



WTO Rules and EU Proposed Amendments to the Renewable Energy Directive affecting Trade in Biofuels

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2 Key Elements of EU Proposal

- Both elements apply to “*CSO crops*” - cereal and other starch rich crops, sugars, and oil crops
 - Both elements are based on concerns over “*ILUC*” – indirect land use change
1. *CSO Cap*: Cap of 5% on biofuels produced from CSO crops in meeting the 10% target for share of renewables in the EU’s transport energy market
 2. *CSO ILUC Factors*: ILUC emissions attributed to CSO crops – our analysis is based on inclusion of ILUC factors in the sustainability criteria (mandatory in GHG calculation)

WTO rules applying to EU proposed measures

- *Agreement on Technical Barriers to Trade (TBT)*
 - National Treatment, Most-Favoured-Nation (MFN)
 - Not more trade-restrictive than necessary
 - Three recent Appellate Body reports
 - *General Agreement on Tariffs and Trade (GATT)*
 - National Treatment, MFN, Quantitative Restrictions
 - Exceptions
- How vulnerable to challenge are the EU proposed measures?

Applying the TBT Agreement

US – Clove Cigarettes

US – Tuna II

US – COOL

Main Issues in New TBT Cases

- Is the measure at issue a technical regulation? (Annex 1.1)
- Are products involved “like” products? (Art 2.1)
- Does the measure modify the conditions of competition between like products? (Art 2.1)
- Is there a legitimate regulatory distinction? (Art 2.1)
- Is the objective legitimate? (Art 2.2)
- Is the measure more trade-restrictive than necessary in order to pursue such objective? (Art2.2)

CSO Cap and CSO ILUC Factors “technical regulations”?

- *Identifiable product or group of products*
 - ✓ Biofuels and bioliquids
- *Subject matters of a technical regulation*
 - “Processes and production methods”, “marking” requirements
- *Compliance is mandatory*
 - ✓ **Mandatory**, esp. for 5% market segment not accessible to CSO biofuels, and 10% market segment reserved for renewable energy biofuels meeting sustainability criteria

Ethanol: “Like products”?

CSO ethanol: e.g. Maize, sugar cane, sugar beet

Non-CSO ethanol: e.g. Miscanthus, switchgrass , wheat straw

✓ **Physical properties**

✓ **End-uses**

✓ **Consumer preferences**

- Consumers may prefer sustainable ethanol, but it is not clear they would distinguish between CSO vs. non-CSO ethanol

✓ **Tariff classification**

Non-EU ethanol: Accorded less favourable treatment?

- **Article 2.1 TBT:** *“products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country”*
- CSO Cap and CSO ILUC Factors **modify the conditions of competition** between CSO ethanol vs. non-CSO ethanol
 - CSO Cap: Bans CSO ethanol from a 5% segment of the EU’s transport market. Non-CSO ethanol is not subject to such a cap/ban.
 - CSO ILUC Factors: Makes it more difficult for CSO ethanol to meet the GHG-threshold in the sustainability criteria. i.e. more difficult to:
 - Be eligible for national mandatory blending requirements
 - Be eligible for financial support

CSO vs. Non-CSO Ethanol: Discrimination according to origin?

- Not *de jure* discrimination, but *de facto* discrimination according to origin
- Discrimination analysis will depend on **“the totality of facts and circumstances”**
 - Non-CSO ethanol production is currently limited to a few WTO Members, including the EU
 - EU and US appear to be clear leaders in non-CSO ethanol production
 - Technology-intensive nature of non-CSO ethanol production currently excludes many developing countries
- Discrimination analysis “does not hinge on whether the imported products *could* somehow get access to an advantage ... by complying with all applicable conditions”

CSO vs. Non-CSO ethanol: A legitimate regulatory distinction?

- **Relevant regulatory distinction:**
 - ✓ Feedstocks with risk of ILUC
 - ✓ ILUC raises GHG emissions and contributes to climate change
- **However, this distinction is not even-handed**
 - Non-CSO feedstocks are also grown on land, e.g. miscanthus, switchgrass. All land-using feedstocks carry a potential ILUC risk.
 - Even “waste” feedstocks may carry ILUC risk. e.g. cereals straw currently used as a complement for animal feed
 - Not all CSO ethanol fuels present high ILUC risk
 - Even taking ILUC risk into account, some CSO ethanol fuels present high GHG emission savings and help mitigate climate change

Conclusion on “less favourable treatment” (Article 2.1 TBT)

- Appears to be *de facto* discrimination against imports from certain countries, particularly developing countries
- This will be a fact-intensive analysis, based on the conditions of competition in the ethanol market
- The regulatory distinction is arbitrary and is not designed or applied in an even-handed manner
- The EU measures would be vulnerable to challenge under Article 2.1 TBT

CSO Cap and CSO ILUC Factors: Legitimate objective?

