



**EUROPEAN UNION – ANTI-DUMPING MEASURES ON IMPORTS OF FATTY ACID  
FROM INDONESIA**

**REQUEST FOR CONSULTATIONS BY INDONESIA**

The following communication, dated 7 February 2024, from the delegation of Indonesia to the delegation of the European Union, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

1. My authorities have instructed me to request consultations with the European Union pursuant to Articles 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) with respect to the European Union's definitive anti-dumping measures imposed on imports of fatty acid originating in Indonesia,<sup>1</sup> the investigation leading to the imposition of those measures (fatty acid anti-dumping investigation) as well as the methodology applied by the European Union in anti-dumping investigations (including in the fatty acid anti-dumping investigation) for constructing normal value based on PCN-specific costs and profit data.

2. The Government of Indonesia (Indonesia) considers that these measures are inconsistent with the Anti-Dumping Agreement and the GATT 1994.

**I. FACTUAL BACKGROUND AND THE MEASURES AT ISSUE**

**A. Fatty acid investigations**

*1. Fatty acid anti-dumping investigation*

*a. Initiation of the investigation*

3. On 18 October 2021, the Coalition against Unfair Trade in Fatty Acid (CUTFA) lodged a complaint pursuant to Article 5 of Regulation (EU) 2016/1036 of the European Parliament and of the Council (Basic Anti-Dumping Regulation)<sup>2</sup> with the European Commission (Commission) requesting an initiation of an anti-dumping investigation. That complaint alleged that imports of fatty acid originating in Indonesia were sold in the European Union at dumped prices and caused material injury to the Union industry.

4. On 30 November 2021, the Commission published a "Notice of initiation of an anti-dumping proceeding concerning imports of fatty acid originating in Indonesia"<sup>3</sup> in the Official Journal of the European Union, whereby it initiated an investigation with a view to imposing anti-dumping duties

<sup>1</sup> Commission Implementing Regulation (EU) 2023/111 of 18 January 2023 imposing a definitive anti-dumping duty on imports of fatty acid originating in Indonesia, Official Journal of the European Union, OJ 2023 L 18, p. 1 (Definitive Anti-Dumping Regulation).

<sup>2</sup> Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, 2016 OJ L 176, p. 21.

<sup>3</sup> Notice of initiation of an anti-dumping proceeding concerning imports of fatty acid originating in Indonesia, 2021 OJ C 482, (Notice of Initiation), p. 5.

on imports of certain fatty acid products. The investigation was initiated on the basis of the complaint made by CUTFA, on behalf of the Union industry of fatty acid, in the sense of Article 5(4) of the Basic Anti-Dumping Regulation. The Commission considered that the complaint contained evidence of dumping and of resulting material injury that was sufficient to justify the initiation of the investigation.<sup>4</sup> The investigation of dumping and injury covered the period from 1 October 2020 to 30 September 2021 (i.e., the investigation period). The examination of trends relevant for the assessment of injury covered the period from 1 January 2018 to the end of the investigation period (i.e., the period considered).

b. Product under investigation

5. The product under investigation described in the Notice of Initiation covers fatty acid with a carbon chain length of C6, C8, C10, C12, C14, C16 or C18 with an iodine value below 105g/100g including: single fatty acid (also referred to as "pure cut"), and blends containing a combination of two or more carbon chain lengths<sup>5</sup>; and, excluding fatty acid certified by a voluntary scheme for the production of sustainable biofuels, bioliquids and biomass fuels recognised by the Commission.<sup>6</sup>

6. Following comments received from the parties, the Commission issued on 21 January 2022 a Note to the File regarding the product scope (Note to File on Product Scope). That note clarified that the investigation covered only fatty acid with a ratio of free fatty acids to triglycerides (degree of split – DoS) of at least 97%.<sup>7</sup> The product concerned is the product under investigation originating in Indonesia.<sup>8</sup>

c. Withdrawal of the complaint

7. On 15 August 2022, KLK Emmerich GmbH (KLK), the largest sampled Union producer, sent a letter to the Commission expressing its concern that anti-dumping duties would cause turbulence on the fatty acid market.<sup>9</sup> On 19 August 2022, KLK sent another letter to the Commission informing it that the company opposes the imposition of anti-dumping duties because it considers those duties to be against the interest of the company and of the Union industry in general.<sup>10</sup> It stated that "Europe needs to maintain a competitive environment for fatty acids in the interest of all stakeholders". KLK also noted that it was able to stay competitive and profitable with imports of the product concerned from Indonesia.<sup>11</sup>

8. On 24 August 2022, CUTFA withdrew its anti-dumping complaint, "due to the influence from stakeholders".<sup>12</sup> Interested parties filed comments on the withdrawal of the complaint,<sup>13</sup> requesting the Commission to terminate the investigation in light of the lack of Union interest as well as the lack of injury to the Union industry, as apparent from the withdrawal of the complaint and KLK's letters of 15 and 19 August 2022.<sup>14</sup>

d. Imposition of the definitive anti-dumping measures

9. The Commission decided not to impose provisional measures. On 1 July 2022, the Commission informed the Member States and all interested parties that no provisional duties would be imposed on imports of fatty acid originating in Indonesia, and that the investigation would continue.<sup>15</sup>

10. On 18 January 2023, the European Union adopted a regulation imposing a definitive anti-dumping duty on imports of fatty acid originating in Indonesia (Definitive Anti-Dumping Regulation). The Definitive Anti-Dumping Regulation imposes anti-dumping duties ranging from 15.2% to 46.4%

<sup>4</sup> Definitive Anti-Dumping Regulation, recital 2.

