KING & SPALDING

AD0058 investigation on Biodiesel Imports from China

Comments on the Product Scope

Submitted by Renewable Transport Fuel Association ("RTFA")

OPEN VERSION

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1. Introduction

1. On 14 June 2024, the TRA invited all interested parties to provide their assessment on whether Sustainable Aviation Fuel ("SAF") should be included within the scope of the AD0058 investigation.

2. RTFA firmly believes that SAF must remain within the scope of the present investigation. Excluding SAF would severely undermine the remedial effect of any anti-dumping duty to be imposed. There is no conceivable rationale or justification to exclude SAF from the scope of the AD0058 investigation.

3. RTFA demonstrates in the present submission that Fatty Acid Methyl Esther ("FAME"), Hydrotreated Vegetable Oil ("HVO") and SAF are like and directly competing products and they all belong to the same general product definition of "biodiesel".

2. Hydrocarbon-based biodiesel must remain within the product scope

4. In its Application, RTFA explained that if the product concerned could be subdivided into separate models, these would be i) FAME and ii) biodiesel obtained from synthesis or hydrotreatment ("hydrocarbon-based biodiesel") including HVO and SAF:[1]

5. FAME is produced through the transesterification process (the reaction of an alcohol with acid). FAME production requires other reagents, such as methanol, and the production of FAME biodiesel generates by-products such as glycerin.

6. HVO is a type of biodiesel made by the hydrocracking or hydrogenation of vegetable oil. Hydrocracking breaks big molecules into smaller ones using hydrogen, while hydrogenation adds hydrogen to molecules. These hydro-processing techniques constitute alternative processes to transesterification to produce diesel from biomass (FAME). Therefore, HVO is as a hydrocarbon-based biodiesel without oxygen content.

7. The technical specifications and quality of SAF are quite similar to HVO as both are hydrocarbon-based biodiesel without oxygen content. SAF can be produced from different feedstocks via a range of different production pathways.

8. One of the main pathways to produce SAF is Hydrotreated Esters and Fatty Acids ("HEFA") whereby vegetable oils, waste oils, or fats are refined into SAF through hydrogenation. HEFA SAF production process is similar to that used for HVO production, only with more severe cracking of the longer chain carbon molecules, into shorter chains.

9. Producing SAF requires the initial production of HVO. Depending on the technology and investments choices, an isomerization process is necessary to obtain 20-30% of SAF from the HVO. The minor difference between HVO and HEFA SAF is that the

[1] Section A.3.2 of the Application.

latter contains shorter chain molecules and lower cloud point compared to the former. HEFA SAF is currently the main form of SAF that is imported into the UK.[2]

10. RTFA acknowledges that some aspects of the chemical composition of FAME may be different compared to HVO and SAF. This is because FAME is an ester, whereas HVO and SAF are hydrocarbons. For instance, while FAME contains 11% oxygen content, HVO and SAF do not contain oxygen:[3]

Table 1. Comparison of FAME and HVO properties [1-3]

Properties	FAME	HVO
% Oxygen	11	0
Density (15°C) (g/ml)	0.883 to 0.885	0.775 to 0.780
Viscosity (40°) (mm^2/s)	4.5	2.5 to 3.5
Cloud point (°C)	−5 to 0	−5 to −30
Sulphur content	< 10 ppm	< 10 ppm
LHV (MJ/kg)	37.5 to 38	44
Storage stability	Very challenging	Good
Cetane number	50 to 65	80 to 99
% change in NO_x emission	+10	0 to −10

11. Nevertheless, these aspects in the composition are minor and largely insufficient to claim that SAF and/or HVO are not like products to FAME for the following reasons:

    i. it has already been established by the TRA and the WTO Dispute Settlement Body ("DSB") that HVO and FAME are like products. As SAF and HVO are also like products, SAF should also remain in the product scope (**a**); and

    ii. all types of biodiesel are or can be used in the transport sector and they are all interchangeable in the road transport (**b**).

a. FAME, HVO and SAF are like products

12. RTFA reiterates its arguments provided in its Application that HVO and FAME are like products, given that:

    a. the feedstocks used are the same for both HVO and FAME. Thus, HVO can be produced from vegetable oils (such as palm oil, canola, soybeans etc.) or from lipidic waste and residues;

    b. both HVO and FAME are fossil-free (renewable) alternatives to conventional diesel, despite differences in their production processes and fuel standards;

    c. HVO and FAME belong to the same market in the UK and compete with one another. They mostly substitute each other depending on the physical properties required or their respective prices. HVO can be used interchangeably by the

