

Commission Decision of 20 December 2012 terminating the anti-subsidy proceeding concerning imports of bioethanol originating in the United States of America and terminating the registration of such imports imposed by Regulation (EU) No 771/2012 (2012/825/EU)

## COMMISSION DECISION

of 20 December 2012

terminating the anti-subsidy proceeding concerning imports of bioethanol originating in the United States of America and terminating the registration of such imports imposed by Regulation (EU) No 771/2012

(2012/825/EU)

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community<sup>(1)</sup> ('the basic Regulation'), and in particular Articles 14 and 15 thereof,

After consulting the Advisory Committee,

Whereas:

### 1. PROCEDURE

#### 1.1. INITIATION

- (1) On 25 November 2011, the European Commission ('the Commission') announced, by a notice published in the *Official Journal of the European Union*<sup>(2)</sup>, the initiation of an anti-subsidy proceeding ('AS proceeding' or 'the proceeding') with regard to imports into the Union of bioethanol originating in the United States of America ('USA' or 'the country concerned').
- (2) On the same day, the Commission announced by a notice published in the *Official Journal of the European Union*<sup>(3)</sup>, the initiation of an anti-dumping proceeding with regard to imports into the Union of bioethanol originating in the USA and commenced a separate investigation ('AD proceeding').
- (3) The AS proceeding was initiated following a complaint lodged on 12 October 2011 by the European Producers Union of Renewable Ethanol Association (ePURE) ('the complainant') on behalf of producers representing more than 25 %, of the total Union production of bioethanol. 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 an investigation.

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- (4) Prior to the initiation of the AS proceeding and in accordance with Article 10(7) of the basic Regulation, the Commission notified the authorities of the USA that it had received a properly documented complaint alleging that subsidised imports of bioethanol originating in the USA were causing material injury to the Union industry. The authorities of the USA were 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 authorities of the USA accepted the invitation and consultations were subsequently held on 17 November 2011. During the consultations no mutually agreed solution was found.

#### 1.2. PARTIES CONCERNED BY THE PROCEEDING

- (5) An information document containing the essential facts and considerations on the basis of which it was decided not to impose provisional countervailing measures (information document) was disclosed to interested parties in August 2012. Several interested parties made written submissions making their views known on these findings. The parties who so requested were granted the opportunity to be heard. The Commission continued to seek information it deemed necessary for its definitive findings. The oral and written comments submitted by the interested parties were considered and taken into account, where appropriate.
- (6) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the termination of both the anti-subsidy investigation concerning imports of bioethanol originating in the USA and the registration of such imports<sup>(4)</sup>. The parties were also granted a period within which they could make representations subsequent to this final disclosure.

#### *Sampling of exporters/producers in the USA*

- (7) In view of the potentially large number of exporters/producers in the USA, sampling was envisaged in the notice of initiation in accordance with Article 27 of the basic Regulation.
- (8) 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 asked to make themselves known to the Commission within 15 days from the date of the initiation of the investigation and to provide, as specified in the notice of initiation, basic information on their activities related to bioethanol during the period from 1 October 2010 to 30 September 2011 ('the investigation period' or 'the IP').
- (9) The relevant US authorities were also consulted for the selection of a representative sample.
- (10) More than 60 companies made themselves known and provided the requested information within the 15 days deadline.

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- (11) In accordance with Article 27 of the basic Regulation, The Commission selected a sample based on the largest representative quantity of exports of bioethanol to the Union which could reasonably be investigated within the time available. The sample selected on that basis consisted of five bioethanol producers and one trader.
- (12) The investigation also showed that although exporters mentioned exports to the Union in the sampling questionnaire they received, none of the sampled producers exported bioethanol directly to the Union market but sold it to unrelated blenders/traders in the USA which then blended it with gasoline and resold it. In order to identify their exports to the Union, the producers relied mainly on data they received from the unrelated blenders/traders customers.
- (13) In this context, it should be noted that the information provided by the US authorities demonstrated that all bioethanol sold in and exported from the United States benefitted from the main subsidy scheme, in particular when it was blended with gasoline. It was the blending activity and the sale of the taxable mixture that triggered the subsidization of bioethanol in the US. In the present case it was found that the main subsidy identified in the US was claimed by and granted to the blenders. The companies selected in the sample were mainly producers of bioethanol and only to a smaller extent were blending bioethanol and it was predominantly the traders/blenders that also exported their products to the Union that received the main subsidy based on the bioethanol contained in the blends they were producing. Consequently, the sample, which is mainly composed of producers of bioethanol which did not export directly to the Union and which did basically not blend bioethanol into fuel mixtures, was not reliable for establishing the level of subsidisation in the present case.

#### 1.2.1. **Sampling of Union producers**

- (14) In view of the potentially large number of Union producers, sampling was envisaged in the notice of initiation in accordance with Article 27 of the basic Regulation.
- (15) In the notice of initiation the Commission announced that it had provisionally selected a sample of Union producers. This sample consisted of five companies and groups, out of the 19 Union producers that were known prior to the initiation of the investigation. The sample was selected on the basis of the production volume of bioethanol during the investigation period and the location of the known producers. This sample represented 48 % of the total estimated Union production during the IP.
- (16) However, the investigation revealed that the groups included in the sample consisted of a large number of companies or single entities producing the like product. In this case it would have meant to investigate thirteen companies. It was thus not possible to investigate all of them given the time available

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for the investigation. It was decided to re-examine the data available for the initial sample. This examination led to the conclusion that the sample should be based on the largest individual producing entities and not on groups of producers taking also into account a certain geographical spread amongst sampled producers.

- (17) Hence, a definitive sample of six individual producers was ultimately selected based on representativity in terms of the production and sales volume of bioethanol during the IP and the geographical location of the producer. These producers represent 36 % of the total estimated Union production and 44 % of the total production reported by the companies that submitted data for the selection of a sample. This sample was deemed to be representative for the Union industry.
- (18) Interested parties were given the opportunity to comment on the appropriateness of the choice of the sample.
- (19) Some parties claimed that the sample was less representative than the one originally selected which included groups of companies. In their view, an objective analysis of the situation of the Union industry could only be made by including all companies which are part of groups in the sample. They alleged in particular that costs and revenues could be allocated to certain companies of a group which are not visited and may thus not be included in the injury analysis.
- (20) In this respect it should be noted that the Commission duly considered and examined the data provided by all non-sampled companies and in particular the companies belonging to groups, in order to make sure that all costs and revenues involved in the production and sale by the companies selected had been fully and correctly reflected in the injury analysis. Furthermore, the six companies finally selected producers represented 36 % of the total estimated Union production and this was considered to be representative for the purposes of Article 27 of the basic Regulation.
- (21) Some parties contested the inclusion in the sample of Union producers which were in a start-up phase. They also claimed that one company with important idle capacity in 2011, located in a Member State that did not implement the Renewable Energies Directive ('RED'), should not have been included in the sample. Parties added that in case these companies would be finally included in the sample, the Commission should adjust their data in order to account for these extraordinary circumstances.
- (22) It is considered that the fact that companies recently started or resumed operations does not preclude them from being part of the sample. The inclusion of these companies is not in contravention with the criteria for the selection of a sample as laid down in Article 27 of the basic Regulation. With regard to the adjustment of their data, parties did not provide any specific issue or substantiated evidence to support their claim, nor a basis on how to make

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the claimed adjustment. Furthermore, the investigation did not reveal any cost, such as for example accelerated depreciations, which should be adjusted to correct any distortion due to the start-up of activity. Hence, this claim is rejected.

- (23) Some parties also disputed the exclusion from the sample of one company that was provisionally selected and located in a Member State with high consumption and production of bioethanol. They claimed that this company performed particularly well and alleged that this was the reason for its exclusion from the sample. They further argued that the selection of the sample had been skewed towards finding injury. According to these parties the Commission should have sent so called mini-questionnaires to all producers to collect the relevant data in order to select a sample. In this respect it should be noted that the company in question informed the Commission that it could no longer be included in the sample. Regarding the sending of mini-questionnaires, it should be noted that, prior to the selection of the sample, the Commission requested information from all Union producers known to be concerned in order to collect the relevant data for the purpose of the selection of a sample. The above claims were therefore rejected.
- (24) Finally, it was claimed that the sample should have included companies producing bioethanol from sugar beet since production from this raw material can be much more profitable than production from, for example, wheat. Even though this claim was not substantiated, the information available has shown that bioethanol produced from sugar beet represents only a small part of total Union production, around 12 % in 2011 and that two of the companies included in the sample partially use sugar beet as feedstock to produce bioethanol. Therefore, this claim was rejected.

