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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union

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Subject:	COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council at the first reading on the adoption of 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 (COM(2012) 595 final- 2012/0288 (COD))

Delegations will find attached document COM(2014) 748 final.

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Brussels, 16.12.2014
COM(2014) 748 final

2012/0288 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to Article 294(6) of the Treaty on the Functioning of the European Union

concerning the

**position of the Council at the first reading on the adoption of 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 (COM(2012) 595 final-
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1. BACKGROUND

Date of transmission of the proposal to the European Parliament and the Council:	18 October 2012
Date of the position of the European Parliament, first reading	11 September 2013
Date of the opinion of the Economic and Social Committee	17 April 2013
Date of the opinion of the Committee of the Regions	No opinion issued
Date of political agreement and formal adoption of the position at first reading by the Council (by qualified majority)	13 June 2014 (political agreement), 9 December 2014 (formal adoption)

2. OBJECTIVE OF THE PROPOSAL FROM THE COMMISSION

The aim of the Commission proposal is to start the transition to biofuels that deliver substantial greenhouse gas savings when also estimated indirect land-use change (ILUC) emissions are reported. While existing investments should be protected, the aims of the current proposal are to:

- limit the contribution that conventional biofuels (with a risk of ILUC emissions) make towards attainment of the targets in the Renewable Energy Directive;
- improve the greenhouse gas performance of biofuel production processes (reducing associated emissions) by raising the greenhouse gas saving threshold for new installations subject to protecting installations¹ already in operation on 1st July 2014;
- encourage a greater market penetration of advanced (low-ILUC) biofuels by allowing such fuels to contribute more to the targets in the Renewable Energy Directive than conventional biofuels;

¹ As defined in paragraph 3.1.1 of C 160 (2010)

- improve the reporting of greenhouse gas emissions by obliging Member States and fuel suppliers to report the estimated indirect land-use change emissions of biofuels.

3. COMMENTS ON THE POSITION OF THE COUNCIL

3.1. General comments on the Council Position:

The Commission regrets that, with regards to its original proposal, the Council position at first reading has significantly lowered the level of environmental ambition and contains no significant incentives for the transition towards advanced biofuels and other low-ILUC (or non-ILUC) options for using renewable energy in transport. The elements in the Council text which jointly lead to a significantly lower level of environmental ambition are:

- increasing the cap for conventional biofuels to 7%²
- new multipliers for renewable electricity in rail
- reduced incentives for using advanced (low-ILUC) biofuels
- weakening the ILUC reporting requirements

The Commission also regrets, and strongly objects to, modifications introduced by the Council which reduce the level of environmental ambition of the overall renewable energy target set by the Renewable Energy Directive.

Furthermore, the Council text removes a series of delegated acts, and converts others into implementing acts which is of serious concern for the Commission.

3.2. European Parliament's amendments at first reading:

The Council explicitly considered some, but not all, of the European Parliament's amendments. The Commission's views on the European Parliament's amendments are below and, where appropriate, we have indicated the Council's position.

² The limit to the contribution that conventional biofuels make towards attainment of the targets in the Renewable Energy Directive

1. ***Use estimated ILUC values for Fuel Quality Directive accounting from 2020; delete ILUC reporting from Renewable Energy Directive (Amendments 60 and 164). Rejected by Commission***

ILUC values, based on the best available science, should be reported in both the Renewable Energy Directive and Fuel Quality Directive but not used for accounting in the Fuel Quality Directive. They should be reported in order to increase transparency about the real greenhouse gas performance of food and feed crop based biofuels and improve knowledge about the scope of the issue. The Council text does not introduce ILUC values for Fuel Quality Directive accounting and maintains ILUC reporting for both the Fuel Quality Directive and Renewable Energy Directive, albeit in an amended form.

2. ***Capping/limiting the use of conventional biofuels by removing sustainability status (Amendment 89). Rejected by the Commission***

The Commission proposed to limit the contribution which biofuels with a risk of causing ILUC can make towards the 10% Renewable Energy Directive target. This provides an incentive for Member States to adjust their support schemes and mandates accordingly, but does not restrict the overall use of such biofuels, thus giving Member States some degree of flexibility. The Council text also sets out that only the contribution towards the 10% target should be limited and that the sustainability status of “additional” conventional biofuels should not be touched upon.