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[2] For the supply of renewable fuels between January-December 2023, please refer to the UK Government's Renewable fuel statistics 2023: Fourth provisional release, accessible via https://www.gov.uk/government/statistics/renewable-fuel-statistics-2023-fourth-provisional-release

[3] Annex 1 - Renewable Diesel Fuel from Processing of Vegetable Oil in Hydrotreatment Units, page 2.

same consumers with other biodiesel and even mixed with pure biodiesel without changing its intended use and purpose; and

d. end consumers do not perceive the differences between several FAME and HVO. In fact, biodiesel is mixed with diesel at the pump without separate labelling. The final customer is not aware of the feedstock used in the production of biodiesel but merely requires a product that meets the UK standard. Commercial users, including bus fleets and trucks, use FAME and HVO interchangeably, switching one to the other or mixing them. Differences in price might inform which type of fuel to use but not the intrinsic characteristics of FAME or HVO.[4]

13. The likeness between the two products is not only factually accurate, but it is also acknowledged by numerous authoritative bodies and jurisdictions. Notably, the Foreign Agricultural Service of the US Department of Agriculture, in its regular Global Agricultural Information Network ("GAIN") reports, employs the term "biobased diesel ("BBD")" to encompass both traditional biodiesel ("FAME") and hydrogenation-derived renewable diesel ("HDRD") covering HVO and SAF.[5]

14. Similarly, the interchangeability and likeness of HVO and FAME biodiesel was highlighted and confirmed in the WTO Panel Report in *EU and Certain Member States — Palm Oil (Malaysia)*[6]. In that dispute, Malaysia explicitly confirmed that "*HVO and FAME are like products*"[7] noting that "*all biodiesels (whether FAME or HVO) are essentially like because their limited differences do not significantly impact their substitutability and their competitive relations*"[8]. The EU also agreed with this position: "*HVO is used as a substitute for biodiesel when blending biofuels with conventional diesel. For example, the USDA FAS [United States Department of Agriculture Foreign Agricultural Service] report for 2019 states that: "EU-produced FAME faced strong competition from domestically produced HVO". Biofuel producers explained in the* context of a merger investigation that HVO and FAME are competing. The strong *competition exercised by HVO vis-à-vis FAME is confirmed by its higher CFPP [Cold Filter Plugging Point] and the higher blending possibility*"[9].

15. Given that Malaysia's complaint centered on an alleged discrimination based on the feedstock used to produce FAME and/or HVO (palm oil as against rapeseed oil and soybean oil), not an alleged discrimination between FAME and HVO, the Panel did not have to explicitly rule on the issue. The Panel did confirm, however, that: *"PME, RME and SBME [i.e., FAME made from, respectively, palm oil, rapeseed oil and soybean oil], as well as HVO made from palm oil, rapeseed oil and soybean oil have similar or the same properties, end-uses, and are considered highly substitutable by the relevant consumers. Therefore, …, palm oil-, rapeseed oil- and soybean oil-based biofuels are like products".*[10]

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4 Section A.2.1 of the Application.
5 *Ibidem*.
6 Panel Report on European Union and certain Member states — Certain measures concerning palm oil and oil palm crop-based biofuels, WT/DS600/R (*EU and Certain Member States — Palm Oil (Malaysia)*, 5 March 2024.
7 *Ibidem*, para. 7.457.
8 EU's first written submission in *EU and Certain Member States — Palm Oil (Malaysia)*, para. 625.
9 *Ibidem*, para. 616.
10 Panel Report on *EU and Certain Member States — Palm Oil (Malaysia)*, para. 7.1024. See also para. 7.988 and para. 7.462.

16. In light of the ongoing, RTFA firmly maintains that HVO is a like product, and thus falls within the scope of the AD0058 investigation.

17. RTFA contends that the same conclusion must be drawn for SAF for the following reasons:

    a. HVO and HEFA SAF are both hydrocarbon-based biodiesel without oxygen content, exhibiting similar technical characteristics. Specifically, HVO is typically produced in conjunction with SAF in the same plant, within integrated oil refineries. There are no significant differences in the feedstocks or production facilities, and the production process for HVO can easily be switched or adapted to produce SAF with the addition of a cracking step.[11]

    b. The production of SAF entails an initial phase where HVO is produced. Depending on the chosen technology and investment, this HVO can then be isomerized to obtain 20-30% of SAF. As a result, the SAF that is produced is classified as *"paraffinic gasoil obtained from synthesis and/or hydrotreatment, of non-fossil origin"*, perfectly aligning with the definition of HVO.

    c. Both HVO and SAF offer low GHG emissions and can be directly refueled in existing diesel vehicles. Consequently, SAF can be easily blended into road fuel, allowing it to directly compete with HVO in the market.

