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Beste mevrouw Van Veldhoven, meneer Wiebes,

Voorstel voor *delegated act* ILUC biobrandstoffen is onvoldoende.

Op 8 februari j.l. heeft de Europese Commissie haar voorstel¹ gepresenteerd over de invulling van criteria voor biobrandstoffen die niet langer als duurzame energie mee mogen tellen omdat ze een te hoog klimaatrisico (High ILUC-risk) hebben.

Het voorstel is volstrekt onvoldoende; het haalt het beoogde doel niet en bevat te veel achterdeuren en mazen om effectief en efficiënt te zijn. Daardoor zullen er nog steeds schadelijke biobrandstoffen gebruikt gaan worden: biobrandstoffen die (veel) méér CO₂ uitstoten dan de fossiele diesel die ze moeten vervangen. Bijvoorbeeld biobrandstoffen gemaakt van grondstoffen zoals sojaolie en palmolie.

Verbeteringen noodzakelijk.

Het voorstel van de Europese Commissie dient drastisch verbeterd te worden zodat:

- **alle** High-ILUC biobrandstoffen ook daadwerkelijk uitgesloten worden. Dus naast palmolie ook sojaolie en andere gelijksoortige voedselolieën;
- de mazen en achterdeuren in de wet verdwijnen:
 - Zo is onder andere het voorstel om palmolie vanaf kleine percelen wél toe te staan onzinnig omdat ook die bijdragen aan ontbossing. De omvang van een plantage of het type grondbezit heeft geen verband met het risico van (indirecte) ontbossing of ILUC.
 - Ook de uitzondering voor palmolie van zogenaamd 'ongebruikt' land dient te verdwijnen. Het is een onzinnige definitie want het houdt geen rekening met het gebruik door lokale gemeenschappen of belangrijke ecosysteemdiensten die door dit land worden geleverd.

Wij vragen de Nederlandse regering dit standpunt ook in te brengen in de consultatie die de Europese Commissie houdt², in de expert groups – zoals degene die gepland is op 5 maart 2019 en in andere relevante gremia.

1 COMMISSION DELEGATED REGULATION (EU) .../...of XXX supplementing Directive (EU) 2018/2001 as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels Ref. Ares(2019)762855 – 08/02/2019, te downloaden op https://ec.europa.eu/info/law/better-regulation/initiative/2099/publication/525646/attachment/090166e5c164467d_en

2 Consultation on Delegated regulation – High and low Indirect Land-Use Change (ILUC) - risks biofuels, bioliquids and biomass fuels, https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-762855_en

Sluitstuk moet daadwerkelijk uitsluiten.

Sinds het begin van de onderhandelingen heeft Nederland het standpunt ingenomen dat ze wil dat conventionele biobrandstoffen met een hoog ILUC risico op Europees niveau worden uitgefaseerd.³

In de Tweede Kamer is deze lijn elke keer weer ondersteund of aangescherpt; in haar motie van 12 december 2017 geeft de Kamer aan de regering als doel dat palmolie en soja vanaf 2021 niet meer gebruikt mogen worden voor biobrandstoffen⁴.

Tienduizenden Nederlanders protesteerden tegen het gebruik van soja- en palmolie als biobrandstof⁵. Bijna 650.000 (!) Europeanen tekenden een petitie tegen de zogenaamd 'groene' biobrandstoffen.⁶ Uit een recente opiniepeiling⁷ bleek dat méér dan tweederde van de Europeanen (69%) wil dat er geen palmolie e.d. meer gebruikt gaat worden voor biobrandstof.

Het huidige ILUC DELEGATED REGULATION voorstel van de commissie is het sluitstuk van een lang proces waarin Nederlanders & andere Europeanen veel belangstelling en een duidelijke wil hebben getoond: plantaardige oliën zoals palmolie moet niet meer gebruikt gaan worden voor biobrandstoffen.

Daarom willen wij u vragen ervoor zorg te dragen dat het voorstel ook **daadwerkelijk** soja - en palmolie uitsluit, en dat het *delegated regulation*-proces dit als uitkomst krijgt.