3. ***Capping/limiting the use of conventional biofuels under the Fuel Quality Directive (Amendment 184/REV). Accepted by the Commission.***

The Parliament also wants to apply the cap to the Fuel Quality Directive target. Although the Commission didn't propose a cap for the Fuel Quality Directive, this provision is one element which could contribute to improving the level of environmental ambition of the overall text. The Council text states that only the contribution towards the 10% Renewable Energy Directive target should be limited.

4. ***Extending the scope of the cap to energy crops (Amendment 181). Partly accepted by the Commission***

Energy crops grown on cropland may have ILUC effects. This proposal by the European Parliament is thus one element which could strengthen the environmental ambition and ILUC mitigation effect of the text. The Commission can accept the change of scope of the cap. The Council retains the coverage of the Commission proposal (food and feed crops).

5. ***Introduce a binding subtarget for advanced biofuels of 0.5% in 2016 and 2.5% in 2020 (Amendment 181 and 152/REV). Partly accepted by the Commission***

The Commission could be open, in the context of an overall compromise, to considering the principle of introducing a binding sub-target as it has potential to raise the level of environmental ambition. While, at this stage, the Commission is not in a position to give a view on a precise percentage, 2.5% seems extremely ambitious, given that biofuels with low ILUC risk (Used Cooking Oil and Tallow), which are currently available at commercial scale would be excluded and given that the biofuels

eligible for the sub-target would just be counted once towards targets. The Council proposes a non-binding subtarget with much lower volumes (reference 0.5 p.p.)

6. *Sub-target of 7.5% for bioethanol (Amendment 152/REV). Rejected by the Commission.*

The European Parliament has proposed that there should be a 7.5% sub-target for ethanol blended into petrol. The Commission considers that this unduly restricts the flexibility of Member States to meet the transport target in accordance with their national conditions. In addition it would require ethanol to be supplied at higher levels than could be blended into fuel for conventional vehicles and so would mandate some 'high blend' use for which Member States may not have the infrastructure.

7. *Amendments to the contribution that different biofuels make to the transport sub-target (amendments 185 and 186). Partly accepted by the Commission*

The original Commission proposal sought to incentivise advanced (low-ILUC) biofuels through increasing the contribution they make to the transport sub-target. Under the proposal the most advanced biofuels would count four times while used cooking oil and tallow would count twice. The European Parliament wants to amend this by severely restricting the list of biofuel feedstocks that would count four times and instead having the majority of feedstocks count only once. The Commission's view is that this creates a contradictory incentive regime for advanced biofuels as the result of the change is that biofuels that are already being made with used cooking oil and animal fat, using simple technologies, would receive twice the incentive of biofuels using novel technologies that are much more expensive to produce. In addition changes to the lists should be fully consistent with the overall scope of the Directives, with the scope of the cap, with introducing/removing accounting multipliers as well as with definitions of feedstocks.

3.3. The Council has inserted a number of new provisions into the text some of which the Commission can accept and others of which significantly weaken the proposal and to which the Commission objects. These changes are as follows:

1. *Increasing the cap to 7%.*

The 5% cap on the contribution of conventional biofuels towards the Renewable Energy Directive targets is the central element of the Commission proposal and the Commission has strongly defended it, as a higher cap would reduce ILUC mitigation. That said, the Commission has recognised that some flexibility towards a higher cap may be required to reach an overall compromise between the Council and the European Parliament. However, the Commission has also been clear that, should it be necessary to show flexibility on the cap, the Commission will endeavour to preserve the overall level of environmental ambition in the proposal. The 7% cap as proposed by the Council does not sufficiently limit ILUC nor does it create enough incentives for low-ILUC options in transport. The Commission also regrets the deletion of recitals indicating its views for the post-2020 period. The Commission could support a 7% cap, if the text is strengthened on the following elements (i) changing the scope of

the cap in accordance with the European Parliament amendments (181) already accepted by the Commission so as to include all land-using biofuels and extending the cap also to the Fuel Quality Directive (184/REV); (ii) providing clarity on the political message of a transition to advanced biofuels (by bringing back the recital on post-2020 and adding a mandatory sub-target of 0.5% for advanced biofuels to at least cover and protect existing investments), (iii) re-instate certain delegations of power or secure transitional clauses for these provisions (iv) the multiplier for renewable electricity in rail is deleted and (v) double counting for the overall Renewable Energy Directive target is deleted.

