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Clarification of the European Commission's Position on the Renewable Energy Directive



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**Palm Oil Green Development
Campaign**

Alleviating Poverty through Wealth Creation

Palm oil provides developing nations and the poor a path out of poverty. Expanding efficient and sustainable agriculture such as Palm Oil Plantations provides small and large plantation owners and their workers with a means to improve their standard of living.

Sustainable Development

Sustainable development of palm oil plantations and growth of the palm oil industry in developing nations can and will be achieved through consultation and collaboration with industry, growers, lobby groups and the wider community.

Climate and the Environment

Palm Oil is a highly efficient, high yielding source of food and fuel. Palm Oil plantations are an efficient way of producing fossil fuel alternatives and capturing carbon from the atmosphere.

Opportunity and Prosperity

Developing nations must be allowed the chance to grow and develop without political intervention by environmental groups or developed nations. It is crucial that developing nations be given the same opportunities which developed nations have benefited from.

Property Rights

Efficient palm oil plantations and the growing demand for palm oil give smaller land holders greater opportunities to make a living off their land, maintain their ownership and support their rights to property and prosperity.

Clarification of the European Commission's Position on the Renewable Energy Directive

Executive Summary

The European Renewable Energy Directive has been subject to considerable 'negotiation' and gamesmanship. The controversies arise over the use and import of biofuels. What is becoming increasingly clear is the extent and depth of friction between competing interests upon which the Directive impacts.

Earlier this year, Environmental NGOs protested that the European Commission was set to define oil palms as forests for the purposes of the Directive. Ultimately, the EC released a Communication which 'excluded' oil palms from the definition of forests.

The reality is that this does not change things. The EC Communication is not binding and does not alter the definition of 'forest' in the Directive – under which oil palms could qualify.

This is just one, and by no means the most important, of the problems being generated by the Directive. It has pitched the widely varying interest of environmental, farm, trade, consumer, renewable energy and transport groups, and the multitude of EC Committees which represent those interests, against each other.

Greenpeace wants no biofuels, the energy, transport and consumer interests do. WWF wants the carbon footprint of biofuels to extend to the land use impact of other activities. Powerful farm groups oppose that. That is the political picture inside the EU.

The ambit of the Directive is so wide and the conflicts of interests it fosters open up such profound differences of interest among EU stakeholders, the capacity to implement it must be questioned, regardless of whether or not it is struck down in the WTO.

What has so far been downplayed in Brussels is the external dimension - how these negotiations impact on the global producers and exporters of biofuels, and on the prospective conflict looming between the Directive and the European Union's commitments under the WTO.

For a start, the Directive discriminates against imported biofuels by setting a different carbon rating which appears to be arbitrarily selected. More important for the regulation of imports is the authority the Directive gives the Commission and Member States to require compliance with EU environmental standards before imports are permitted.

The recent Communications from the European Commission (EC) suggest it will be light-handed and will certify biofuels as sustainable through 'voluntary schemes' and bilateral agreements. The reality is different. The EC will regulate compliance. It has full authority to examine whether a biofuel meets the sustainability criteria, and will exercise it. As well, the measures cross the threshold of what mainstream trade law experts consider trade barriers.

Just how member states interpret the Directive will depend on exactly how they enact those provisions in national regulations. That will not be known until each Member State regulates the terms of the Directive into law.

If that is not sufficiently beyond the WTO rule that trade should only be regulated by tariffs, the Directive also requires the EC to review the 'social impact', as well as its impact on food prices, property rights and other development issues. In the case of food prices, the EC is empowered to 'propose corrective action'. Regulating imports to secure compliance to correct these effects could also widen conflict with WTO obligations.

Finally the Directive also obliges EU member states to widen the carbon impact of the exported biofuel to take into effect any "Indirect Land Use Change" caused by production of biofuels. How that is to be done is not known.

The biofuel imports will be regulated in the same way as if subject to a quota, able to be changed at the whim of the European Commission. The least exporters should do seek certainty in the administration of import controls. The EU has no reason to grant such a right unless exporters have leverage. Challenging the consistency of the EU regulation with WTO rules under its disputes procedures would create that leverage.

This note reviews the content of the recent communications from the Commission and assesses the implication of them.