18. In view of the above, RTFA requests that the TRA considers SAF as a like and directly competitive product to HVO and to FAME. Accordingly, RTFA urges the TRA to maintain both HVO and SAF within the product scope of the AD0058 investigation. Failure to do so will severely undermine any anti-dumping duty to be imposed due to interchangeability between all types of biodiesel.

b. All types of biodiesel are or can be used in the transport sector

19. All types of biodiesel serve fundamentally the same purpose: to be used in the transport sector as standalone fuel or blended with mineral diesel. The distinctions between sub-sectors of transport – namely, road, maritime, air transport – are irrelevant because (i) technically, HEFA SAF can be used or blended for both road and air transport thus directly competing with HVO and SAF, and (ii) FAME, HVO and SAF all compete under the same regulatory framework in the UK.

(i) SAF can be used for both road and air transport

20. As outlined above, both HVO and HEFA SAF can be directly refueled in existing diesel vehicles. While airplane engines may exclusively use SAF for safety reasons, cars, trucks and boats can operate on SAF, HVO or FAME interchangeably.

21. It is important to note that the SAF specification has been developed to meet the stringent requirements for jet engine use. Although jet engines and fuels must adhere to more restrictive standards due to the risks associated with inferior fuel quality in

[11] Annex 2 - Press Release on Cooperation between Galp and Mitsui for the production HVO & SAF.

aviation, this does not preclude the use of SAF in lower-risk applications, such as cars and trucks in road transport.

22. Consequently, SAF can technically compete with HVO/FAME in the road fuel market if its price is competitive.

(ii) All biodiesels compete under the same regulatory framework

23. Distinguishing between different types of biodiesel (FAME, HVO and SAF) based on whether they are used in different sub-sectors of transport would not produce a reasonable outcome, especially considering the current regulatory framework. For example, in the EU, starting in 2025 with the implementation of the Renewable Energy Directive ("RED3"), SAF, HVO and FAME will all contribute to fulfilling transport obligations (road, aviation, maritime), extending beyond the currently applicable RED1 and RED2 mandates covering exclusively road fuels.[12]

24. In the UK, the current regulatory environment governing renewable fuels for transport closely resembles the EU's new RED3 Directive. Specifically, all renewable fuels supplied into the UK transport market (road, non-road and aircraft) currently compete with one another, pursuant to the Renewable Transport Fuel Obligations ("RTFO") Order.[13] The RTFO mandates a specific percentage of transport fuels to be sourced from renewables, requiring a certain number of Renewable Transport Fuel Certificates ("RTFCs") to be generated each year.

25. The RTFO currently allows SAF to claim RTFCs. Since SAF is currently eligible for support through the RTFO, the RTFCs it generates can offset the need for other fuels. In theory, a company could meet its entire obligation using SAF without relying on FAME or HVO. This indicates that SAF, HVO and FAME all compete within the same end market under the RTFO.

26. It should be noted that the UK Department for Transport ("DfT") has expressed its intention to introduce a SAF mandate, which is currently pending parliamentary approval. Should this mandate take effect on 1 January 2025, it would ostensibly segregate the demand for fuels used in air transport. However, this proposal, detailed in the consultation response published in April 2024, has not yet been adopted nor incorporated into UK legislation.

27. Moreover, even if the UK Government were to enact a SAF mandate, it would not entirely segregate SAF from other uses. Specifically, HEFA SAF directed towards road transport would still qualify for RTFCs. As long as HEFA SAF remains the only commercially viable SAF available in the UK, the possibility of its diversion to road transport will persist. Thus, despite the prospective mandate, the competitive dynamics between SAF, HVO and FAME in the broader fuel market will likely remain unchanged.

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[12] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, PE/36/2023/REV/2, OJ L, 2023/2413, 31.10.2023.

[13] The Renewable Transport Fuel Obligations Order 2007, UK Statutory Instruments 2007 No 3072 (as amended).