<sup>5</sup> Notice of Initiation, recital 2.

<sup>6</sup> Definitive Anti-Dumping Regulation, recitals 70,101-102, Article 1.

<sup>7</sup> European Commission, Note to the File for the Inspection by Interested Parties - Clarifications on the product scope, restart of sampling process and procedural aspects (21 January 2022), Ref t22.000602.

<sup>8</sup> Definitive Anti-Dumping Regulation, recital 74.

<sup>9</sup> Letter KLK 15 August 2022.

<sup>10</sup> Letter KLK 19 August 2022.

<sup>11</sup> Letter KLK 19 August 2022.

<sup>12</sup> Letter - withdrawal of anti-dumping complaint on behalf of CUTFA.

<sup>13</sup> Definitive Anti-Dumping Regulation, recital 62.

<sup>14</sup> Musim Mas letter regarding withdrawal of complaint, 24 August 2022, p. 1.

<sup>15</sup> Definitive Anti-Dumping Regulation, recitals 55-56.

on imports into the European Union of fatty acid originating in Indonesia. These anti-dumping duties are due to expire on 20 January 2028.

11. Definitive anti-dumping duties were set at the level of the dumping margin for two Indonesian producers (Wilmar and Musim Mas) at 15.2% and 46.4% respectively.<sup>16</sup> The definitive duty for the other cooperating non-sampled companies in Indonesia was based on the weighted average dumping margin for those two sampled companies, at 26.6%. The definitive duty for all other companies was based on the highest dumping margin of the two sampled cooperating exporters, at 46.4%.<sup>17</sup>

## 2. *Fatty acid anti-subsidy investigation*

12. On 13 May 2022, the Commission initiated a separate anti-subsidy investigation concerning imports of fatty acid originating in Indonesia following a complaint made by CUTFA.<sup>18</sup> The fatty acid anti-dumping and anti-subsidy investigations share the same product scope, the same investigation period and the same period considered.<sup>19</sup>

13. On 24 August 2022, KLK sent a letter to the Commission expressing its opposition to the imposition of countervailing measures on imports of the product concerned from Indonesia.<sup>20</sup>

14. On 3 October 2022, CUTFA withdrew its anti-subsidy complaint.<sup>21</sup>

15. Consequently, the Commission terminated the fatty acid anti-subsidy investigation on 21 December 2022.<sup>22</sup> The decision to that effect was published by the Commission on 20 March 2023.<sup>23</sup> In that decision, the Commission referred to the withdrawal of the complaint and stated that "[t]he investigation had not brought to light any considerations demonstrating that such termination would not be in the Union interest".<sup>24</sup>

## **B. EU methodology for constructing normal value based on PCN-specific costs and profit data**

16. In EU anti-dumping investigations, the product concerned is typically subdivided into several models designated by product control numbers (PCNs). The normal value and the export price are computed for each PCN and the comparison between normal value and export price is carried out on a PCN-basis.

17. When the normal value cannot be established based on the domestic sales prices in the exporting country, the European Union resorts to a constructed normal value based on the cost of production plus a reasonable amount for administrative, selling and general (SG&A) costs and for profits.

18. Pursuant to Article 2(6) of the Basic Anti-Dumping Regulation, which mirrors the text of Article 2.2.2 of the Anti-Dumping Agreement, "the amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product by the exporter or producer under investigation".

<sup>16</sup> Definitive Anti-Dumping Regulation, recitals 487-488.

<sup>17</sup> Definitive Anti-Dumping Regulation, recitals 489.

<sup>18</sup> Notice of initiation of an anti-subsidy proceeding concerning imports of fatty acid originating in Indonesia, 2022 OJ C 195, p. 11. The EU case number of the anti-subsidy investigation is AS688.

<sup>19</sup> Definitive Anti-Dumping Regulation, recital 54.

<sup>20</sup> Letter KLK 24 August 2022.

<sup>21</sup> Letter withdrawal of anti-subsidy complaint on behalf of CUTFA.

<sup>22</sup> General Disclosure Document AS688 – Anti-subsidy proceeding concerning imports of fatty acid originating in Indonesia.

<sup>23</sup> Commission Implementing Decision (EU) 2023/617 of 17 March 2023 terminating the anti-subsidy proceeding concerning imports of fatty acid originating in Indonesia, 2023 OJ L 80, p. 99.