Key Points

The European Commission has issued three documents on the implementation of the Directive. They indicate:

- The Commission has the ultimate power to regulate compliance with the Directive by Member States. That includes approval of “voluntary” schemes to demonstrate compliance. As a result, these standards cannot be considered voluntary.
- The comments by the Commission which excludes oil palm from the definition of a ‘continuously forested areas’ are “non-binding” and only give guidance to Member States.
- Despite dropping the reference to oil palm plantations as a forest from earlier drafts of the Commission’s non-binding Communication, the definition of ‘forest’ contained in the Directive remains unaltered.
- The Directive states that the definition of a ‘forest’ is an area of more than 1ha, containing vegetation which is 5 meters tall and with more than 30 per cent canopy cover or capable of growing to that stage on that site. Oil palm may still meet that definition.
- The Commission recognizes a carbon value for oil palm which will qualify it as an eligible biofuel under the Directive if it is grown on land which previously had between 10 and 30 percent canopy cover.
- The Directive adheres to the standards set in the most recent IPCC report for the value of carbon stock from different land uses. When the next (Fifth) IPCC Assessment is produced (it is due in 2014 — work has begun) it should be anticipated Green groups will attempt to alter that standard.

The elaboration by the Commission underlines the additional conditions the EU can attach to imports under the Directive (this includes the impact on food prices, social sustainability, respect for land-use rights and wider development issues), prospectively expanding its likely contravention of WTO rules.

Introduction

The European Union Renewable Energy Directive ('the Directive') sets a target of 10 percent of transport fuel from transport fuel by 2020.

The Directive sets out criteria which must be satisfied before a type of biofuel may be accepted as a 'renewable fuel' for the purposes of the Directive.

The main criterion for palm oil is the sustainability criteria contained in Articles 17(2)-(5).

Article 18 of the Directive outlines how it will be verified whether a biofuel meets the sustainability criteria.

Recently, the European Commission released two Communiqués and one Decision on the implementation of the Directive which seek to clarify how Member States will apply the Directive.

The first Communiqué is binding and takes further action on questions raised by Article 18 of the Directive. This Communiqué focuses on applying 'voluntary schemes'.

The second Communiqué is non-binding and expands on how the sustainability criteria in Article 17 may be interpreted by Member States. In particular, this Communiqué excludes oil palm plantations from the definition of 'continuously forested areas'.

The Decision is made under powers given to the EC under Annex V of the Directive. The Decision adopts values for carbon stocks in different land uses, including oil palm, based on IPCC figures.

The Renewable Energy Directive —A Review

Under Article 17(2) — (5) of the Renewable Energy Directive 'economic operators', or biofuel producers, must show Member States that their product meets the sustainability criteria.

The 'sustainability criteria' are:

- Biofuels must provide a greater than 35 percent saving in greenhouse gas emissions;
- Biofuel shall not be obtained from raw material obtained from land with high biodiversity value, namely land that was primary forest, areas designated for protection or highly biodiverse grassland as of January 2008;
- Biofuel shall not be obtained from raw material obtained from land with high carbon value, namely land that was wetland or continuously forested areas as of January 2008; and
- Biofuel shall not be obtained from raw material obtained from land that was peatland as of January 2008.

Article 17(7) states that every two years, the Commission will report to the European Parliament and the Council on the impact of the Directive of increased demand for biofuel in third countries, food prices, in particular for people living in developing countries, wider development issues and the respect of land-use rights. Where the Commission considers appropriate, they will propose corrective action where it is found that implementation of the Directive has an adverse impact on food prices.

Article 18 of the Directive outlines how verification of compliance with the sustainability criteria for biofuels and bioliquids can be met.

Article 18 of the Directive states that Member States have responsibility for requiring the sustainability criteria is fulfilled for all biofuels counted under the Directive's targets.

Under Article 18 of the Directive there are three methods which a Member State may use to ensure verification that a biofuel meets the sustainability criteria.

The allowable methods for verification under Article 18 are:

- Member State measures to provide independent auditing to ensure compliance with the sustainability criteria. For example, it is under this power that the Germany ISCC system has been created.
 - o Article 18 (3) of the Directive states that the Commission may “establish the list of appropriate and relevant information” with particular regard to ensure there is not an excessive administrative burden for operators.
 - o Under Article 25(3) of the Directive the Commission must exercise this power under Articles 3 and 7 and with reference to Article 8 of 1999/486/EC – the European Council decision on the procedures for the exercise of implementing powers conferred on the Commission.
 - o Article 3 of 1999/468/EC state that the Commission’s decision making process will be assisted by a Committee including Member State representatives and chaired by a representative of the Commission. Article 7 states that the same principles of public access to documents as applied to the Commission shall apply to the Committee.
- Article 18(4) of the Directive states that where the Community has concluded bilateral or multilateral agreements containing provisions relating to the sustainability criteria, the Commission may decide that those agreements are evidence that biofuels from feedstocks produced in that country meet the sustainability criteria.
- Article 18(4) of the Directive also states that the Commission may decide that voluntary national or international

schemes standard setting scheme would demonstrate compliance with the sustainability criteria (i.e. – RSPO).