In de bijlage vindt u de technische analyse en adviezen van de experts in de Europese biofuels community die wij u van harte aanbevelen. Mocht u nog vragen hebben, dan kunt u contact opnemen met dhr. Ton Sledsens, email: ton.sledsens@milieudefensie.nl

Met vriendelijke groet,



Donald Pols,
Directeur Milieudefensie

P.S. Een afschrift van deze brief is gestuurd naar de relevante commissies in de Tweede Kamer.

3 "Conventionele biobrandstoffen met een hoog ILUC risico kunnen indirect veranderend landgebruik veroorzaken, dat zowel negatieve milieu (o.a. extra CO2 -uitstoot) als sociale impact kan hebben. Vanwege deze mogelijk negatieve impact is Nederland geen voorstander van de inzet van dit type biobrandstoffen en wil daarom dat op Europees niveau deze biobrandstoffen worden uitgefaseerd." BNC Fiche 5: Herziening richtlijn hernieuwbare energie ; Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast).

4 Kamerstuk 34717, nr. 18 motie 4/12/2017; aangenomen 12/12/2017

5 <https://milieudefensie.nl/actueel/nederland-wil-palmolieverbod-voor-brandstof-vanaf-2021>

6 <https://www.act.transportenvironment.org/nl-NL>

7 <https://www.transportenvironment.org/news/momentum-growing-behind-phase-out-palm-oil-diesel-europe>

T&E detailed comments on the draft EU delegated act

T&E commissioned a research study to present compiled evidence on the ILUC emissions of different biofuels, the expansion of different crops into high-carbon stock areas and different options for low iLUC risk criteria. The study was done by Cerulogy and is called [“risk management: Identifying high and low ILUC biofuels under the recast of the RED”](#). T&E summarised the main conclusions of the report [in a briefing](#) published and presented in January 2019.

On high-ILUC risk biofuels, current (and latest) science on ILUC emissions points out at the high emissions linked to biodiesel feedstocks, with special regards to soy and palm oil. Furthermore, there’s a large body of evidence pointing at the deforestation linked and caused to palm and soy expansion. More than 30% of palm expansion globally happens on high carbon stock areas, with some studies pointing at higher shares (up to 70% as in the GIS study in the accompanying report). In the case soy, at least 7% of expansion is expected to occur at the expense of high carbon stock areas.

On low-ILUC certification, very stringent and robust criteria are needed in order to avoid a big loophole that would allow for more imports of palm oil for biodiesel than we currently have, now certified as low ILUC. For any certification to be credible, robust additionality safeguards are crucial, for instance based on the CDM mechanisms. However, such additionality safeguards are very challenging to implement and the chances are high that any system to ensure additionality can’t guarantee that land isn’t being displaced and therefore ILUC impacts are taking place.

Based on these conclusions, T&E’s briefing recommended the following:

- Soy oil and palm oil and PFAD should be included in the category of high ILUC risk biofuels.
- Member states should adjust downwards their targets for renewables in transport and their cap on food-based biofuels.
- Regarding the low ILUC category, the available evidence at that stage does not provide for a workable and sufficiently robust system for certification. The Commission should close the door to this option for high ILUC risk biofuels.
- Discussions with producing countries on more sustainable production practices should focus on priority uses such as food.

Now, the European Commission released a draft delegated act open for comments. This draft delegated act presents criteria for classifying certain feedstocks in the high ILUC risk category, but still allows an option for certifying low ILUC risk biofuels. This document highlights, on the basis of the research commissioned by T&E, the major loopholes in the draft text and a package of recommendations to close these loopholes as much as possible.

I. The high ILUC risk category should include soy, not only palm, and their co-products

We welcome the robust evidence and criteria presented for identifying the deforestation rates for different crops, and using them as a basis to categorise different crops into the high iluc risk category. However the current threshold to determine ‘significant’ expansion is too high.

1. Robust evidence regarding rates of deforestation

The identified rates of expansion in the EC proposal are generally in line with the ranges of Malins (2019) and Searle & Giuntoli (2018) and reflect the data presented in the accompanying [report](#). The years of analysis vary and the figures are not comparable as such and the ICCT used a narrower geographic scope but what is crystal clear is that palm oil is very strongly associated to deforestation, and that soy has also significant expansion into high carbon stock lands, especially in Latin America.