#### 1.2.2. Sampling of unrelated importers

- (25) In view of the potentially large number of importers involved in the proceeding, sampling was envisaged for importers in the notice of initiation in accordance with Article 27 of the basic Regulation.
- (26) Only three importers provided the requested information and agreed to be included in the sample within the deadline set in the notice of initiation. In view of the limited number of cooperating importers, sampling was not deemed to be necessary.

#### 1.2.3. Questionnaire replies and verifications

- (27) The Commission sent questionnaires to all parties known to be concerned. Questionnaires were thus sent to the authorities of the USA, the sampled US exporters/producers, the sampled Union producers, the three cooperating unrelated importers in the Union and to all users known to be concerned by the investigation.

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(28) Replies were received from the authorities of the USA, the sampled US exporters/producers, the sampled Union producers, two unrelated importers and four users.

(29) The Commission sought and verified all the information provided by interested parties and deemed necessary for the purposes of a determination of subsidisation, resulting injury and Union interest.

(30) Verification visits were carried out at the following US authorities:

*Federal authorities of the USA*

- Department of Agriculture
- Department of Commerce
- Department of Energy
- Department of the Treasury
- International Trade Administration
- Office of the United States Trade Representative

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

*Exporters/producers in the USA*

- CHS Inc, Inver Grove Heights, Minnesota
- Marquis Energy LLC, Hennepin, Illinois
- Patriot Renewable Fuels LLC, Annawan, Illinois
- Plymouth Energy Company LLC, Merrill, Iowa
- POET LLC, Sioux Falls, South Dakota
- Valero Renewable Fuels Company LLC, San Antonio, Texas

*Producers in the Union*

- Abengoa Energy Netherlands B.V., Rotterdam, the Netherlands
- BioWanze, S.A., Wanze, Belgium.
- Crop Energies Bioethanol GmbH, Mannheim, Germany
- Ensus, Yarm, United Kingdom
- Lantmännen Energi / Agroetanol, Norrköping, Sweden
- Tereos BENP, Lillebonne, France

*Unrelated importers in the Union*

- Shell Trading Rotterdam B.V., Rotterdam, the Netherlands
- Greenergy Fuels Limited, London, United Kingdom

*Users in the Union*

- Shell Nederland Verkoopmaatschappij B.V., Rotterdam, the Netherlands

### 1.3. INVESTIGATION PERIOD

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- (32) The investigation of subsidisation and injury covered the period from 1 October 2010 to 30 September 2011. The examination of trends relevant for the assessment of injury covered the period from January 2008 to the end of the IP ('the period considered').

## 2. PRODUCT CONCERNED AND LIKE PRODUCT

### 2.1. PRODUCT CONCERNED

- (33) The product concerned is bioethanol, sometimes referred to as 'fuel ethanol', i.e. ethyl alcohol produced from agricultural products, denatured or undenatured, excluding products with a water content of more than 0,3 % (m/m) measured according to the standard EN 15376, as well as ethyl alcohol produced from agricultural products contained in blends with gasoline with an ethyl alcohol content of more than 10 % (v/v) originating in the USA, currently falling within CN codes ex 2207 10 00, ex 2207 20 00, ex 2208 90 99, ex 2710 12 11, ex 2710 12 15, ex 2710 12 21, ex 2710 12 25, ex 2710 12 31, ex 2710 12 41, ex 2710 12 45, ex 2710 12 49, ex 2710 12 51, ex 2710 12 59, ex 2710 12 70, ex 2710 12 90, ex 3814 00 10, ex 3814 00 90, ex 3820 00 00 and ex 3824 90 97.
- (34) Bioethanol can be produced from various agricultural feedstocks, such as sugar cane, sugar beet, potatoes, manioc, and corn. In the USA a distinction on the basis of the various feedstocks is made, as described below:
- (a) The Conventional Biofuel (mainly produced from corn feedstock and commonly called corn ethanol) which is defined as a renewable fuel derived from corn starch produced from facilities that commenced construction after the date of enactment (December 19, 2007) and which must achieve in the future a 20 % reduction in greenhouse gas ('GHG') emissions compared to baseline lifecycle GHG emissions of gasoline and diesel.
- (b) The Advanced Biofuel which is defined as a renewable fuel other than ethanol derived from corn starch, which is derived from renewable biomass and has lifecycle GHG emissions, as determined by the Energy Policy Act ('EPA') Administrator, that are at least 50 % less than baseline GHG emissions. This term includes "cellulosic biofuels" such as bioethanol and "biomass-based diesel." The schedule for Advanced Biofuels includes the schedule for Cellulosic Biofuels, Biomass-Based Diesel, and Undifferentiated Advanced Biofuels.
- (35) More specifically, Cellulosic Biofuel<sup>(5)</sup> is defined as a renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle GHG emissions, as determined by the EPA Administrator, that are at least 60 % less than the baseline lifecycle GHG emissions. Cellulosic biofuels include bioethanol. There are researches and pilot projects largely supported by the US Federal Government for producing Advanced Biofuels and in particular cellulosic bioethanol, produced in

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particular out of agricultural and forestry wastes. According to US officials and publicly available data<sup>(6)</sup>, the production of this type of biodiesel will reach around 4 billion litres in 2014 and more than 50 billion litres by 2021. Production of cellulosic bioethanol was negligible in the IP.

- (36) During the investigation period up to now corn has been the main feedstock used in the USA, while the main feedstock used in the Union is wheat.
- (37) The investigation showed that bioethanol is generally sold in its pure form to blenders/traders which blend<sup>(7)</sup> it with gasoline in particular to produce high level blends which are exported or sold on the domestic market for further blending and consumption. Blending is not a very complex operation and may be accomplished by mixing the products in special tanks adding the desired percentages of bioethanol and gasoline.
- (38) To identify the various types of bioethanol, bioethanol blends or mixtures in use around the world, ethanol fuel mixtures have "E" numbers which describe the percentage of ethanol fuel in the mixture by volume. For example, E85 is 85 % anhydrous ethanol and 15 % gasoline. Low ethanol blends, from E5 to E25, are also known as gasohol, though internationally the most common use of the term gasohol refers to the E10 blend. Blends of E10 or less have been used in more than twenty countries around the world by 2011, led by the USA, where almost all retail gasoline sold in 2010 was blended with 10 % of ethanol.
- (39) The investigation showed that all types of bioethanol are considered to be biofuels under the current National Renewable Fuel Standard program (RFS1) established under the Energy Policy Act of 2005, which amended the Clean Air Act by establishing the first national renewable fuel standard. The U.S. Congress gave the US Environmental Protection Agency (EPA) the responsibility to coordinate with the US Department of Energy, the US Department of Agriculture, and stakeholders to design and implement this program.
- (40) As a result of the policy engaged in the USA for a number of years for the promotion of bioethanol, the USA became the largest worldwide producer of bioethanol as from 2005 accounting for 57,5 % of global production. In 2009, the EPA announced that the Renewable Fuel Standard will require most refiners, importers and non-oxygenate blenders of gasoline to displace around 10 % of their gasoline with renewable fuels such as ethanol. That requirement aimed to ensure that at least 11 billion US gallons of renewable fuels would be produced in 2009, in particular to keep with the targets established by the Energy Independence and Security Act of 2007 (EISA) but also to export to other markets.
- (41) Based on official sources, market and publicly available information<sup>(8)</sup>, all types of bioethanol and bioethanol contained in blends, namely mixtures of bioethanol with mineral gasoline, which are produced and sold in the USA



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and exported are considered to be bioethanol fuels and are part of a legislative package concerning energy efficiency and renewable energy and alternative fuels in the USA.

