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NEW OCCASIONAL PAPER:

Biofuels Reform in the European Union: Why New ILUC Rules will Reinforce the WTO Inconsistency of EU Biofuels Policy

This paper takes stock of the proposals by the European Commission and members of the European Parliament to amend the Renewable Energy Directive (RED) and how the proposed revisions integrate with the obligations of the European Union in the World Trade Organisation (WTO). The European Commission claims that neither RED nor its new proposal violates WTO rules as the sustainability standards and the new reporting requirement apply equally to domestic and foreign biofuels and feedstock. This paper argues that the proposals are not so innocent and that they will err on the wrong side of core WTO rules.

- In order to understand why the proposals are likely to run into opposition from these rules – and why other countries will argue that their trading rights have been violated – the paper goes through the WTO inconsistency of RED and why so many scholars and lawyers have concluded that RED would not stand the test in a WTO proceeding. Indeed, the European Union has already been subject to WTO complaints. The first case was resolved when the targeted Member States changed its implementation of RED. The second case has recently been filed in Geneva.
- If the new direction of EU biofuels policy is endorsed, the EU will introduce a requirement on sellers of biofuels and Member States to report emissions generated by indirect land-use change (ILUC) in the production of biofuel crops. ILUC is a strange concept for regulation: it regulates not the behaviour of a biofuels producer but derivate effects of biofuels production. It effectively demands that one producer should be accountable for farming decisions by others.
- No one knows the actual emissions from indirect land-use change. ILUC is neither observed nor measured: it is estimated on the basis of multi-factor models. A plurality of scientists and scholars that have examined the reliability of the results derived from these models conclude that results are uncertain, show substantial differences, and that small changes in model assumptions have big impacts on the result. Indeed, it has been concluded that the most important factor for estimating ILUC for a particular crop is the choice of model, not the characteristics of the production of that crop. The absence of robust results from modelling exercises is also the reason why the Commission decided not to condition effective market access on the basis of ILUC.
- The new proposal has several effects on the WTO inconsistency of EU biofuels policy. First, it accelerates discrimination based on RED sustainability criteria: higher thresholds on greenhouse gas savings will be introduced sooner than decided in RED.

- Second, the introduction of a requirement to report a Commission-decided estimate on ILUC emissions changes the legal character of RED. The EU can no longer discriminate on the basis of emission savings estimate based on RED and RED methodology. Its own policy will show that some feedstock that is not discriminated against will lead to lower greenhouse gas savings than those feedstock discriminated against if also ILUC emissions are counted. Consequently, the notion that discrimination of “like” products – a crucial concept in WTO rules – can be defended as legitimate because it promotes environmental ambitions collapses.
- Third, the cap on how much conventional biofuels that can be used by Member States in achieving the national targets for renewable sources of transport fuels introduces a new element of discrimination: discrimination between exactly the same type of biofuels, not just “like” biofuels.
- Fourth, the introduction of ILUC factors in EU biofuels policy will also lead to direct frictions with WTO rules, especially if EU policy will follow the amendment by the Rapporteur in the European Parliament and condition market access on the basis of ILUC emissions. Such a regulation would most certainly be ruled against lock, stock and barrel.

[The study can be downloaded here](#)

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