- Under Article 18(7) where the Commission has decided that an agreement or a scheme is appropriate to verify compliance with the sustainability criteria, a Member State will not require further evidence of compliance.
- The Commission has authority under Article 18(8) to examine whether a biofuel meets the sustainability criteria and whether a Member State may count that biofuel towards its obligations under the Directive. Such a decision must be down under Articles 3 and 7 of 1999/468/EC as outlined above.

1. The Communiqué from the Commission – on Voluntary Schemes and Default Values in the EU Biofuels and Bioliquids Sustainability Scheme (‘the Communication’)

Under Article 18 of the Directive, the Commission has the power to use ‘voluntary schemes’, bilateral or multilateral schemes and default values for carbon savings as tools to verify whether a biofuel meets the sustainability criteria. ‘Voluntary schemes’ and ‘bilateral or multilateral agreements’ are used as a tool to verify the fulfillment of the sustainability criteria under Article 17(3)-(5) of the Directive. ‘Default values’ are used as a tool to verify the satisfaction of the minimum greenhouse gas emissions savings under Article 17(2) of the Directive.

This Communication addresses the practical implementation of these tools by the Commission.

A. Meeting the Sustainability Criteria: ‘Voluntary Schemes’ and ‘Bilateral and Multilateral Agreements’

The Communication from the Commission provides more information on how the Commission intends to exercise its power under the Directive to certify ‘vol-

untary schemes' and 'bilateral or multilateral agreements' as a tool to demonstrate compliance with the sustainability criteria.

The Communication states that bilateral and multilateral agreements between the European Union and third parties which accord with the sustainability criteria will be recognised by the Commission in the same way as a 'voluntary scheme'.

- *Which 'voluntary schemes' will be considered?*

The Communication states that all schemes will be considered regardless of whether they are run by the private sector or government or if they cover criteria or produce which another scheme already covers. As a general rule a scheme will be recognised for a 5-year period.

- *What factors will the Commission consider when assessing a 'voluntary scheme'?*

The Communication states that 'voluntary schemes' may include information on other sustainability grounds not covered by "the Directive's criteria", which may not be used as grounds of refusal to consider the biofuel as a biofuel covered by the Directive.

The Communication states that the "voluntary scheme" must not only meet the sustainability criteria contained in the Directive, but also "the assessment and recognition requirements" of the Commission.

For a scheme to be recognised by the Commission, the Communication states that it must be capable of being independently audited.

The Communication also states that for the purpose of assessing whether to recognise a 'voluntary scheme',

the Commission intends to assess whether the scheme provides information on the social impact of biofuel production, impact on food prices and other development issues for the purposes of Article 17(7) of the Directive. Article 17(7) paragraph 2 states that the Commission will report to the European Parliament every two years on the impact on social sustainability in the Community and in third countries of increased demand for biofuel, the impact on the availability of foodstuffs at affordable prices, in particular for people living in developing countries, wider development issues and the respect of land-use rights.

Article 17(7) also states "the Commission shall, if appropriate, propose corrective action, in particular if evidence shows that biofuel production has a significant impact on food prices."

Article 17(8) of the Directive states that a Member State shall only refuse to consider a biofuel as a biofuel for the purposes of the Directive on the grounds of a breach of the sustainability criteria and precludes refusing a biofuel "on other sustainability grounds". However it is unclear whether social impact, food prices and other development issues as defined under Article 17(7) constitute "sustainability grounds".

- *Are 'voluntary schemes' voluntary?*

The use of the term "voluntary scheme" does not mean that the sustainability criteria or its verification is voluntary. If economic operators do not provide all their data to Member States for verification under national schemes, the Directive states that biofuel producers must have either a 'voluntary scheme' or bi or multi-lateral agreement recognised by the Commission.

The Commission also has its own power under Article 18(8) to assess (through a Committee constituted by

representatives of the Member States and the Commission) whether a Member State can count “a source of biofuel” as a biofuel under the Directive without request from either the Member State or the biofuel producer. On this reading, the Commission retains the ultimate power for assessing whether a biofuel can be considered as a biofuel under the Directive regardless of how a Member State may construct their national scheme.

B. Meeting the Minimum Greenhouse Gas Emissions Savings: ‘Default Values’

Under Article 19 of the Directive, ‘default values’ can be used as a short-cut to proving that a biofuel meets the threshold greenhouse gas emissions savings of 35 percent, as detailed in Article 17(1) of the Directive. Annex V of the Directive contains the current ‘default values’. The Communication states that ‘default values’ are derived from the ‘typical value’, which is ‘scientifically assessed’. A factor of 40 percent is then applied to the processing element of the typical value to achieve a ‘conservative default value’.

The Commission intends to publish the calculations for default values on its transparency platform, which has not yet been released.

The Directive currently contains default values for both ‘general pathways’ (i.e. palm oil¹) and ‘specific pathways’ (i.e. palm oil with POME capture at the mill).