- (42) It has been found that all types of bioethanol and bioethanol in blends covered by this investigation, despite possible differences in terms of feedstock 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 minor variations in the product concerned do not alter its basic definition, its characteristics or the perception that various parties have of it.
- (43) Some parties claimed that the definition of the product concerned was not clear, in particular because it did not allow for distinguishing the bioethanol for fuel applications from that destined for other applications. Hence, they claimed that the investigation should cover ethanol for all uses and ethanol from all sources, including synthetic ethanol that competes with bioethanol for industrial use.
- (44) Another party claimed the opposite, namely that the investigation should only cover bioethanol for fuel applications and that bioethanol for industrial use should thus be excluded.
- (45) In this context, it is noted that the product concerned should primarily be defined on the basis of its basic physical, technical and chemical characteristics and not its uses or applications. A product which has various applications may indeed have the same or similar basic characteristics notwithstanding its further use and in certain circumstances it may be necessary to deepen the analysis of the product definition and the product scope in the light of the specificity of the industry and the market.
- (46) In the present case, it was clear that the notice of initiation did not intend to cover synthetic ethanol in the product definition. Synthetic ethanol has different characteristics than bioethanol and does not correspond to the above criteria linked to the definition of the product concerned. There is no producer that focusses on the production of that product which took part in this investigation. Therefore, synthetic ethanol cannot be included in the definition of the product concerned and is outside the scope of the investigation.
- (47) During the investigation of operators in the US and in the Union, no questions regarding possible problems for distinguishing bioethanol for fuel application and bioethanol destined to other applications were raised and thus no relevant evidence could be examined. The investigation confirmed that subsidization in the USA is intended for fuel bioethanol, namely bioethanol included in a fuel mixture and the investigation of Union producers focussed on bioethanol destined to fuel applications and not for other uses.

## 2.2. LIKE PRODUCT

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- (48) It was found that bioethanol manufactured by the Union industry and sold on the Union market have similar basic physical, chemical and technical characteristics when compared to bioethanol exported to the Union from the USA.
- (49) As described in recital (34) above, bioethanol can be produced from various feedstocks. However, the investigation did not show that the feedstock used would lead into any differences in the end product. It was found that the product concerned produced in the USA and exported to the Union is interchangeable with that produced and sold in the Union by Union producers. In addition, there are no significant differences in the uses and the perception by operators and users in the market.
- (50) It is therefore concluded that bioethanol produced and sold in the Union and the product concerned should be considered to be alike within the meaning of Article 2(c) of the basic Regulation.

### 3. SUBSIDISATION

#### 3.1. INTRODUCTION

- (51) On the basis of the information contained in the complaint and the replies to the Commission's questionnaires, the following Federal Schemes, which allegedly involved the granting of subsidies, were investigated:

##### *Federal Schemes*

- (a) Fuel mixture tax credits - Excise Tax/Income Tax credits
- (b) Small producer income tax credit
- (c) Income tax credit for producers of cellulosic bioethanol
- (d) The US Department of Agriculture Bioenergy Program
- (e) USDA Bioenergy Program for Advanced Biofuels
- (f) USDA Biorefinery Assistance Program
- (g) USDA Biomass Crop Assistance Program
- (h) USDA Rural Energy for America Program
- (i) Department of Energy Biorefinery Project Grants
- (52) On the basis of the information contained in the complaint and the replies to the Commission's questionnaires, the following State Schemes, which allegedly involved the granting of subsidies, were also investigated:

##### *State Schemes*

- (a) Illinois State Bioethanol Incentives

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- (i) Illinois Biofuels Production Facility Grants
    - (ii) E85 Infrastructure Grants
  - (b) Iowa
    - (i) Iowa Alternate Energy Revolving Loan Program
    - (ii) Biofuels Infrastructure Grants
  - (c) Minnesota State Bioethanol Incentives
    - (i) Minnesota Cellulosic Ethanol Investment Tax Credit
    - (ii) E85 Fueling Infrastructure Grants
  - (d) Nebraska Ethanol Production Tax Credit
  - (e) South Dakota Ethanol Production Incentive
- 3.2. FEDERAL SCHEMES
- 3.2.1. **Fuel mixture tax credits - Excise Tax/Income Tax credits**
- (a) *Legal basis*
    - (53) Title 26 U.S.C – Internal Revenue Code - sections 6426 and 6427 is the legal basis for the fuel mixture tax credit ('mixture tax credit') on bioethanol.
  - (b) *Eligibility*
    - (54) In order to be eligible for the mixture tax credit in the IP, persons were required to create a mixture of bioethanol with a taxable fuel (gasoline, diesel fuel or kerosene), which would then be used as a fuel or sold for use as a fuel. For such persons (blenders), the credit was 0,45 USD per gallon of bioethanol blended in a taxable fuel.
    - (55) The producers of bioethanol can only claim the incentive when they are themselves performing a blending activity. The producer must blend the unmixed bioethanol with e.g. gasoline. Companies that do not produce but rather purchase unmixed bioethanol and blend it into a bioethanol mixture are also entitled to the mixture tax credit. In terms of entitlement to the incentive, there are no differences between blended bioethanol destined for domestic sales and export sales.
  - (c) *Practical implementation*
    - (56) It is thus the activity of blending that triggers the eligibility for the mixture tax credit. The amount of the subsidy granted for a blended fuel depends on the proportion of bioethanol it contains. The subsidy can be claimed either as a credit against excise tax liability or income tax liability or as a direct cash payment.

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- (57) During the IP, the mixture tax credit was predominantly (more than 90 %) claimed as an excise tax credit by a blender on Schedule C of Form 720, 'Quarterly Federal Excise Tax Return'. The credit was allowed to the extent of fuel tax liability and would be claimed on this form by anyone subject to tax on gasoline, e.g. in a situation where the blending of bioethanol and gasoline took place within the storage terminal before the taxation of gasoline.
- (58) The blender could also claim a refundable income tax credit or direct payment instead of an excise tax credit, but only for the amount by which the excise tax credit exceeded the total excise tax liability, i.e. the amount by which the maximum subsidy allowable for the mixture exceeded the credit allowed on Form 720. It should be noted that the excise tax credit could exceed excise tax liability if, for example, the gasoline used to make the mixture was taxed before it was acquired by the blender. In such cases claims could be made on Form 8849, 'Claim for Refund of Excise Taxes'.
- (59) The mixture tax credit was non-cumulative, i.e. it remained the same whether the subsidy was claimed as an excise tax credit, an income tax credit, a direct payment to the taxpayer or any combination of the foregoing. Claims for payment were made either on Form 8849, Schedule C of Form 720 or in case of the refundable income tax credit on Form 4136, 'Credit for Federal Tax Paid on Fuel', which was attached to the claimant's income tax return. It should be noted, however, that the total amount of the subsidy could not exceed 0,45 USD per gallon of bioethanol.
- (60) A non-refundable income tax credit was also available to bioethanol blenders during the IP. This non-refundable income tax credit on a quantity of fuel available to a blender was reduced by the amount of the excise tax credit claimed with respect to that same quantity of fuel. In other words, a blender could not claim both the excise tax credit and the non-refundable income tax credit for the same quantity of bioethanol blended with gasoline. When applying for the non-refundable income tax credit the producer had to declare that he had not claimed the excise tax credit for the same quantity of bioethanol.
- (61) The mixture tax credit can only be claimed once for the same quantity of bioethanol used to make a mixture, i.e. either by the producer who blends himself or by a purchaser who is undertaking the blending activity. In both cases the blender is entitled to a 0,45 USD per gallon tax credit for the number of gallons of bioethanol used in producing a mixture.
- (62) The investigation showed that in the majority of cases the one claiming the subsidy ('the claimant') was a blender/trader with excise tax liabilities such as a petrochemical company. Indeed, blending will depend on a number of factors such as the available tank capacity as well as the geographical location of available bioethanol and gasoline respectively. In most cases it appeared that the producer of bioethanol did not claim the mixture tax credit. In fact

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it is clear that the blending in most cases took place in terminals or terminal racks. In this respect, it appears that the claimant was in the majority of cases a person with excise tax liability.