- **Article 2.2 TBT:** *“technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create”*
- *“Protection of human health or safety, animal or plant **life or health, or the environment**”*
 - ✓ Limit risk of ILUC emissions
 - ✓ Encourage advanced biofuels
 - ✓ Improve reporting of GHG emissions
- **WTO panel is unlikely to question the legitimacy** of the EU’s objectives

CSO Cap and CSO ILUC Factors: More trade-restrictive than necessary?

- The panel will assess:
 - The degree of contribution made by the measure to the legitimate objective
 - The trade-restrictiveness of the measure
 - The nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective
 - Comparison with reasonably available alternative measures
- CSO Cap and CSO ILUC Factors are vulnerable to challenge:
 - Some non-CSO biofuels may also present ILUC risk, while some CSO biofuels present only low ILUC risk
 - Measures will discourage GHG-saving CSO biofuels, and may result in failure to meet 10% target for EU renewable energy for transport

Addressing ILUC risk: Reasonably available alternative measures?

- Alternative measure should:
 - Be less trade restrictive
 - Make an equivalent contribution to the legitimate objective, taking account of the risks non-fulfillment would create
 - Be reasonably available
- Potential alternatives that may be compared to the CSO Cap and CSO ILUC Factors
 - ✓ Providing incentives to low-ILUC biofuels in an even-handed manner
 - ✗ Imposing ILUC factors or a cap only on biofuels from non-EU countries
 - ✗ Distinguishing between “food crops” and “non-food crops”

Conclusion on “more trade-restrictive than necessary” (Article 2.2 TBT)

- All WTO Members have the right to regulate, and a WTO panel is unlikely to question the EU’s objectives
- However, it is not clear that the CSO Cap and CSO ILUC Factors would achieve the declared objectives
 - Degree of contribution to limit ILUC is uncertain, while degree of trade-restrictiveness is high
- The EU could choose alternative, less trade-restrictive measures
- The EU measures would be vulnerable to challenge under Article 2.2 TBT

Applying the GATT

If the CSO Cap and CSO ILUC Factors are not found to be “technical regulations” under the TBT Agreement

Main Issues in GATT analysis

- Does the measure:
 - Violate national treatment? (Article III:4)
 - Violate MFN treatment? (Article I:1)
 - Impose quantitative restrictions? (Article XI:1)
- Can the measure be *provisionally justified* under the exceptions on life, health or conservation of exhaustible natural resources? (Article XX(b) and (g))
- Does the measure meet the *chapeau* requirements for an exception? (Article XX)

National treatment, MFN treatment, Quantitative restrictions

- *National treatment and MFN treatment*
 - ✓ CSO Cap and CSO ILUC Factors are **vulnerable to challenge** under GATT, for similar reasons as under the TBT Agreement Article 2.1
- *Quantitative restrictions*
 - If the measures do not fall within the scope of GATT Article I or III, then fall under Article XI:1
 - ✓ The measures would limit access to the EU market as a **measure prohibiting or restricting imports**

Provisional justification under exceptions?

- *“Necessary to protect human, animal or plant life or health”*
 - CSO grouping for ILUC appears too flawed to establish a close connection between these measures and solving the risk of climate change
 - Trade-restrictive impact of the measures appear disproportionate to their contribution to addressing the risk of climate change
- *“Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”*
 - ✓ CSO Cap and CSO ILUC Factors are **primarily aimed at conservation of resources** threatened by climate change

Compliance with *chapeau* requirements for exceptions

- *Measure must not be applied in a manner which would constitute:*
 - A means of **arbitrary or unjustifiable discrimination** between countries where the same conditions prevail, or
 - A disguised restriction on international trade
- Arbitrary or unjustifiable discrimination in application of CSO Cap and CSO ILUC Factors?
 - Distinction between CSO and non-CSO biofuels is arbitrary and does not adequately reflect ILUC risk

Conclusions

- WTO rules are a **source of external legal discipline** on EU measures
- Whether CSO Cap and CSO ILUC Factors fall under the TBT Agreement or the GATT depends on whether the measures constitute “*technical regulations*”
- Both under the TBT Agreement and under the GATT, the measures would be **vulnerable to challenge**
- As the EU institutions consider the proposed amendments to the RED, they will need to take steps to **ensure WTO-consistency**