The Commission will introduce additional ‘specific pathways’ if it can be proved that the difference between the default values for the general and specific pathways “is a significant size”.

The Communication states that while the Commission will update the default values, “the Commission does not intend to introduce default values for specific pathways according to the geographical origin of where the feedstocks or biofuels are produced, but rather related to specific practices”.

Under Article 19 greenhouse gas emission savings can also be calculated according to ‘actual values’ which is dealt with by the Commission Decision on guidelines for the calculation of land carbon stocks for the purpose of Annex V (see below).

2. Communiqué from the Commission – on the Practical Implementation of the EU Biofuels and Bioliqids Sustainability Scheme and on Counting Rules for Biofuels

The Communication represents guidelines for Member States on the practical and consistent implementation of the sustainability criteria under Article 17 of the Directive and of the counting rules for biofuels under Article 19 of the Directive.

The Communication states that it has no binding character and is “designed to assist Member States and to facilitate a consistent implementation of the sustainability criteria”.

The Directive gives no power to the Commission to make this Communication binding.

- *The Sustainability Criteria: Land-Related Criteria*

The Communication gives greater definition to the Directive’s land related criteria in the sustainability criteria which fall under Articles 17(3)-(5).

1 ‘Continuously forested areas’ is defined in the Directive as forest with over 30% canopy cover and 5+ meters in height or capable of growing to such a size.

- Land with high biodiversity value (Article 17 (3)(b) of the Directive): an exception to the rule that no feedstock should be harvested from designated protection areas may be given if evidence can be provided that harvesting did not interfere with the natural protection purpose.
- Land with high carbon stock (Article 17(4) of the Directive): the Communication states that land under agricultural or urban use cannot be considered as ‘continuously forested areas’ for the purposes of satisfying the sustainability criteria.
- It must be noted that this Communication is not binding on Member States and operates as guidance only. This Communication does not preclude Member States from finding that oil palm plantations meet the criteria for ‘continuously forested areas’¹.
- Also note that while the exclusion of oil palm plantations from the category of ‘continuously forested areas’ may allow for a biofuel being accepted under Article 17(4), Article 17(3) still maintains that no biofuel may be grown on land that was primary forest or undisturbed wooded land in January 2008.
- A draft copy of this Communication including a clause which included oil palm plantations as a ‘continuously forested area’ was leaked to Friends of the Earth in early 2010. This draft was the basis of a vigorous media campaign against the inclusion of oil palm plantations as a ‘continuously forested area’.
- Peatland (Article 17(5) of the Directive): the Communication states that feedstock cannot be grown

on land which was peatland as at January 2008 unless the soil was already completely drained or required no further draining for cultivation.

The Communication notes that EU-based producers of biofuels feedstock are subject to a number of requirements that are unique to them. These requirements are contained in the 2009 EU Regulation on establishing common rules for direct support schemes for farmers under the Common Agricultural Policy. However systems for the verification of these criteria are not included in the Directive, but instead are left to Member States under the CAP.

The Directive also states that the sustainability criteria will apply to all biofuels, regardless of where they are produced.

3. Commission Decision – on Guidelines for the Calculation of Land Carbon Stocks for the Purpose of Annex V of Directive 2009/29/EC

- The Committee decision provides the rules for calculating emissions from land use change (LUC). Please note – this does not apply to indirect land use change (ILUC), which will not be released until later this year.
- Under Annex V (10) of the Directive, the Commission must adopt by 31 December 2009, guidelines for the calculation of land carbon stock, based on the 2006 IPCC Report.
- Estimates for the calculation of carbon stock in land are drawn from the seven categories included in the IPCC Report plus an additional category for multi-year rotation and plantation agriculture such as oil palm.
- Notably, the guidelines for carbon calculation under this decision give the carbon storage for oil palm at

60 tonnes carbon per hectare. This compares with a maximum of 45 tonnes per hectare for forest (in Asia) with between 10 and 30 percent canopy cover. For a forest (in Asia) with more than 30 percent canopy cover, the maximum carbon storage is 230 tonnes per acre.

- Article 17(4)(c) of the Directive states that biofuel feedstock for the purposes of the Directive cannot be sourced from forest land with a canopy cover of between 10 and 30 percent unless it can be proven the carbon stock of the area before and after con-

version is such that the biofuel provides greenhouse gas emissions savings greater than 35 per cent.

- The fact that the Commission Decision gives oil palm a greater carbon stock than forest with 10 to 30 percent canopy cover, it will satisfy criteria 17(4)(c).
- As a result oil palm plantations grown on land which was forest (10 to 30 percent canopy cover) before January 2008 should satisfy the Directive's sustainability criteria.



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