- (63) The market for unmixed bioethanol as an end-use was not big and it therefore made economic sense to blend the bioethanol produced and make a mixture which would trigger the mixture tax credit. It should be noted that the mixture tax credit (Excise Tax /Income tax credit) for bioethanol had been in existence since 1980, i.e. for more than 30 years, and expired at the end of December 2011 (post-IP).
- (64) The investigation found that two companies in the sample made claims for the mixture tax credit in the IP. However, for both companies the subsidies obtained were insignificant.
- (65) Nevertheless, when comparing the total production of bioethanol in the USA during the IP with the total quantity of bioethanol receiving a mixture tax credit, it is clear that all bioethanol produced in the USA in the IP benefitted from a subsidy under this scheme. This is also confirmed by the statistics provided by the relevant US authorities.
- (66) On this basis, the findings of investigation clearly showed that all bioethanol was subsidised through this mixture tax credit during the IP.
- (d) *Conclusion*
- (67) The investigation showed that during the IP, all the US produced bioethanol benefitted from the mixture tax credit. This mixture tax credit has to be regarded as a fiscal incentive whether or not it is given to be offset against tax liabilities or as a cash payment.
- (68) This scheme is considered to be a subsidy in the sense of Article 3(1)(a)(i) and Article 3(1)(a)(ii) of the basic Regulation as the scheme provides a financial contribution by the Government of the USA in the form of direct grants (cash payments) and revenue foregone which is otherwise due (tax offset). The subsidy confers a benefit to the companies receiving them.
- (69) The scheme is limited to companies that are involved in the bioethanol industry i.e. the blending of bioethanol, and is therefore considered to be specific under Article 4(2), first sub-paragraph, point (a) of the basic Regulation and therefore countervailable.
- (e) *Calculation of the subsidy amount*
- (70) The bioethanol mixture tax credit was granted by reference to the quantities of bioethanol used in a blend, i.e. 0,45 USD per gallon of bioethanol blended in a taxable fuel.
- (71) It is considered that the amount of subsidy is 0,45 USD per gallon on a country-wide basis as the total production of US bioethanol, including

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**Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 20 December 2012 terminating the anti-subsidy proceeding concerning imports of bioethanol originating in the United States of America and terminating the registration of such imports imposed by Regulation (EU) No 771/2012 (2012/825/EU). (See end of Document for details)

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exports of bioethanol to the Union, ultimately would have benefitted from the bioethanol mixture credit. It is therefore not necessary to differentiate between economic operators, in particular as the subsidy is rarely granted to producers of bioethanol but predominantly to operators who blend the bioethanol with e.g. gasoline.

### 3.2.2. **Small producer income tax credit**

#### (a) *Legal basis*

(72) Title 26 U.S.C Internal Revenue Code, section 40 is the legal basis for the small producer income tax credit.

#### (b) *Eligibility*

(73) This scheme is only available to small producers of bioethanol. A small producer is defined as any person whose production capacity does not exceed 60 million gallons of bioethanol per year. During the IP a small producer could claim a non-refundable, general business income tax credit of 0,10 USD for each gallon of bioethanol produced. Any blender or trader who purchases but does not produce bioethanol is not eligible for the credit. In addition, to be eligible for the credit, the production may not exceed 15 million gallons in any taxable year and the bioethanol produced must be used as a fuel, sold for use as a fuel, or used to create a mixture of bioethanol and a taxable fuel that is subsequently used as a fuel or sold for use as a fuel.

#### (c) *Practical implementation*

(74) Claims for the small producer income tax credit are made annually, as part of the claimant's income tax return. The credit for each gallon of bioethanol 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.

(75) Due to the eligibility criteria, only two companies in the sample benefitted from this scheme during the IP.

#### (d) *Conclusion*

(76) This scheme is considered to be a subsidy in the sense of Article 3(1)(a)(ii) of the basic Regulation as the scheme provides a financial contribution by the Government of the USA in the form of revenue foregone which is otherwise due. The subsidy confers a benefit to the companies receiving them.

(77) The scheme is limited to companies that produce bioethanol, and is therefore considered to be specific under Article 4(2), first sub-paragraph, point (a) of the basic Regulation and therefore countervailable.

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**Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 20 December 2012 terminating the anti-subsidy proceeding concerning imports of bioethanol originating in the United States of America and terminating the registration of such imports imposed by Regulation (EU) No 771/2012 (2012/825/EU). (See end of Document for details)

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- (78) Statistics provided by the US authorities showed overall very little use of the small producer's income tax credit in contrast to claims made for the mixture tax credit. A comparison of the total amount claimed under this incentive in relation to the total production of bioethanol showed insignificant overall subsidisation during the IP.

### 3.2.3. **Income tax credit for producers of cellulosic bioethanol**

(a) *Legal basis*

- (79) Title 26 U.S.C Internal Revenue Code, section 40 is the legal basis for the income tax credit for producers of cellulosic bioethanol.

(b) *Eligibility*

- (80) This scheme is only available to producers of cellulosic bioethanol.

(c) *Practical implementation*

- (81) Claims for the income tax credit are made annually, as part of the claimant's income tax return.

- (82) Prior to 1 January 2012 the credit available was 0,46 USD per gallon of cellulosic bioethanol produced. As of 1 January 2012 the credit increased to 1,01 USD per gallon.

(d) *Conclusion*

- (83) This scheme is considered to be a subsidy in the sense of Article 3(1)(a)(ii) of the basic Regulation as the scheme provides a financial contribution by the Government of the USA in the form of and revenue foregone which is otherwise due. The subsidy confers a benefit to the companies receiving them.

- (84) The scheme is limited to companies that produce bioethanol, and is therefore considered to be specific under Article 4(2), first sub-paragraph, point (a) of the basic Regulation and therefore countervailable.

- (85) There were no claims for the income tax credit from producers of cellulosic bioethanol during the IP which coincides with the lack of commercial production of cellulosic bioethanol up to the end of the IP. In these circumstances, no subsidy amount was calculated.

### 3.2.4. **The US Department of Agriculture Bioenergy Program**

(a) *Legal basis*

- (86) 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.

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

(b) *Eligibility*

(88) 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, bioethanol producers were required to produce and sell bioethanol commercially.

(89) 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 claimants were required to follow in order to be eligible for payments.

(c) *Practical implementation*

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

(91) The scheme provided payments to bioethanol producers based on a combination of their base bioethanol production and increased bioethanol production in the corresponding period of the previous fiscal year. For fiscal year 2006, companies only received incentives from increased bioethanol production.

(92) As the scheme was terminated in June 2006, none of the companies in the sample received incentives under this scheme during the investigation period.

(93) There appears to have been confusion about whether this scheme was re-introduced for the fiscal year 2009 (October 2008-September 2009). However, the investigation confirmed that this was not the case. The scheme as described above expired in 2006.

(d) *Conclusion*

(94) It was found that the scheme was terminated in June 2006 and that no subsidies were provided during the IP.

### 3.2.5. **USDA Bioenergy Program for Advanced Biofuels**

(95) The Bioenergy Program for Advanced Biofuels (generally referred to as the 'Advanced Biofuel Payment Program') provides production-based payments to eligible producers of 'advanced biofuels'. According to the US authorities,



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'advanced biofuels' are specifically defined to exclude fuel derived from corn which is the main feedstock for US bioethanol production.

(a) *Legal basis*

- (96) Title IX, Section 9005 of the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) as amended by Title IX, Section 9001 of the Food, Conservation, and Energy Act of 2008 is the legal basis for the Bioenergy Program for Advanced Biofuels.

(b) *Eligibility*

- (97) An applicant must be an 'advanced biofuel producer'. The term 'advanced biofuel producer' is defined as: 'An individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or non-profit entity that produces and sells an advanced biofuel. An entity that blends or otherwise combines advanced biofuels into a blended biofuel is not considered an advanced biofuel producer under this Program'.
- (98) Advanced biofuel is defined in Section 9001 of the Food, Conservation, and Energy Act of 2008 as 'fuel derived from renewable biomass other than corn kernel starch'. According to this Act, advanced biofuels specifically include:
- Biofuel derived from cellulose, hemicellulose, or lignin;
  - Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);
  - Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste and yard waste;
  - Diesel-equivalent fuel derived from Renewable Biomass, including vegetable oil and animal fat;
  - Biogas produced through the conversion of organic matter from Renewable Biomass;
  - Butanol or other alcohols produced through the conversion of organic matter from Renewable Biomass; and
  - Other fuel derived from cellulosic biomass.

(c) *Practical implementation*

- (99) Bioethanol producers can benefit from this scheme. In order to be eligible for payments, the producers must maintain records for all relevant fiscal years and quarters. Such records include documentation for purchase of feedstock, production of bioethanol, price and quantity of bioethanol sold. Producers receive direct payments from the Government.
- (100) The scheme provides payments to bioethanol producers based on a combination of their actual production and incremental production, i.e. the increase in production compared to the previous year. Actual production payment rates are calculated quarterly for the amount of actual advanced

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biofuel produced each quarter. Incremental production payments are made for the quantity of eligible advanced biofuel produced in a fiscal year by an eligible producer that exceeds the quantity produced in the prior fiscal year.

- (101) The end-product is exactly the same regardless of whether the bioethanol is derived from the feedstock mentioned in recital (98), or whether it has been produced from corn which is the main feedstock for US bioethanol production.