Data on expansion to wetlands could be further refined for the other crops. The GIS analysis only looked at parts of Malaysia and Indonesia with recent data, and for other parts of the world it relied on data from early 2000's. The literature survey largely focused on palm oil production areas in the wetlands analysis, and it seems that soy expansion to wetlands was not analysed at all. More recent data on wetland show that ["tropical peatlands are much more extensive than previously thought"](#), especially in Latin America. Higher granularity at global level would hence be needed on evaluating expansion of crops other than palm oil to wetlands since 2008.

The act also highlights that *"Scientific literature also demonstrates that the impact of ILUC on the potential of biofuels, bioliquids and biomass fuels to achieve greenhouse gas emission savings is particularly pronounced for oil crops. Renewable fuels made from such feedstocks are therefore widely considered as having a higher ILUC-risk."* ILUC modelling is crucial to take into account first, to then apply the analysis about the expansion to the ones with the highest modelled ILUC numbers - oil crops.

Finally, the act includes a review clause to take into account new data in the future. This is important and active monitoring would be relevant also for the EU's upcoming deforestation strategy and would support the goals of the Amsterdam declaration, as more up to date data is available.

- Overall, the evidence presented in the draft act and the report on expansion of different crops seems sufficiently robust to support the classification of different crops.
- The timeframe for analysing the average expansion and its share on high carbon stock lands should remain the same: from 2008 (before the RED) to the most recent data.
- Regular monitoring of deforestation rates of different crops should be maintained.

2. The threshold needs to be set at a lower level

Among oil crops, to identify "significant" expansion [Malins \(2019\)](#) identified two options: (1) either a simple threshold for deforestation of the crop or (2) a threshold based on GHG emissions. The commission chose a mixed approach: having a threshold for expansion, of which the level is decided based on GHG emissions with the assumption that the fuel needs to bring GHG savings compared to fossil fuels.

The commission approach is reliant on a "deforestation emission factor" of 344 g CO₂/MJ fuel for above ground biomass, which is based on averages from literature. Based on a requirement for the fuel not to increase emissions compared to fossil fuels, the Commission assumed that 47 g CO₂/MJ is allowed, resulting in a threshold of 14%. This was then reduced to 10% (or 34.4 g CO₂/MJ) to take into account uncertainty. With the Commission's approach, the effective GHG savings threshold for biofuels would be only 13% compared to fossil fuels and subject to significant uncertainty as it is based on an average "deforestation emissions factor", and rough multipliers in the formulas presented in article 3.

By using the GHG savings thresholds Malins recommends a maximum 33 gCO₂e/MJ (the maximum direct GHG emissions intensity allowable for new facilities under the RED). When

considering a target of no deforestation, even a threshold at 33g CO₂ e/MJ appears very high. In comparison, considering the goals to stop deforestation as included in the Amsterdam declaration, Malins recommended using a threshold of maximum 5%.

Several examples of reports and initiatives identify soy and palm as high forest risk commodities. In 2013, a study for the European Commission on the impact of EU consumption on deforestation classified soy and palm among the commodities the most associated to deforestation, together with other products such as beef. Another example is the Amsterdam Declaration – Towards Eliminating Deforestation from Agricultural Commodity Chains with European Countries – signed in 2015 by Germany, Denmark, Norway, France and the United Kingdom.

-Based on the Commission's formula and reported information, palm oil biofuels is classified as a high ILUC risk feedstock. This is important, but it should be clear that all palm co-products should be as well.

-According to the Commission, soy is associated with 8% expansion in high carbon stocks globally and 8% is a significant number.

-We recommend to set the threshold significantly lower than 10% - at maximum 5% - to effectively end the support to the oil crops that are significantly associated with deforestation.

-Soy should therefore fall in that category. This is supported by previous initiatives and reports on deforestation risk commodities.

II. The low ILUC risk criteria need to be fixed

The draft report does not provide a lot of information regarding the category of 'low ILUC risk'. There is no detailed explanation regarding the choice for different options and no assessment of the expected impact in terms of eligible palm production. In its draft report, the Commission highlights that it '*will set out further technical details regarding concrete verification and auditing approaches in an Implementing Act in line with Article 30(8) of the REDII. The Commission will adopt this implementing act by 30 June 2021 at the latest.*' It is challenging to judge how the system proposed in the draft act is likely to work (or not) in practice, without these additional technical details.

