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NOTE

from: General Secretariat of the Council

to: Coreper/Council

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Subject: Proposal for a Directive of the European Parliament and of the Council
amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and
amending Directive 2009/28/EC on the promotion of the use of energy from
renewable sources (First reading)
- Progress report

I. INTRODUCTION

1. The Commission submitted the above proposal on 18 October 2012, based on Article 192(1) of the Treaty on the Functioning of the European Union, and Article 114 thereof in relation to a number of proposed provisions. The proposal aims at amending the Directives on Fuel Quality (98/70/EC as amended through 2009/30/EC, hereinafter Fuel Quality Directive) and on Renewable Energy Sources (2009/28/EC, hereinafter RES Directive) on the basis of the requirement included in those two Directives for the Commission to provide a report reviewing the impact of indirect land-use change¹ on greenhouse gas emissions and addressing ways to minimise the impact, if appropriate accompanied by a proposal.²

¹ "ILUC"

² Article 7d(6) of Directive 2009/30/EC and Article 19(6) of Directive 2009/28/EC.

2. After a first round of examination by the Ad hoc Working Party on ILUC, which looked at both the impact assessment and the proposed Directive including its annexes, orientation debates were held in Council (TTE and Environment, 22 February and 21 March 2013 respectively).¹
3. The European Economic and Social Committee adopted its opinion on 17 April 2013. The European Parliament's Committee on Environment, Public Health and Food Safety is expected to vote on a draft report in July.
4. The Permanent Representatives Committee/Council (TTE - Energy) are invited to take note of this progress report drawn up under the responsibility of the Presidency. This report outlines the main issues discussed and how they have or could be addressed with a view to facilitating the development of a Council position.

II. STATE OF PLAY

Following the orientation debates in Council and the guidance resulting from them, the Ad hoc Working Party on ILUC continued to examine the proposed draft Directive at its meetings on 26 February, 26 March, 16 April, 14 and 21 May 2013, on the basis of revised texts and proposed options presented by the Presidency, which built on oral and written comments from delegations.² At the end of April, the Presidency held informal bilateral consultations with delegations in order to gain a better insight into their positions and possible ways forward. Delegations hold general reservations/scrutiny reservations.

A. General views:

There is general support among delegations for the aims of tackling the global occurrence of indirect land-use change resulting from the production of biofuels that compete with food and feed, and of further improving the greenhouse gas emissions balance of biofuels production compared to fossil fuels. At the same time, many delegations are concerned with a policy shift that could create uncertainty among investors, jeopardise existing investments and ultimately render the achievement of the existing EU renewables objectives more costly and challenging.

¹ 6208/13 and 6854/13.

² The latest Presidency text can be found in 7480/1/13 REV 1.

B. Main issues:

It is the Presidency's understanding that the following main issues have emerged from the discussions and consultations. Progress on these issues can be recorded, but they require further in-depth consideration. Furthermore, this report is without prejudice to particular points of interest of individual delegations or other provisions included in the proposal which have not yet been addressed further under the working method proposed by the Presidency to date.

5% threshold for conventional biofuels under Directive 2009/28/EC:

Setting a **threshold of 5 % for conventional biofuels** (those produced from cereal and other starch rich crops, sugars and oil crops) to count towards the targets of the RES Directive represents the core of the Commission's proposed approach to initiate a transition to biofuels with low ILUC risks. As the orientation debates at Council showed, some delegations could support this approach, while some other delegations instead called for an **introduction of ILUC factors** in the calculation of greenhouse gas emissions under the Fuel Quality and RES Directives. A number of delegations oppose the proposed threshold of 5 %, expressing doubts about the sufficient **availability** of cost-efficient advanced biofuels with low ILUC risks, and concerns as to the **protection of existing investments** made on the basis of EU policy, including with the support of EU funds and through national support measures, future investment certainty, and the achievability of existing EU renewables targets. Some other delegations have on the contrary called for a similar provision to the 5 % threshold to be applied under the Fuel Quality Directive.

While some delegations support the idea of **double and quadruple counting** of certain feedstocks as an **incentive** for, and mirroring the higher costs of, advanced biofuels, a number of other delegations have serious doubts about the **scientific basis** of the classification, as well as about possible risks of fraud and market distortions. Other issues raised in the context of the 5 % threshold relate to the possible impact on markets for **by-products for animal feed**, possibly leading to additional imports of protein feed with higher ILUC risks, and **competing uses** for raw materials and by-products.

Delegations also call for a more in-depth analysis of the specific list of individual feedstocks subject to double and quadruple counting (proposed new Annex IX to the RES Directive). It was proposed by delegations that the list could be supplemented with **definitions** for "conventional" and "advanced" biofuels, and/or could be shortened. Some delegations are of the view that **cross-compliance** under the Common Agricultural Policy provides sufficient assurances for non-ILUC risk biofuels production within the EU. The treatment of bioliquids and energy crops also requires further consideration.

In the course of the examination of the draft Directive, the Presidency therefore made several **proposals for other options and approaches** to address the ILUC impact of conventional biofuels and encourage a transition towards more advanced biofuels, based on various requests and suggestions made by delegations. One option would have consisted of applying the 5 % threshold to **oil crops only**, a second of **raising the 5 % threshold**, but to a level below the expected business-as-usual scenario, and a third option of giving Member States the choice of using their **2011 consumption figure** for conventional biofuels and bioliquids as threshold instead of an EU-wide 5 % threshold.