(d) *Conclusion*

- (102) It was found that the subsidies provided under this scheme did not benefit any of the companies in the sample. The majority of producers benefiting from this scheme are biodiesel producers. In fact, only 15 out of around 155 companies in the USA who received subsidies under this scheme in 2011 produced bioethanol.

- (103) As regards the companies not selected in the sample, the investigation showed that the total amount of subsidies granted under this scheme to bioethanol production was insignificant when compared to the total production of bioethanol during the IP.

- (104) It was therefore not necessary further to assess the countervailability of this scheme.

### 3.2.6. **USDA Biorefinery Assistance Program**

- (105) The Biorefinery Assistance Program is meant to assist the development of new and emerging technologies for advanced biofuels.

(a) *Legal basis*

- (106) Title IX, Section 9003 of the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) as amended by Title IX, Section 9001 of the Food, Conservation, and Energy Act of 2008 is the legal basis for the Biorefinery Assistance Program.

(b) *Eligibility*

- (107) The program is administered by a branch of the Department of Agriculture. It offers loan guarantees to eligible applicants in support of the development and construction of commercial-scale biorefineries using eligible technology, or the retrofitting of existing facilities with eligible technology. To be eligible for the scheme, a given project must use a technology adapted for a viable commercial-scale operation or it has to be demonstrated to have technical and economic potential for commercial application in a biorefinery that produces advanced biofuel. The project must use an eligible feedstock for the production of advanced biofuels and bio-based products. Examples of eligible feedstocks include, but are not limited to, renewable biomass, biosolids,

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treated sewage sludge, and by-products of the pulp and paper industry. The majority of an eligible biorefinery's production must be of advanced biofuels.

(c) *Practical implementation*

(108) Bioethanol producers can benefit from this scheme if they meet the eligibility criteria and provided that sufficient Government funds are available. A project must have technical merit and the borrower must meet certain financial criteria set out in relevant legislation. There must also be reasonable assurance that the loan being guaranteed will be repaid.

(109) A successful applicant would receive a loan guarantee to enable the applicant to obtain the necessary fund from a third-party lender. Maximal Agency (Federal Government) participation in an eligible project is a 90 % guarantee of a loan which covers up to 80 % of eligible project's costs of the project being financed. The borrower must provide the remaining 20 %. In addition, the maximum guarantee percentage decreases as the amount of the loan increases.

(d) *Conclusion*

(110) The investigation showed that no companies had yet received payments from the US Government under this scheme. During the IP three companies not selected in the sample had applied for a loan guarantee relating to the production of cellulosic bioethanol, although two of the loan guarantee applications were pending. None of these companies are producers of bioethanol derived from corn. The investigation also showed that there has not yet been any production of bioethanol as a result of this scheme.

(111) The investigation also showed that the loan guarantee awards to future producers of cellulosic bioethanol had no impact on the production and sale of bioethanol during the IP.

(112) It is therefore not necessary to further evaluate the countervailability of this scheme in the context of this investigation.

**3.2.7. USDA Biomass Crop Assistance Program**

(113) The USDA Biomass Crop Assistance Program ('BCAP') supports the production of feedstocks for next-generation advanced biofuels. BCAP provides benefits to producers of eligible crops or owners of biomass materials grown on eligible lands. As such, benefits are provided for the production of crops and materials that may be used as an input for advanced biofuels, but not for the production of biofuels.

(114) According to the authorities of the USA, bioethanol produced from corn, which accounts for nearly all US bioethanol production and exports, is specifically excluded from the BCAP. In the view of the authorities of the USA, given BCAP's focus on advanced biofuels, and the lack of advanced

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biofuels commercial production, the program did not confer any benefit on commercial producers of bioethanol in the United States during the IP.

(a) *Legal basis*

(115) Section 9011 of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) is the legal basis for the USDA Biomass Crop Assistance Program.

(b) *Eligibility*

(116) BCAP has two components, each with specific and different eligibility. The first component, the Project Area component, provides benefits to producers of 'eligible crops' while the second component, the Matching Assistance component, provides benefits to owners of 'eligible materials'. Eligible crops and eligible materials serve as inputs for advanced biofuels, heat, power, and bio-based products. According to the authorities of the USA, payments are not made to biofuel and bioenergy producers themselves.

(117) An eligible crop is defined as any crop of 'renewable biomass' excluding any crop eligible to receive payments under Title I of the 2008 Farm Bill. Among other things, the excluded crops are corn, grain sorghum, oats, rice, wheat, honey and sugar.

(118) Eligible material is defined as any 'renewable biomass', excluding whole grain from any crop excluded from 'eligible crops' as mentioned above. Although the grain from excluded crops (such as corn) is excluded from 'eligible materials', residuals from those crops (such as the cellulosic material) are 'eligible materials'.

(119) The first component of BCAP provides benefits to producers of eligible crops. To be eligible for benefits the eligible crop must be produced in a geographic area designated as 'project area'. The second component of BCAP provides matching payments for the collection, harvest, storage and transportation of renewable biomass sources or eligible materials.

(c) *Practical implementation*

(120) Biomass conversion facilities, including bioethanol producers, do not receive compensation through BCAP. Their suppliers, who produce eligible crops or own eligible material, receive payments. The authorities of the USA stated that the BCAP has not contributed to the production of any bioethanol, including cellulosic bioethanol during the IP.

(121) Regarding BCAP payments during the IP, three bioethanol facilities qualified for the purpose of Research and Development in the area of transportation and storage. During the IP, a total of 1,7 million USD was paid to 83 material owners who delivered corn to one approved facility. No payments were made to the other material owners for delivery of materials to the two other qualified biomass conversion facilities.

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(122) Before the IP there were 458 biomass conversion facilities that were qualified to receive the delivery of eligible materials. Only two of these qualified facilities were bioethanol producers.

(123) There were nine project areas established in the IP. During this time, crops were being signed up or were in the process of enrolling in BCAP. Thus, no crop collection or harvesting occurred in that period.

(d) *Conclusion*

(124) As explained above, suppliers who produce eligible crops or own eligible material, receive payments under this scheme. There was no evidence showing that benefits passed through to the producers of bioethanol and the amounts paid are thus not countervailable.

### 3.2.8. **USDA Rural Energy for America Program**

(125) The USDA Rural Energy for America Program ('REAP') provides loan guarantees and grants to rural small businesses and agricultural producers to purchase renewable energy systems and to make energy efficiency improvements. It also provides grants to conduct feasibility studies for renewable energy systems, to perform energy audits, as well as renewable energy development assistance for agriculture producers and rural small businesses. According to the authorities of the USA, REAP supports a wide range of agricultural producers and small businesses in their efforts to reduce energy consumption; it does not support the production of any specific commodity and it is not specific to an enterprise or group thereof.

(126) REAP has three components:

- The Renewable Energy System ('RES') and Energy Efficiency Improvement ('EEI') Loan Guarantee and Grant Program provides loan guarantees and/or grants to agricultural producers and rural small businesses to purchase, install and construct renewable energy systems and make energy efficiency improvements;
- The Energy Audit and Renewable Energy Development Assistance Grant Program provides grant assistance to entities that assist agriculture producers and small rural businesses by conducting energy audits and providing information on renewable energy development assistance;
- The Feasibility Studies Grant Program provides grant assistance to applicants that need to complete a feasibility study, which is required in applications for many of the Government's energy programs.

(127) Through these three components, REAP is available for the following types of projects: Renewable Energy Systems, Energy Efficiency Improvements, Energy Audits, Renewable Energy Development Assistance and Feasibility Studies.

(a) *Legal basis*

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(128) Title IX, Section 9006 of the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill) as well as Title IX, Section 9007 of the 2002 Farm Bill as amended by Title IX, Section 9001 of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) is the legal basis for the USDA Rural Energy for America Program.

(b) *Eligibility*

(129) The eligibility criteria vary depending on the type of project, as referred to in recital (127), and, as regards projects for Renewable Energy Systems and Energy Efficiency Improvements, whether a grant or loan guarantee is being requested.

(c) *Practical implementation*

(130) The investigation showed that since the 2008 Farm Bill was enacted, REAP has made awards to over 5 960 projects, covering the period 1 October 2008 through 30 September 2011 (the investigation period). According to the authorities of the USA, the majority of these awards were for projects unrelated to biofuels of any kind. Such projects included, but were not limited to solar, wind and energy efficiency.

(131) During the IP, only two bioethanol producers received benefits under REAP programs, each for a feasibility study grant. Prior to the IP, one company received a grant for Renewable Energy Systems for a project involving bioethanol production from sugar and alcohol-based waste.