2. ***Extension of multiple counting of advanced biofuels that currently applies only to the 10% transport target to the overall Renewable Energy Directive target.***

The Commission is strongly opposed to the idea of applying double counting for advanced biofuels towards the overall 20% Renewable Energy Directive target and includes this position in its statements to the minutes (see below). Although the impacts on the deployment of RES as stated above are expected to be low, this would open a very problematic political precedent as we approach 2020 - there is no reason to lower the level of ambition for a key headline target of the 2008 energy and climate package. At the March European Council this year, Member States confirmed their commitments to reach the 2020 targets. The 2008 package offers enough flexibility to Member States to avoid excessive compliance costs. Through applying multipliers in various instances less 'real' energy is required and so the transport target shrinks significantly. Instead, if there is a need to further reduce compliance costs while limiting ILUC within the transport target, the Commission considers the European Parliament amendments 153 and 154, which would take into account additional efforts to improve energy efficiency and energy savings in transport, more appropriate.

3. ***Accounting multiplier of 5 for renewable electricity in electric road vehicles and one of 2.5 for electric trains.***

The Commission did not include accounting multipliers for electric vehicles and electric trains in its proposal. However, the Commission could, as part of an overall compromise, agree with the establishment of an accounting multiplier of 5 in road vehicles. The Commission opposes the introduction of an accounting multiplier for renewable electricity in trains, as it would substantially lower the level of ambition of the transport target and not create an additional incentive for low carbon transport. The European Parliament, as in the Commission proposal, does not introduce new or increased multipliers.

4. ***Introduction of a non-binding sub-target for biofuels produced from feedstocks listed in Part A of Annex IX.***

As discussed above, the Council text introduced a requirement for Member States to set a non-binding sub-target for biofuels produced from certain feedstocks for 2020 with a reference value of 0.5 percentage points in energy terms, i.e. before double counting. However, Member States can deviate from this reference value using a range of justifications and there is no sanction for non-compliance. In the overall context of the Council text, this provision provides little incentive to move to advanced biofuels as non-ILUC options in transport. The Commission favours strengthening this element and, in principle, welcomes the corresponding European Parliament amendment (181) but has already signalled that the sub-target in the

European Parliament amendment seems to be overly ambitious and will likely to be very costly to achieve.

5. *Additional feedstocks added into the list in Annex IX.*

The Commission's proposal included a list of feedstocks that should receive additional incentives when supplied as biofuel. The Council position includes a number of additional feedstocks and it will be important to ensure that these can be considered advanced (low-ILUC) biofuel feedstocks and that this is consistent with other elements of the final text (i.e. what substances are included under the cap).

6. *Additional feedstocks beyond the list in Annex IX.*

The Council position includes a provision that "biofuels made from feedstocks not listed in Annex IX that were determined to be wastes, residues, non-food cellulosic material or ligno-cellulosic material by the competent national authorities and are used in existing installations prior to the adoption of this Directive" would also be counted towards the sub-target mentioned in point 4 above. The Commission considers that this provision is too broad in scope, involves the risk of inconsistent application across the EU and goes beyond grandfathering existing investments as it allows changes until the adoption of the ILUC Directive. Furthermore, such a provision seems to give the 'competent national authorities' the right of the ultimate interpretation of the corresponding part of the Renewable Energy Directive – against the legal rule which generally applies for the interpretation of an European Union directive.

7- *Weakened ILUC reporting provisions.*

The Commission's proposal included a requirement for Member States to report the estimated ILUC emissions of the biofuels supplied to meet their domestic targets, using estimated values from the IFPRI modelling. The Council has changed this requirement such that Member States report only the biofuel feedstock and the Commission produces a report on Member States' biofuel consumption adding ILUC values, also meaning this information will be provided later than if provided by Member States. In addition the Council has added language stressing the provisional and uncertain character of the ILUC values. The Commission favours the reintroduction of its original reporting requirements. See also the Commission's position on the European Parliament's amendments 60 and 164.