As none of these options gained sufficient support among delegations either, the Presidency proposed to approach the issue through an incentive for advanced biofuels in the form of a **mandatory 2 % minimum sub-target for advanced biofuels** (those listed in proposed Annex IX) instead of a direct limitation on the counting of conventional biofuels. This new approach would include the choice for Member States to double count the contribution of these feedstocks towards the 10 % transport target of the RES Directive. Used cooking oil and animal fats could also be double-counted, but not towards the achievement of the 2 % minimum sub-target. Stronger incentives for the use of electricity from renewable sources in transport such as through higher multiplication factors for its energy content were also considered as part of an overall solution towards reducing the ILUC impact from the use of biofuels. The consideration of ILUC mitigation measures at project level as part of an early review by the Commission could also form part of this approach.

Some delegations are not supportive of such an approach, believing that a 2% target is too ambitious in the context of the availability of advanced biofuels, and others raised concerns in relation to the treatment of used cooking oil and animal fats, underlined the key role of new Annex IX of the RES Directive in setting out the feedstocks that would be considered as "advanced", or could only see a mandatory sub-target for advanced biofuels as one element of a broader package of measures. A number of delegations found the proposal to go in the right direction, and several others expressed the wish to further scrutinise it. The Commission raised questions as to the ILUC mitigation effect of such an approach and finds a 2 % level to be an ambitious target, but has signalled openness to finding a way forward. It is the impression of the Presidency that, from all the options on the table to date, including the Commission's proposal, this approach, or at least some of its elements, have so far overall received the most open reception by delegations.

ILUC factors:

The current Presidency text maintains the Commission proposal to **strengthen reporting obligations** of fuel suppliers and Member States **by using estimated indirect land-use change emissions** from biofuels and bioliquid crop groups set out in the proposed new Annexes V and VIII of the Fuel Quality and RES Directives, respectively. Some delegations plead for **inclusion of ILUC factors** in the greenhouse gas calculations which they see as the **most effective way to address ILUC risks**, while others oppose **using ILUC estimates even for reporting purposes** due to what they consider a **lack of firm scientific evidence** of the crop group values. The Presidency is inclined to believe that the reporting provisions as put forward by the Commission, together with a **strengthened review clause** in Article 3 proposed by the Presidency, seem to be half way between these conflicting views.

New installations:

Some delegations are not supportive of the Commission's proposals under the sustainability criteria for biofuels of the RES and Fuel Quality Directives that installations starting operation after 1 July 2014 would need to reach **60 % of greenhouse gas emissions savings** from the use of biofuels, based on concerns for investment decisions already made. A number of delegations can however support accelerating the timeline for increasing emissions savings by new installations. It is the Presidency's impression that a solution to the 5 % threshold discussed above could effectively **address concerns around protecting existing investments** and would thus facilitate agreement on the treatment of new installations.

Bonus for degraded land:

There is general agreement among delegations to **maintain the bonus for degraded and contaminated land** under the rules for calculating life cycle greenhouse gas emissions from land use change of the Fuel Quality Directive and those for calculating the greenhouse gas impact of biofuels and bioliquids under the RES Directive. The Presidency has thus proposed not to delete these provisions from the existing Directives, contrary to what was suggested by the Commission. The Presidency sees this also as an invitation to the Commission to come forward with respective definitions, as required by the existing Directives.

Fraud prevention:

The risk of fraud is a concern for delegations already under the current Directives, and, in the view of a number of them, it would be exacerbated by double and quadruple counting of certain feedstocks as proposed by the Commission. The Presidency has amended the text to clarify **Member States' obligations on acting against fraud**. In addition, there is a certain degree of support to **strengthen the provisions at EU level** through a single register and a traceability scheme in analogy to EU requirements on waste, given that the greatest risk of fraud is considered to exist with wastes and residues, and fraudulent practices for their accounting. However, there are also concerns around increased administrative burden.

Mutual recognition:

Early in the process, a number of delegations pointed to what they consider a discriminatory treatment of **national schemes** for verification of compliance with the sustainability criteria for biofuels vis-à-vis **Commission-recognised voluntary schemes**, pursuant to Article 18 of the RES Directive. However, it became clear that a number of other Member States and the Commission have strong misgivings about establishing a system of automatic mutual recognition between these two types of schemes, pointing also to ongoing comitology work. The Commission argued that automatic mutual recognition among national schemes would be an option, but that voluntary schemes should not be forced to recognise national schemes or other voluntary schemes.

The Presidency proposed the inclusion of a comitology examination procedure to **facilitate mutual recognition and thus trade in the internal market**, and which would give both the Commission and all Member States a role in the verification of different schemes.

Delegations critical of automatic mutual recognition saw merit in this Presidency proposal, and even though some other delegations would have preferred automatic mutual recognition, the Presidency is of the view that the approach proposed could form the basis of a compromise. Furthermore, the Presidency looks forward to the Commission actively contributing to finding a way forward both for **temporary solutions through comitology and longer-term legislative tools**, in the interest of a functioning internal market for biofuels.

Review:

The current Presidency text responds to calls by delegations to have an early Commission review of work in relation to the **scientific evidence for determining ILUC factors** and on an assessment of the **availability of cost-efficient advanced biofuels** with low ILUC risks. Two delegations request that an **early introduction of ILUC factors** into the sustainability criteria be included in possible legislative proposals as part of the review, together with ILUC mitigation measures, while some other delegations call for extending the early review to an assessment of the **economic, social and environmental impact** of the proposed policy orientation towards biofuels with lower ILUC risks.

Delegation of power:

There is **general concern among delegations about the wide use of delegated acts** proposed by the Commission. The Presidency has made suggestions both to consider **implementing acts or the ordinary legislative procedure** for some of the provisions instead, together with a **time limitation of five years** for the Commission's delegated power, which were received positively by delegations. However, there was also a general feeling that the issue of delegation of power would **need to be revisited at a later stage**, when the content and scope of the actual provisions would be clearer.