(iii) Differentiating among sub segments of the transport sector is irrelevant in the present case and legally flawed

28. RTFA firmly opposes differentiating biodiesel products based on sub segments of the transport sector. In the present case, because the primary designation of SAF for air transport does not preclude its technical suitability for and compatibility with road transport.

29. One of the main criteria for biodiesel customers is the CFPP ("cold filter plugging point"), i.e., the temperature at which a biodiesel may start to freeze. It is essential for customers to ensure that their biodiesel can reach the required temperature to avoid damaging the engine. Each type of biodiesel has a different CFPP, depending on the feedstock used in its production. In this respect, SAF must necessarily have a very low temperature to adapt to low temperature in the air. This being said, SAF can technically still be used in the road transport if there is any economic interest, such as the possibility to replace FAME or HVO by SAF to avoid the anti-dumping duties in place.

30. Under the WTO law, whether products are "like products" fundamentally hinges on the nature and extent of their competitive relationship.[14] This determination requires a case-by-case analysis, considering all relevant characteristics of the products in question. The criteria include (i) the products' properties, nature and quality, i.e. their physical characteristics; (ii) the products' end-uses; (iii) consumers' tastes and habits, also referred to as consumers' perceptions and behavior, in respect of the products; and (iv) the products' tariff classification. These criteria are neither cumulative nor exhaustive,[15] and no single criterion is preeminent in determining likeness.[16] Therefore, a holistic approach should be followed based on the facts of each case. The TRA has consistently adhered to this methodology in the past investigations.[17]

31. Moreover, established WTO case-law suggests that assessing likeness requires considering the competitive relationship between products. In this respect, in *Canada – Periodicals*, the Appellate Body considered that a relationship of "imperfect substitutability" would still be consistent with the notion of "directly competitive or substitutable products".[18]

32. RTFA has demonstrated above that FAME, HVO and SAF are like products, sharing, *inter alia*, similar end-uses in the transport sector. RTFA firmly rejects the view that the primary use of SAF in air transport qualifies it as a different product compared to FAME and HVO.

33. In any event, even if the TRA were to consider that the end uses of SAF and FAME/HVO differ, it still would not justify excluding SAF from the scope of the AD0058 investigation, given the direct competitiveness and substitutability inherent in

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[14] Panel Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Recourse to Article 21.5 of the DSU by Mexico, WT/DS381/RW, adopted 3 December 2015, (*US – Tuna II (Mexico)*), para. 7.407

[15] *US – Tuna II (Mexico)*, para. 7.408

[16] Appellate Body Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R, WT/DS403/AB/R, adopted 20 January 2012 (*Philippines –Distilled Spirits*), para. 119.

[17] See for instance, AD0012 - *Aluminium Extrusions (China)*, Final Determination, para. 90, TD0001 - *Welded Tubes and Pipes (Belarus, Russia, China)*, Final Determination paras 4.7 - 4.13, TD0004 – *Biodiesel from United States and Canada*, Statement of Essential Facts, Section D, paras 64- 82.

[18] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 148.

the nature of FAME, HVO and HEFA SAF in the road sector, as explained in previous sections.

34. Furthermore, RTFA notes that the TRA has appropriately adopted a holistic approach in the past investigations. For instance, in *TD0001 – Welded Tubes and Pipes from Belarus, Russia and China*, the TRA concluded that the products were like due to similarities in their distribution channels, methods for negotiating prices, and end-uses.[19] RFTA considers that the TRA must conduct a similar multi-criteria analysis in the present case.

35. Similarly, in *TD0010 – HFP Rebar from China*, the TRA determined that "*the Like Goods may be of a higher quality than the Goods Subject to Review but remain entirely interchangeable and directly comparable*".[20] RTFA submits that SAF is in a similar position relative to FAME and HVO for road transport. SAF, being a higher quality and a more expensive biodiesel, meets all the technical requirements for use in car or truck engines. Therefore, the TRA should adhere to its precedent and maintain SAF within the product scope.

3. The UK industry is currently developing hydrocarbon-based biodiesel production which entails only minimal investment requirements

36. The present submission provides ample evidence to support the inclusion of SAF within the product scope of the AD0058 investigation as a like product.

37. RTFA draws the TRA's attention that any exclusion of SAF may have very detrimental effects on the UK biodiesel industry. Currently, the UK biodiesel industry predominantly produces FAME. The production of HVO and SAF in the UK is currently limited, mainly through co-processing, with the volume of co-processed fuel remaining rather constrained.