<sup>24</sup> Anti-subsidy termination decision, recitals 9-11.

19. If the domestic sales volume of certain PCNs constitute less than 5% of the total volume of the same PCNs sold to the European Union, the European Union applies a PCN-specific profitability test to determine the methodology for constructing the normal value of those PCNs:

- when a PCN has no profitable sales during the entire investigation period, the amounts for SG&A and for profit used to construct normal value of that PCN are based on weighted average of *all* profitable domestic sales of the exporting producer (first methodology);
- when a PCN has some profitable sales (even very minor) during the investigation period, the amounts for SG&A and for profit used to construct normal value of that PCN are based on weighted average of the profitable domestic sales of *that PCN only* (second methodology).

20. The second methodology, whereby the Commission uses exclusively the data relating to the specific PCN, is consistently applied by the Commission in its anti-dumping investigations, including the fatty acid anti-dumping investigation. It is evidenced by the findings of previous investigations and is also reflected in the OASYS calculation file, included in the company-specific disclosure files in each EU anti-dumping investigation, which shows the different steps followed by the Commission when calculating normal value.

### **C. The measures at issue**

21. The measures at issue in this dispute cover the definitive anti-dumping measures imposed by the European Union on imports of fatty acid originating in Indonesia, and the investigation leading to the imposition of those measures. They include any amendments, supplements, reviews, replacements, renewals, extensions, implementing measures and any other related measures taken by the European Union in relation to the investigation and/or the anti-dumping measures at issue. The measures at issue also include the European Union's decision of 21 December 2022 to terminate the anti-subsidy investigation, as published on 20 March 2023.

22. Furthermore, the measures at issue cover the EU methodology for constructing normal value based on PCN-specific costs and profit data for PCNs sold in non-representative quantities on the domestic market of the exporting country, as explained in Section B above.

## **II. LEGAL BASIS FOR THE COMPLAINT**

23. Indonesia considers that the definitive anti-dumping measures imposed by the European Union on imports of fatty acid originating in Indonesia and the investigation leading to the imposition of those measures appear to be inconsistent with the following obligations in the relevant WTO covered agreements:

- Articles 5.3 and 5.8 of the Anti-Dumping Agreement because the European Union failed to reject the application based on a determination that the application was supported by insufficient evidence of injury, particularly as a result of the deficient product scope included in the application.
- Article 5.4 of the Anti-Dumping Agreement because the European Union failed to reject the application or terminate the investigation despite the lack of standing of the domestic industry.
- Article 5.6 of the Anti-Dumping Agreement, because – following the withdrawal of the complaint – the European Union *de facto* carried out an *ex officio* investigation, without sufficient evidence of dumping, injury and a causal link.
- Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement because when constructing the normal value of PCNs sold in insufficient quantities in the domestic market, the European Union used amounts for SG&A costs and for profit which are not reasonable and are not based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.

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- Article 2.4.1 and Article 9.3 of the Anti-Dumping Agreement, as well as Article VI:2 of the GATT 1994, because the European Union applied an anti-dumping duty which exceeds the margin of dumping, as a result of using an incorrect exchange rate.
  - Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the European Union failed to make an objective and unbiased examination of the injury factors and erroneously found the existence of material injury to the Union industry.
  - Articles 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, because the amount of the anti-dumping duty imposed by the European Union exceeds the margin of dumping as established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.
  - Article X:3(a) of the GATT 1994 because by imposing the anti-dumping duties while terminating a parallel countervailing investigation following the withdrawal of both complaints, the European Union failed to administer its Basic Anti-Dumping and Basic Anti-Subsidy Regulations, and in particular Articles 9(1) and 14(1) governing the termination of an investigation following the withdrawal of a complaint, in a uniform and reasonable manner.
  - Article X:3(a) of the GATT 1994 because by applying different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country, depending on the existence of profitable sales of those PCNs, the European Union failed to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner.
  - Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 as a consequence of the violations described above.

24. Indonesia considers that the EU methodology for constructing normal value based on PCN-specific costs and profit data appears to be inconsistent with the following obligations in the relevant WTO covered agreements:

- Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement because by requiring the use of the SG&A and profit data relating exclusively to a specific PCN sold in insufficient quantities on the domestic market of the exporting country, the EU methodology uses amounts for SG&A costs and for profit which are not reasonable and are not based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.
- Article X:3(a) of the GATT 1994 because by applying different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country, depending on the existence of profitable sales of those PCNs, the European Union fails to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner.

25. The measures described above appear to nullify or impair the benefits accruing to Indonesia, directly or indirectly, under the Anti-Dumping Agreement and the GATT 1994.

26. Indonesia reserves its right to raise additional claims and other matters in respect of the mentioned issues, whether factual or legal, during the course of the consultations. This request also covers any other amendments, replacements, extensions, related measures or implementing measures that relate to the inconsistent measures at issue here.

27. Indonesia looks forward to receiving a response to the present request from the European Union and to establishing a mutually convenient date for consultations, with a view to resolving this dispute.

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