(d) *Conclusion*

(132) This scheme is considered to be a subsidy in the sense of Article 3(1)(a)(i) of the basic Regulation as the scheme provides a financial contribution by the Government of the USA in the form of a grant. The subsidy confers a benefit to the companies receiving them.

(133) However, it should also be noted that none of these grants appeared to be specific for the production of any commodity including bioethanol which means that they cannot be considered countervailable pursuant to Article 4 of the basic Regulation.

### 3.2.9. Department of Energy Biorefinery Project Grants

(134) The relevant legislation authorises the funding of 'Integrated Biorefinery Demonstration Projects' to demonstrate: the commercial application of integrated biorefineries with a focus on lignocellulosic feedstock; the commercial application of biomass technologies for a variety of uses, including liquid transportations fuels, high-value bio-based chemicals, substitutes for petroleum-based feedstock and products, and energy in the form of electricity or useful heat; and the collection and treatment of a variety of biomass feedstock.

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(a) *Legal basis*

- (135) Energy Policy Act of 2005, sections 931-932 is the legal basis for the Department of Energy Biorefinery Project Grants.

(b) *Eligibility*

- (136) Eligibility is specific to the funding opportunity announcement (FOA) for each project published by the relevant authorities of the Department of Energy. Regarding FOAs relevant to bioethanol, recipients must use cellulosic biomass and produce a biofuel; the particular eligible biomass and biofuel(s) are delineated in each FOA.

(c) *Practical implementation*

- (137) The scheme is administered through a series of annual competitive solicitations or FOAs that distribute appropriated funds. The competitive solicitations are open to eligible applicants from industry, academia and national laboratories. Eligible applicants submit proposals that are reviewed against the criteria set out in the FOA. Once an award has been granted, the relevant authorities of the Department of Energy monitor the performance of the recipient against the scope, schedule and cost through the life of the award. Payment for costs incurred by the recipient in performance of the project is made on a reimbursement basis.
- (138) No financial assistance agreements under this program support the development of corn bioethanol process technologies. The assistance is solely focused on cellulosic advanced biofuels.
- (139) Recipients must use cellulosic biomass and produce a biofuel; the particular eligible biomass and biofuel(s) are delineated in each FOA.
- (140) During the IP there were five large scale bioethanol projects funded under this scheme. One of the companies in the sample received benefits from this scheme during the IP.

(d) *Conclusion*

- (141) This scheme is considered to be a subsidy in the sense of Article 3(1)(a)(i) of the basic Regulation as the scheme provides a financial contribution by the Government of the USA in the form of grants. The subsidy confers a benefit to the companies receiving them.
- (142) However, the investigation established that during the IP there was no commercial cellulosic bioethanol sold on the market. In view of the particular circumstances in the present case, i.e. the fact that the scheme focuses for example on cellulosic biofuels, and the lack of commercial cellulosic bioethanol production, it is considered that during the IP this scheme did not confer any benefit on commercial producers of bioethanol in the USA and

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consequently did not have any impact on exports of bioethanol to the EU during the IP.

- (143) It is also noted that in relation to the turnover of the product concerned by the sampled companies, the amount of subsidies provided under this scheme was insignificant.

### 3.2.10. Conclusion on Federal Schemes

#### *Fuel mixture tax credits - Excise Tax/Income Tax credits*

- (144) It was established that during the IP the US Government provided a credit of 0,45 USD for each gallon of ethanol used in producing alcohol fuel mixture. This means that bioethanol blenders benefited from a reduced tax rate at the time of sale or received a direct payment, which offset their normal liability for a part of the excise duty on gasoline fuel. Only to a lesser extent the mixture tax credit was used to offset income tax liability. This is a financial contribution, in the form of Government revenue foregone, which confers a benefit to the recipients in the form of a reduced tax liability. The scheme is limited to companies that are involved in the bioethanol industry, i.e. the blending of bioethanol, and is therefore countervailable.
- (145) The investigation established, however, that the main subsidy scheme, the bioethanol mixture tax credit, expired in the end of 2011 and has not been reintroduced.
- (146) Following the disclosure of the essential facts and considerations on the basis of which the Commission has decided to continue the investigation without the imposition of provisional measures, one party claimed that various tax forms allow recipients to still claim this subsidy later than 31 December 2011.
- (147) In reply to this claim it is noted that the investigation showed that the bioethanol mixture tax credit was predominantly claimed as an excise tax credit by a blender at the time of the blending of bioethanol with gasoline in order to reduce the excise tax liability of the claimant. Only to a limited extent the bioethanol mixture tax credit would be used to offset the income tax liability of the claimant. It goes without saying that there is a certain time span between the time of blending and the time when the credit is paid to the claimant. The amount of mixture tax credits provided during the IP also relates to blending taking place before the IP. Consequently, unless the scheme is retroactively reinstated, at the time of the decision whether or not to impose definitive measures in 2012, any claims for the mixture tax credit would be insignificant. Therefore, there are no elements to say that the subsidy continued.
- (148) The same party argued that it is clear from the provisions of Article 15(1), fourth subparagraph, that a subsidy should not be considered as "*withdrawn*" until the defending party has brought convincing evidence that no payments, under any subsidy scheme benefitting producers/exporters of the product



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concerned, could still be made. It should be noted, however, that the bioethanol mixture tax credit was the only subsidy scheme which provided potentially countervailable subsidies during the IP and this scheme has expired. The other investigated schemes which provided benefits directly to the bioethanol industry were insignificant. This argument is therefore rejected.

- (149) The party has also claimed that the income tax credit for producers of cellulosic bioethanol, which is described in recitals (79) to (85) above, is a scheme designed to replace the mixture tax credit scheme as a means of subsidising the product concerned. In reply to this claim it is noted that, while support for first generation bioethanol has been mostly phased out, schemes for second generation biofuels has increased. However, the production of second generation biofuels is not significant and therefore granted subsidies are at this stage very limited. It should be clarified that the income tax credit for producers of cellulosic bioethanol is not a replacement scheme for the mixture tax credit scheme for the simple reason that it is already in existence. Moreover, income tax credit for producers of cellulosic bioethanol is, as the name of scheme suggest, an incentive to producers of cellulosic bioethanol. The mixture tax credit provides an incentive to blenders. The investigation showed that in the majority of cases the one claiming the mixture tax credit was a blender/trader with excise tax liability such as a petrochemical company. In other words, it was not bioethanol producers who claimed the bulk of the mixture tax credit during the IP. Therefore, it cannot be argued that the income tax credit for producers of cellulosic bioethanol replaces the mixture tax credit. Consequently, this claim is rejected.

- (150) Finally, the party has claimed that the benefits can still be conferred after the end of the mixture tax credit scheme due to the continued utilization of fixed assets paid by the subsidy. It was argued that in case of recurring subsidies linked to the acquisition of fixed assets, benefits accruing from previous years within the depreciation period should be taken into account when calculating the benefit. First of all it is noted that the subsidy is not linked to the acquisition of fixed assets. The mixture tax credit is a recurring subsidy in the sense that it is periodic and the benefits are presumed to accrue in the year in which they are granted. Moreover, as mentioned above, during the IP, the claimants were only to a very little extent bioethanol producers. Therefore, this claim is rejected.

#### *Other Federal Schemes*

- (151) Statistics provided by the US authorities showed overall very little use of the small producer's income tax credit in contrast to claims made for the mixture tax credit. A comparison of the total amount claimed under this incentive in relation to the total production of bioethanol showed insignificant overall subsidisation during the IP.

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***Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 20 December 2012 terminating the anti-subsidy proceeding concerning imports of bioethanol originating in the United States of America and terminating the registration of such imports imposed by Regulation (EU) No 771/2012 (2012/825/EU). (See end of Document for details)*

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- (152) There were no claims for the income tax credit from producers of cellulosic bioethanol during the IP which coincides with the lack of commercial production of cellulosic bioethanol up to the end of the IP.
- (153) The investigation established that the US Department of Agriculture's Bioenergy Program expired in 2006 and was not re-introduced. As regards the USDA Bioenergy for Advanced Biofuels, the USDA Biorefinery Assistance Program, the USDA Biomass Crop Assistance Program, the USDA Rural Energy for America Program and the Department of Energy Biorefinery Project Grants, the investigation showed that to the extent these six schemes provided benefits to production of bioethanol during the IP, the amount of subsidies was insignificant.

