxygen by weight. The oxygen content impacts several performance and environmental limitations, including but not limited to higher nitrogen oxide (NOx) emissions, inferior low temperature operability, and degradation over time.

There is no blending limitation for "renewable diesel". The blending is determined to fulfil the standard (e.g., density), and up to 50-70% volume blend is generally feasible.

Unlike "renewable diesel", blends with more than 7% "biodiesel" require engine modifications. Even lower blends of "biodiesel" can lead to filter blocking. "Renewable diesel" does not have this issue.

"Renewable diesel" can be stored, handled and blended just like fossil diesel. By contrast, "biodiesel" comes with blending and handling limits necessary to preserve product usability and vehicle operability. When stored for too long, biodiesel is prone to bacterial (filter blocking) growths and product separation where the bio-components drop out and form wax-like substances. Conversely, "renewable diesel" has a much longer storage life than "biodiesel" and a reduced need for regular testing because of its extended storage lifespan (versus quicker degradation of "biodiesel"). Additionally, existing infrastructure for distribution does not need to be modified for "renewable diesel", it is considered simply a "drop in" fuel, endorsed by a wide range of OEMs and meeting existing fuel standards, including EN15940 standard for paraffinic fuels, ASTM D975 19B and Fuel Quality Directive 2009/30/EC Annex II.

The table below summarizes the different physical, chemical and technical characteristics between "renewable diesel" and "biodiesel" and the resulting differences in terms of storage and handling.

Property	Renewable Diesel	Biodiesel (FAME)
Production process	Hydro-processing	Esterification
BTU ¹⁷ content	Same as diesel fuel	Lower than diesel fuel
Cold temperature issues	At the same level as fossil diesel	Issues with cloud point and pour point; more difficult to use in colder temperatures
NOx tailpipe emissions	Lower than diesel fuel; more environmentally friendly	Higher than diesel fuel

¹⁶ Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC, 5.6.2009, OJ L 140/88. See Annex II with the environmental specifications for market fuels to be used for vehicles equipped with compression ignition engines in the EU, in particular the 7% limit for FAME content.

¹⁷ BTU refers to British thermal unit, which is a measure of the heat content of fuels or energy sources.

Stability / storage	No issues; no clogging; can be stored for a long time	Degrades over time; clogging; cannot be stored for a long time.
Blend Limit EN590	50-70% (by density)	7%
Engine modifications	None required	Required

3.2 Different end-use and consumer perception (no functional likeness)

There is a difference in end-use and consumer perception between "renewable diesel" and "biodiesel", in particular with regard to environmental considerations and engine performance.

With regard to the environmental considerations, "renewable diesel" has a superior nitrogen oxides (NOx) emissions profile compared to "biodiesel" and fossil diesel blends. "Renewable diesel" generally also emits less CO₂, particulate matter and carbon monoxide emissions due to the fact that " it allows for a higher blend and hence a higher displacement of incumbent fossil due to the permissible higher blending limits. As also indicated in the table above, "biodiesel" blend is limited to 7% whereas "renewable diesel" blends up to 50-70%.

In light of the above, a consumer concerned with decreasing their impact on the environment would therefore opt for "renewable diesel" rather than "biodiesel."

"Renewable diesel" also has a higher cetane index score than "biodiesel", which leads to higher performance in ignition engines. "Renewable diesel" produces less particles during combustion which in turn reduces the aging of engine oils¹⁸. Therefore, consumers concerned with engine performance and durability would also prefer "renewable diesel" over "biodiesel."

Finally, "renewable diesel," as a true "drop in fuel", does not require special handling or blending requirements at the terminal level, and it fits in seamlessly in the existing petroleum infrastructure and distribution system. Conversely, "biodiesel" must be blended at low levels or segregated, as it is not a true hydrocarbon.

3.3 Significant price differences

Given its higher properties and superior quality, "renewable diesel" is more expensive than "biodiesel". "Renewable diesel" trades on average at a premium of up to [CONFIDENTIAL: This information is only available upon the payment of a subscription fee and is subject to copyrights]. Recent Argus¹⁹ data highlights this price differential.

The chart below shows Argus' assessment of class 2 "renewable diesel"²⁰ (i.e. derived from used cooking oil/palm wastes) compared to "biodiesel" produced from used cooking oil methyl ester ("UCOME"). Over a period of approximately one month, mid-September to mid-October 2020, the graph illustrates the highest and lowest prices (USD per tonne) at which UCOME and "renewable diesel" were traded on the EU market. [CONFIDENTIAL: This information is only available upon the payment of a subscription fee and is subject to copyrights].

¹⁸ See for example in this regard the marketing materials of Crown Oil for HVO fuel, which illustrates the various differences between HVO and biodiesel.

¹⁹ Argus is a reputable independent provider of energy and commodity price benchmarks <https://www.argusmedia.com/>. Please note that Argus have only begun to capture the price data referenced in this submission as from September 2020.

²⁰ Please note that in the graph used by Argus "renewable diesel" is referred to as "HVO", which stands for hydrotreated vegetable oil. HVO is more commonly used in the EU, but it refers to the same product as what is called "renewable diesel" in the present submission.

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The graph below reflects the average price²¹ in USD per tonne for both UCOME and “renewable diesel” over the same period of time as [CONFIDENTIAL: This information is only available upon the payment of a subscription fee and is subject to copyrights].

[CONFIDENTIAL: This information is only available upon the payment of a subscription fee and is subject to copyrights].

3.4 It would be against UK’s economic interests to include “renewable diesel” in the scope of the transition review

In accordance with Paragraph 25 of Schedule 4 of the Taxation (Cross-Border Trade) Act 2018, the Department of International Trade should apply the Economic Interest Test (“EIT”) when investigating trade practices that may be causing injury to the UK industry. The DIT Guidance confirms the application of the EIT in the context of transition reviews.²²

Following the end of the Brexit transition period, the UK will no longer be bound by the RED II renewable energy targets. Instead, the UK adopted an amendment to the Climate Change Act of 2008 to commit to bringing all GHG emissions to net zero by 2050²³. The Climate Change Committee, the UK’s independent climate advisory body, indicated that, among others, a major expansion of renewable and other low-carbon power generation is needed, in particular for the transport and heating sectors.²⁴ By consequence, demand of “renewable diesel” is expected to follow an increasing trend in the UK. High blend fuels such as “renewable diesel” will be critical to the next stages of the UK’s decarbonisation.

To DGD’s knowledge, there are no existing or planned levels of “renewable diesel” production in the UK. It follows that the UK is 100% dependent on third country imports for “renewable diesel”. By extending the measures to “renewable diesel”, the UK would be dependent on other – namely EU – based sources of “renewable diesel” which are likely to be more expensive and hence negatively impacting UK consumers.

Excluding “renewable diesel” from the scope of the transition measures would reduce costs for consumers, who are currently relying on limited supply of mostly EU-origin “renewable diesel”. In addition, it would enable the UK to take advantage of its lower carbon intensity based combustion fuel which would in turn contribute significantly to the UK’s GHG reduction targets, including the ‘Net Zero’ emissions by 2050 legislation.

²¹ The average price of the minimum and maximum prices indicated in the Argus table above.

²² <https://www.gov.uk/government/publications/the-uk-trade-remedies-investigations-process/how-we-apply-the-economic-interest-test>

²³ <https://www.legislation.gov.uk/uksi/2019/1056/contents/made>

²⁴ <https://www.theccc.org.uk/uk-action-on-climate-change/reaching-net-zero-in-the-uk/>