8. *Extension of 'statistical transfers' of renewable energy to include the transport sub-target.*

The Council text introduces the ability to make statistical transfers towards meeting the transport target, something already allowed for the overall Renewable Energy Directive target. While the Commission does not see this change as necessary given that transport fuels can be easily traded between Member States, the Commission also acknowledges the potential to lower the cost of compliance.

9. *Mutual recognition of Voluntary Schemes.*

According to the Commission, the concept of mutual recognition between Voluntary Schemes approved by the Commission pursuant to Renewable Energy Directive Article 18(6) is redundant in light of Article 18(7). The latter ensures that verification

through such Voluntary Schemes must be recognised in Member States without requiring further evidence for compliance. Mutual recognition between Voluntary Schemes approved by the Commission pursuant to Article 18(6) is also detrimental to the idea that they may certify further sustainability aspects beyond the harmonised criteria in accordance to Art 18(4). The Commission welcomes the Council text in so far as it introduces the possibility for the Commission to assess and explicitly approve a national scheme. The legal consequence, however, should be the same level of recognition as for Voluntary Schemes pursuant to Article 18(6). See also European Parliament amendment 102 which would establish mutual recognition between all verification schemes. The Commission supports the idea of mutual recognition between national systems; Voluntary Schemes should not be forced to recognise national systems.

10. *Enhanced reporting by and on Voluntary Schemes.*

According to the Council text, Voluntary Schemes are required to report on a regular basis, these reports will be made public by the Commission and the Commission has to review how the Voluntary Schemes work. To the Commission, this text is acceptable but legal clarification is needed regarding whether these changes can be applied to existing Voluntary Schemes. The European Parliament (amendments 58 and 103) wants the Commission to report on the functioning of Voluntary Schemes and to make a proposal if appropriate which the Commission could accept in principle (further improvements and clarifications needed).

11. *Degraded land bonus.*

The Council text keeps the degraded land bonus for greenhouse gas saving calculations. The Commission has deleted this element from the greenhouse gas calculation as it is inconsistent with the greenhouse gas methodology and ILUC reporting and as it seems difficult to identify this type of land. The Commission can accept keeping this element in the context of an overall satisfactory compromise but would prefer provisions are made for the safe physical segregation of crops grown on heavily contaminated land. The European Parliament accepted the deletion of this element in the Commission text.

12. *Merge land-use categories "cropland" and "perennial cropland".*

The Council text merges the land-use categories "cropland" and "perennial cropland" for the purpose of the calculation of greenhouse gas savings. This is in order to address a potential issue with the greenhouse gas accounting methodology when 'cropland' is converted to 'perennial cropland' and back again. While the Commission could accept the Council's proposed changes in the context of an overall satisfactory compromise the Commission remains seriously concerned about the possible impacts on third country biofuel sustainability and believes this issue could be addressed in a different way. (This element is not contained in either the Commission or European Parliament texts).

13. *Review clause.*

According to the Council text, the Commission would have to report one year after the entry into force of the Directive on advanced biofuels, ILUC science and the identification and certification of low-ILUC biofuels. The Commission would have to

report in 2017 on ILUC measures including again on certification of low-ILUC biofuels, fraud prevention, and Voluntary Schemes. The Commission strongly suggests having one review in 2017 for all items. The Commission also questions the usefulness of introducing any legal definitions for low-ILUC risk biofuels before such review is conducted. Furthermore, the Council adds text regarding the “provisional” character of the estimated ILUC values to be used for reporting. The review clause should clarify what the next steps should be, i.e. whether the “provisional” values should be retained until 2020 or “final” values should be suggested. According to the Commission, European Parliament amendments 107, 189 and 190 (if made consistent) could provide useful orientation.

14. *Concept of 'Low-ILUC risk' biofuels.*

As mentioned above, the Council text introduced a definition of 'Low-ILUC risk' biofuels and a requirement for the Commission to provide a report which will 'set out criteria for the identification and certification of low-ILUC risk biofuels' in the review clause. The Council text's definition distinguishes these types of biofuels from biofuels made from feedstocks in part A of Annex IX. While the Commission could accept further work in this area (with the caveat that it should be conducted as one piece of work in 2017) a cautious approach should be taken to ensure that any feedstocks determined to be 'low-ILUC risk' genuinely are low risk. Neither the Commission nor the European Parliament have referred to this category of biofuels.