### 3.3. STATE SCHEMES

#### 3.3.1. Introduction

- (154) The investigation showed that three State schemes, i.e. the E85 Infrastructure Grants run by the State of Illinois, the Biofuels Infrastructure grants run by the State of Iowa and the E85 Fuelling Infrastructure Grants run by the State of Minnesota are not applicable to bioethanol producers. These schemes provide fuel retail establishments with support for the installation of fuel pumps capable of delivering high-ethanol content fuel and are limited to bioethanol retailers. Consequently, bioethanol producers receive no benefits from these schemes. In this regard, it is noted that none of the companies in the sample received benefits from these schemes directly or indirectly.
- (155) Moreover, it was clarified by the US authorities that the State of Minnesota does not have a Cellulosic Ethanol Investments Tax Credit scheme as claimed by the complainant. It was clarified that the State of Minnesota enacted a law in early 2010 called the 'Small Business Investment Tax Credit' commonly referred to as the 'Angel Investment Tax Credit'. Contrary to what is alleged in the complaint, the Angel Investment Tax Credit provides no tax credits to businesses, but rather to investors who invest in small businesses.

#### 3.3.2. Illinois Biofuels Production Facility Grants

- (156) According to the authorities of the USA, this scheme was not in operation during the IP, has not received funding since July 2007 and has been inoperative since 2008 when funds were exhausted. When operative, the scheme authorised grants for the construction of new renewable fuel production facilities or the expansion of existing facilities.
- (157) Two grants were granted in 2008 when the scheme was still in operation, and two companies outside the sample located in Illinois each received a grant. However, this scheme is no longer in operation and none of the sampled companies availed of benefits under this scheme during the IP.

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**Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 20 December 2012 terminating the anti-subsidy proceeding concerning imports of bioethanol originating in the United States of America and terminating the registration of such imports imposed by Regulation (EU) No 771/2012 (2012/825/EU). (See end of Document for details)

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### 3.3.3. Iowa Alternate Energy Revolving Loan Programme

- (158) The Alternate Energy Revolving Loan Program (AERLP) is authorized by section 476.46 Code of Iowa 1997 as amended. This code states that the Iowa Energy Center shall establish and administer an alternate energy revolving loan program and creates an alternative energy revolving loan fund in the office of the Treasurer of State to be administered by the Energy Center.
- (159) Money in the AERLP fund may be used to provide loans for the construction of alternate energy production facilities or small hydro facilities as defined in section 476.46 Code of Iowa 1997, as amended.
- (160) According to the authorities of the United States, no bioethanol production facilities received loans pursuant to the AERLP for the years 2008, 2009, 2010 and the IP. None of the sampled companies received benefits under this scheme. Consequently, it was decided not to further investigate this scheme in the context of this proceeding.

### 3.3.4. Nebraska Ethanol Production Tax Credit

- (161) The current Nebraska State motor fuels tax rate is 0,267 USD per gallon for all gasoline, gasohol, diesel fuel, bioethanol and compressed gases sold in the State. The Ethanol Production Incentive scheme in effect during the IP provides a 0,18 USD per gallon tax credit to qualifying ethanol production facilities in operation on or before 30 June 2004.
- (162) The deadline to apply to participate in this scheme was 16 April 2004. A qualified production facility must have been located in the State of Nebraska and must have either (i) not been in production on or before 1 September 2001 or (ii) not received credits prior to 1 June 1999. All fermentation, distillation and dehydration must take place at the qualified facility.
- (163) This scheme did not benefit any of the companies in the sample. In any event, it appears that the amount of subsidy was negligible when compared to the total production of bioethanol in the USA.

### 3.3.5. South Dakota Ethanol Production Incentive

- (164) The State of South Dakota administers a bioethanol producer payment program that provides financial assistance for eligible bioethanol plants of 0,20 USD per gallon of bioethanol produced up to a possible 1 million USD annually per facility.
- (165) The ethyl alcohol must be fully distilled and produced in South Dakota, must be 99 % pure, must be distilled from cereal grains and must be denatured. The ethanol production payment is only available for qualifying ethyl alcohol produced by plants than began production on or before 31 December 2006.

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- (166) Each eligible facility may receive a maximum of 83 333 USD per month of production incentive payments. If sufficient funds are not available to pay the monthly payment of 83 333 USD to each bioethanol production facility, each facility receives a prorata share of the funds available based upon the gallons of ethyl alcohol produced that month proportionate to all qualifying gallons of ethyl alcohol produced at all qualifying facilities. Each eligible facility may receive a maximum of 1 million USD per year and for all years of participation in the scheme a maximum of 9 682 000 USD in production payments. As such the subsidies are recurring and considered to be expensed each particular year.
- (167) The investigation showed that two of the companies in the sample received benefits under this scheme during the IP. For both companies, the subsidy amount was calculated on the basis of the amount of payments received during the IP. The amount of subsidy was then allocated over the total sales of bioethanol made by the companies concerned during the IP as the appropriate denominator.
- (168) This calculation showed that the amount of subsidy for both companies was insignificant.

### 3.3.6. Conclusion on State Schemes

- (169) The investigation showed that two of the US State schemes identified by the complainant, i.e. the Nebraska Ethanol Production Tax Credit and South Dakota Ethanol Production Incentive, provided subsidies to bioethanol production that are financial contributions which confer a benefit to the producers in those States. Although the schemes seem to be specific within the States concerned, the amount of subsidies is insignificant when compared to the total production of bioethanol in the USA. Regarding subsidies received by the companies in the sample, it was also concluded that the amount of subsidisation was insignificant.

### 3.4. AMOUNT OF COUNTERAVAILABLE SUBSIDIES DURING THE IP

- (170) The investigation has shown that all investigated schemes except the one mentioned in recital (171) below, were negligible and not countervailable during the IP.
- (171) As mentioned in recitals (53) to (71) above, the investigation showed that the US Government provides a mixture tax credit of 0,45 USD for each gallon of bioethanol used in producing an alcohol fuel mixture which benefits ethanol blenders.
- (172) As such the subsidy was granted on a per unit basis, i.e. by reference to the quantities of bioethanol used. The benefit is also attached to the imported product in the Union.

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- (173) The amount of countervailable subsidies in accordance with the provisions of the basic Regulation is 0,45 USD per gallon.
- (174) It is noted that the amount of subsidisation depends on the proportion, in weight, of bioethanol in the blend.
- (175) It is considered that the amount of subsidy is 0,45 USD per gallon on a country-wide basis as all of US produced bioethanol, including exports to the Union, ultimately benefitted from the bioethanol mixture tax credit. It is therefore not necessary to differentiate between economic operators, in particular as the subsidy is rarely granted to producers of bioethanol but predominantly to traders/operators that are blending the bioethanol.
- (176) Following the disclosure of the essential facts and considerations on the basis of which the Commission decided to continue the investigation without imposition of provisional measures, several parties argued that in any case, the sampled producers should be assigned individual subsidy margins, and in case they did not receive the bioethanol mixture tax credit they should be assigned a zero subsidy margin.
- (177) Pursuant to Article 15 of the basic Regulation, any regulation imposing the duty shall either specify the duty for individual suppliers or the supplying country concerned. In this case it was found that the structure of the bioethanol industry and the way the subsidies were granted, in particular the Bioethanol Mixture Tax Credit, any individual subsidy margins would not be representative and would not reflect the actual situation on the bioethanol market, in particular for the export.
- (178) It is clear from the WTO Agreement on Subsidies and Countervailing Measures and GATT Article VI:3 that the purpose of any measures is to offset the effect of the subsidised imports.
- (179) In the present case the evidence found in the investigation showed that all US exports of bioethanol were subsidised by a maximum amount of USD 0,45 per gallon during the IP. It is noted that at a point in the investigation it became clear that any sample was not representative due in particular to the nature of subsidisation in the present case. Moreover, the sampled producers did not export the product concerned to the Union.
- (180) Indeed, it was the activity of blending which triggered the credit irrespective of whether the blender is a producer or an exporter. In the present case it was established that it was predominantly the exporters who claimed the Bioethanol Mixture Tax Credit.
- (181) It was also argued that, in the alternative to assigning individual subsidy margins to the sampled companies, the Commission should provide a pass-through analysis on how the bioethanol mixture tax credit can automatically be attributed to and benefit the producers. The request for a pass-through

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analysis appears unfounded. The subsidy is only paid once and the product does not change. It is the product exported to the EU, bioethanol, which is subsidised. Therefore, there is no need for such analysis.