38. Nevertheless, RTFA underlines that there are concrete governmental and sectoral plans to develop a hydrocarbon-based biodiesel industry in the UK. The UK Government is at the forefront of encouraging and incentivizing these plans. This implies that, UK producers would require only minimal investments to integrate HVO/SAF production equipment into their facilities and will soon begin producing HVO and SAF in line with the UK Government's plans.

39. The UK biodiesel industry is actively exploring ways to manufacture biodiesel through the hydro-treated vegetable oils process. Zemo Partnership, an independent membership organisation jointly funded by its members and the UK Government, states that "*[h]igher blends of biodiesel, mainly B20 and B30, and HVO (100%) are concurrently being deployed by fleet operators across the UK as a route to decarbonization. These fuels (higher blend biodiesel and HVO) comprise the main opportunity for further increasing the renewable proportion of transport fuel consumed in the UK, which is an important Government objective*."[21]

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19 TD0001 – *Welded Tubes and Pipes (Belarus, Russia and China)*, Final Determination, para. 4.9.
20 TD0010 – *HFP Rebar from China*, Final Determination, para. 87.
21 *Ibidem*, p. 2.

40. In its Second Consultation on the SAF Mandate, the UK Government's Department for Transport stresses that "*SAF production is currently very limited, although volumes are increasing, with provisional statistics showing that 26 million litres were supplied in the UK in 2022. We need to continue to rapidly increase supply and it is clear that the government must help drive the demand for, and production of, these fuels*". In the same document, the UK Government mentions that "*[t]he government has set out its vision to establish the UK as a global leader in the development, production and use of SAF. The government's SAF program has three pillars: creating secure and growing UK SAF demand; kickstarting a domestic SAF industry; and working in partnership with industry and investors to build long term supply*".[22] This vision is further affirmed in recent documents, such as the Government response to the Second Consultation on the SAF Mandate.[23]

41. Moreover, the UK Government is currently working on a SAF mandate to incentivize the production and consumption of SAF in the UK, with legislation expected to enter into force in 2025.

42. Based on the above, RTFA submits that:

    a. Installing HVO/SAF production plants requires only minimal amount of investment,

    b. the UK biodiesel industry is prepared to invest in the production of HVO/SAF in alignment with the UK Government's efforts and the ongoing legislative processes.

43. For encouraging the development of a strong HVO and SAF industry in the UK, producers must first be ensured that there is a level playing field in the UK. This pre-condition is critical for the development of any industry.

44. In this respect, RTFA notes that the fact that the industry is still at its infant stage is not a reason to exclude SAF in the present case. In *TD0008 – Wire Rod from China*, the TRA found that mats were not substitutable for chopped strands or rovings, and that there was no UK production or planned production of mats. Consequently, the TRA determined to vary the description of the goods to exclude mats, as their inclusion would not result in any injury.[24] Conversely, in the same investigation, the TRA retained multi-end rovings within the scope, recognizing that although there was no UK production of this product, the UK producer could resume production with minimal investment requirements.[25]

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[22] Second Consultation on the SAF Mandate, accessible via: https://assets.publishing.service.gov.uk/media/6424782560a35e00120cb13f/pathway-to-net-zero-aviation-developing-the-uk-sustainable-aviation-fuel-mandate.pdf
The Government response to the Second Consultation on the SAF Mandate, accessible via: https://assets.publishing.service.gov.uk/media/662938db3b0122a378a7e722/creating-the-UK-saf-mandate-consultation-response.pdf

[24] TD0008 – *Wire Rod from China*, Final Determination, para. 76.

[25] TD0008 – *Wire Rod from China*, Final Determination, para. 82.

4. Conclusion

45. RTFA has established in the present submission that it is critical to maintain SAF in the scope of the present investigation to allow for efficient anti-dumping duties to be imposed.

46. Therefore, RTFA respectfully requests the TRA to confirm that SAF is within the scope of the present investigation.

47. RTFA also takes the opportunity of the present submission to highlight that while the present investigation covers the customs codes relating to HVO and SAF, there are however two customs codes that are currently missing in relation to SAF namely: (i) JET-A and blends with lower SAF content (2710 1921), and (ii) jet fuel with SAF content (2710 1915). Since SAF is a recent product that is being progressively commercialized, it still lacks its own dedicated customs code. Therefore, RTFA is carefully monitoring the use by operators to import SAF. In this respect, it has noted that the two codes identified above has started to being used by the operators to import SAF into the UK.

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