15. *Fraud prevention.*

The Council text calls for better cooperation amongst national systems and between voluntary schemes and national systems, Member States shall encourage the development and use of track and trace systems, Member States have to report on their anti-fraud measures, and, in 2017, the Commission has to assess the effectiveness of these measures and submit a proposal if appropriate. The Commission can accept the Council's proposed additions. The European Parliament is also concerned about fraud (amendment 185).

16. *Removal of delegated acts.*

In the Council text, delegated acts with limited scope are only kept for adding default values to Annexes IV of the Fuel Quality Directive and V of the Renewable Energy Directive, and for adding feedstocks to Annex IX of the Renewable Energy Directive. The Council has introduced the no-opinion clause in Article 11(4) of Directive 98/70/EC and in Article 25, paragraphs 3 and 4 of Directive 2009/28/EC for the adoption of implementing acts.

- (a) The Commission is of the view that the Directives need to be updated in line with scientific progress and new technological developments. Doing this through the ordinary legislative procedure would be too cumbersome and too slow and does not adequately ensure the need for flexibility/efficiency in dealing with adaptation of strictly technical aspects in the Fuel Quality and Renewable Energy Directives reflecting scientific progress in view of the achievement of their environmental objectives (reduction of greenhouse gas in transport sector). Most of the proposed delegated acts are intended to replace acts adopted under the former regulatory procedure with scrutiny contained in the Directives ("Lisbonisation"). In the Commission's view the approach, recently proposed by the Presidency, of repealing conferral of powers on the Commission for adoption of delegated acts/implementing

acts and including all the provisions in the legislative act risks to compromise the distinction between the modification/adaptation of non-essential and essential elements of the Directives. The technical adaptation obviously belongs to the first category. Where appropriate, the Commission will explore compromise texts, keeping consistency with its approach on conferral of powers under the treaty rules, which is that the scope of Articles 290 and 291 TFEU is mutually exclusive. The Commission welcomes the position of the European Parliament which fully supports the Commission's view and continues to seek compromises that grant use of delegated acts.

- (b) The Commission strongly opposes any removal of delegated powers affecting ongoing procedures under Decision 1999/468/EC or procedures starting on [date to be determined by Commission] at the latest supplementing both Directives. Alternatively, a transition period for applying procedures under Regulation (EU) 182/2011 must be incorporated.
- (c) Furthermore, the Council has introduced the no-opinion clause for the adoption of implementing acts. The Commission considers that there is no specific justification for the inclusion of the non-opinion clause and asks for a recital justifying the introduction of such a clause. If at the end of the process, such a recital were not to be accepted, the Commission will make the standard statement in relation to this issue.

4. CONCLUSION/GENERAL OBSERVATIONS

Although it considers that the Council's political agreement at first reading does not meet some of the essential aims of its initial proposal, the Commission perceives that the only way of allowing the ordinary legislative procedure to continue is to refrain from opposing it. The Commission aims to keep the elements of the proposal which can contribute to mitigate the ILUC impacts and preserve the overall level of environmental ambition of biofuels use in transport, including some of the elements which are part of the position at first reading of the European Parliament.

5. STATEMENTS BY THE COMMISSION

The Commission has drafted a statement to be included in the Council minutes as follows:

Statement from the Commission on the Council's position at first reading on the ILUC proposal

[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]

The Commission regrets that, with regard to its original proposal, the Council position at first reading has significantly lowered the level of ambition in mitigating the ILUC impacts of conventional biofuels and contains no significant incentives for the transition towards advanced biofuels and other non-ILUC options for using renewable energy in transport. The Commission also regrets that modifications introduced by the Council reduce the level of environmental ambition of the overall renewable energy target set by the Renewable Energy Directive³.

However, in order to allow the legislative process to move forward, the Commission will not oppose the Council's position at first reading.

The Commission will therefore continue to closely cooperate with the co-legislators in the next steps of the legislative procedure. The Commission aims at keeping the elements of the proposal which can contribute to mitigate the ILUC impacts and preserve the overall level of environmental ambition of biofuels use in transport, including some of the elements which are part of the position at first reading of the European Parliament. The Commission will do so in the hope that a solution reflecting the European interest in combating negative environmental effects of conventional biofuels can be found.

³ 2009/28/EC