### 3.5. POST IP DEVELOPMENTS

- (182) Parties highlighted the fact that the main subsidy scheme, the mixture tax credit, which conferred countervailable subsidies to US recipients in the IP, expired in the end of 2011 and has not been reintroduced. They noted that Article 15 of the basic Regulation provides that no measures shall be imposed if the subsidy or subsidies are withdrawn or when the subsidies no longer confer any benefit on the exporters concerned.
- (183) In view of the current cessation of the main subsidy scheme identified in the IP and the fact that there are no signs that it will be introduced, these parties considered that imposition of definitive countervailing measures would not be warranted. They also argued that any imposition of definitive measures would anyway go beyond what is necessary to counter the effects of the subsidisation at the time these measures would be imposed.
- (184) The investigation showed that the bioethanol mixture tax credit procured during the IP was withdrawn at the end of 2011. Given that this event occurred after the IP, the Commission thus contacted in several occasions the US authorities to receive further information with regard to the definitive termination of the main subsidy scheme.
- (185) The information collected during the investigation at the premises of the US authorities and the further clarification they provided demonstrated that certain amounts were paid out to US recipients just after the IP, namely in the US fiscal year 2012, which ran from 1 October 2011 to 30 September 2012. Whilst these amounts would still lead to continued subsidisation above the de minimis threshold in the first quarter of fiscal year 2012, the amounts paid out after that period, and in particular at the end of 2012, would be negligible in view of the cessation of the main subsidy scheme in December 2011. Up to now, there are no signs of reinstatement of the mixture tax credit and any reinstatement of that scheme would normally require an act of the United States Congress.

## 4. REGISTRATION OF IMPORTS FROM THE COUNTRY CONCERNED

- (186) The complainant requested several times registration of imports of bioethanol originating in the USA with a view of retroactive collection of duties. The request contained sufficient evidence to justify registration in accordance with Article 24(5) of the basic Regulation.
- (187) The Commission considered that, even if it had provisionally concluded that the main subsidy scheme in force during the IP had ceased, in the sense that it no longer conferred a benefit at the time provisional measures would have been imposed, there was evidence that the United States might reinstate such

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subsidy scheme. Thus, in order to preserve the European Union's rights under these special circumstances, the Commission decided to subject imports of the product concerned to registration pursuant to Article 24(5) of the basic Regulation so that, eventually, measures may retroactively be levied against those imports from the date of such registration. A Commission Regulation (EU) No 771/2012<sup>(9)</sup> was published on 24 August 2012 to this effect.

## 5. TERMINATION OF THE ANTI-SUBSIDY PROCEEDING AND OF REGISTRATION

- (188) The investigation established that apart from the main subsidy scheme, the mixture tax credit described in recitals (53) to (71) above, the amount of subsidisation received for all other subsidy schemes investigated were insignificant and not countervailable during the IP.
- (189) As mentioned above in recitals (182) to (185), the investigation established that the main subsidy scheme, the mixture tax credit, expired in the end of 2011 and has not been reintroduced. The information available clearly point to the cessation of the main subsidy scheme. Up to now, there are no signs of reinstatement of the mixture tax credit and any reinstatement of that scheme would normally require an act of the United States Congress.
- (190) Article 15 of the basic Regulation provides that no measures shall be imposed if the subsidy or subsidies are withdrawn or it has been demonstrated that the subsidies no longer confer any benefit on the exporters concerned.
- (191) It is also noted that pursuant to Article 14(3) of the basic Regulation, there shall be immediate termination of the proceeding where it is determined that the amount of countervailable subsidies is *de minimis*, namely below 2 % *ad valorem*.
- (192) In view of the withdrawal of the main subsidy scheme established in the IP and the fact that the amount of subsidisation received for all other subsidy schemes investigated were below the *de minimis* threshold during the IP in the meaning of Article 14(3) of the basic Regulation, it is considered that imposition of definitive measures is not warranted.
- (193) In the light of the above, it is considered that the present anti-subsidy investigation should be terminated.
- (194) In line with the termination of this investigation the registration of imports should hereby be terminated.
- (195) All parties were informed about the essential facts and considerations on the basis of which it was intended to terminate proceeding. They were granted a period within which they could make representations subsequent to this disclosure.
- (196) In light of the above, the Commission therefore concludes that the anti-subsidy proceeding concerning imports into the Union of bioethanol originating in

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**Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 20 December 2012 terminating the anti-subsidy proceeding concerning imports of bioethanol originating in the United States of America and terminating the registration of such imports imposed by Regulation (EU) No 771/2012 (2012/825/EU). (See end of Document for details)

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the United States of America should be terminated without the imposition of anti-subsidy measures and that the registration of imports should likewise be terminated,

6. **ADVISORY COMMITTEE**

- (197) Objections to the termination of this anti-subsidy proceeding were raised in the Advisory committee. Consequently, in accordance with Article 14 of Regulation (EC) 597/2009, the proceeding shall stand terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise. This Decision shall then be published in the *Official Journal of the European Union*,

HAS ADOPTED THIS DECISION:

*Article 1*

The anti-subsidy proceeding on imports of bioethanol, sometimes referred to as “fuel ethanol”, i.e. ethyl alcohol produced from agricultural products (as listed in Annex I to the Treaty on the Functioning of the European Union), denatured or undenatured, excluding products with a water content of more than 0,3 % (m/m) measured according to the standard EN 15376, as well as ethyl alcohol produced from agricultural products (as listed in Annex I to the Treaty on the Functioning of the European Union) contained in blends with gasoline with an ethyl alcohol content of more than 10 % (v/v) currently falling within CN codes ex 2207 10 00, ex 2207 20 00, ex 2208 90 99, ex 2710 12 11, ex 2710 12 15, ex 2710 12 21, ex 2710 12 25, ex 2710 12 31, ex 2710 12 41, ex 2710 12 45, ex 2710 12 49, ex 2710 12 51, ex 2710 12 59, ex 2710 12 70, ex 2710 12 90, ex 3814 00 10, ex 3814 00 90, ex 3820 00 00 and ex 3824 90 97 and originating in the United States of America, is hereby terminated.

*Article 2*

Customs authorities are hereby directed to cease the registration of imports carried out pursuant to Article 1 of Regulation (EU) No 771/2012. No countervailing duty shall be collected on the imports thus registered.

*Article 3*

Regulation (EU) No 771/2012 is hereby repealed.

*Article 4*

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

Done at Brussels, 20 December 2012.

*For the Commission*

*The President*

José Manuel BARROSO



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**Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 20 December 2012 terminating the anti-subsidy proceeding concerning imports of bioethanol originating in the United States of America and terminating the registration of such imports imposed by Regulation (EU) No 771/2012 (2012/825/EU). (See end of Document for details)

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**Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 20 December 2012 terminating the anti-subsidy proceeding concerning imports of bioethanol originating in the United States of America and terminating the registration of such imports imposed by Regulation (EU) No 771/2012 (2012/825/EU). (See end of Document for details)

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- (1) [OJ L 188, 18.7.2009, p. 93.](#)
- (2) [OJ C 345, 25.11.2011, p. 13.](#)
- (3) [OJ C 345, 25.11.2011, p. 7.](#)
- (4) [OJ L 229, 24.08.2012, p. 20.](#)
- (5) See US Internal Revenue Code (IRC) – sec. 40(b)(4) point E.
- (6) See [www.ethanol.org](http://www.ethanol.org) – RFS (Renewable fuels standard) under the Energy Independence and Security Act of 2007.
- (7) The investigation showed that to avail the alcohol mixture credit, as defined in Sec. 40(b)(3) of the IRC in the USA it sufficed to blend neat bioethanol with as little as 0,1 % of gasoline.
- (8) For instance (a) The information published by the American Coalition for Ethanol (ACE) on the web (b) the Energy Policy Act (EPA) of 2005, in particular P.L. 110-58 (c) the Energy Independence and Security Act of 2007 (P.L. 110-140, H.R.6) which amended and increased the Renewable Fuels Standard (RFS) requiring 9 billion gallons of renewable fuels use in 2008 and 13,9 billion gallons in 2011, (d) fact sheets issued by the US Department of Energy under the Clean cities actions, etc.
- (9) [OJ L 229, 24.8.2012, p. 20.](#)

**Changes to legislation:**

There are currently no known outstanding effects for the Commission Decision of 20 December 2012 terminating the anti-subsidy proceeding concerning imports of bioethanol originating in the United States of America and terminating the registration of such imports imposed by Regulation (EU) No 771/2012 (2012/825/EU).