As mentioned earlier, on the basis of an earlier study, [T&E recommended](#) to close the option for low ILUC risk biofuels altogether. The Commission kept this option open, unfortunately. As low-iluc risk biofuels need to be 'additional' to avoid ILUC, it needs to be demonstrated that a producer is acting beyond business as usual, which constitutes practically a challenging task. More details are provided below on the potential size of the low ILUC risk loophole and recommendations to fix this as much as possible.

1. A loophole potentially bigger than the current EU consumption of palm for biofuels

The draft act and accompanying report are silent regarding the potential palm volumes that could become eligible under a 'low ILUC risk' option. More palm oil could be used in the future for EU biofuels compared to today's figures, and this would be categorised as 'low-iluc risk' while deforestation linked to palm oil would not be reduced. The delegated act, as now stands will promote the expansion of palm oil plantations, without avoiding indirect effects.

- **Derogation for unused, degraded or abandoned land**

As demand for palm oil is growing for non-energy uses like food or oleochemicals, the area expansion for palm oil will continue to grow irrespective of biofuels. Palm production is expected to grow by 40% by 2030. The ICCT estimated that there is a total of 1.52 Million hectares of land which could be converted to biofuel production meeting the RED II sustainability criteria in a business as usual case, if low iluc criteria for unused land does not require additionality. This analysis is still valid as the delegated act does not require any additionality analysis for 'unused' land.

As currently presented, the low ILUC risk criteria are basically reduced to the existing sustainability criteria. The only added requirement is to shuffle production so that new plantations on currently 'unused' land, which are supplying the EU would now be the ones labelled 'sustainable'.

A land area providing 4.9 million tonnes of palm oil in 2030 could qualify as 'low ILUC risk', without avoiding ILUC impacts. This is more than current palm oil consumption for EU biofuels.

- **Derogation for smallholders**

'Independent' smallholders are exempted from the financial barrier analysis of Article 5.1 (a) i, thus they receive preferential treatment over larger estates. The reasoning for the exclusion of smallholders from this requirement is mainly administrative burden, it has nothing to do with smallholders being more or less sustainable than larger estates. **There are severe risks associated with this derogation, insufficient insurance about 'independence' from big companies and no data to exactly analyse how much biofuels could be provided by smallholders, as the definitions vary largely.**

It remains unclear if the exemption is applied to the total biomass provided by the smallholders, or only the additional biomass that is due to adoption of a new practice which will lead to additional yields. This is a crucial question which will need to be clarified as it will have important implications regarding the potential volumes of palm oil which could be eligible as 'low ILUC risk'. **Our understanding is that only the additional production can be credited, but the text should perhaps be clarified to avoid a the risk that the entire production gets a free pass.**

The definition of smallholders vary and thus no data is available smallholders in the range 2-5ha and how much they contribute to global markets. [RSPO defines small holders](#) as cultivating on land up to 50 ha, and based on this threshold they estimate small holders producing 40% of global palm oil. RSPO defines [scheme smallholders](#) as smallholders who are structurally bound by contract, by a credit agreement or by planning to a particular mill. Scheme smallholders are often not free to choose which crop they develop, are supervised in their planting and crop management techniques, and are often organised, supervised or directly managed by the managers of the mill, estate or scheme to which they are structurally linked. In many regards the smallholders are tied contract farmers integrated into the vertical model of production and processing. **Thus scheme smallholders (such as FELDA) should not be considered 'independent'.**

Real independent smallholders are vulnerable. They are likely not to have [proven land tenure](#), with indigenous people having more difficulties proving land tenure than migrant smallholders. This also impacts their access to loans, as they cannot prove guarantees or collateral for loans. There is also a productivity gap with independent smallholders having lower yields, which is also linked to finance, as they cannot buy fertilisers or better planting material. Also the independent smallholders usually sell to intermediaries and sell at prices

of [up to 40% lower](#) than the mandated price. Also access to certification is an issue and the support is likely to go to absentee landlords, and fraud would be a significant risk, essentially splitting large estates into small chunks of “independent smallholders”. **Given these constraints it is likely that the true small holders will anyway be left out of this low-iluc risk certification and its benefits.**

What is also relevant is how much of the independent smallholders can be certified to meet the general REDII sustainability criteria. Currently [around 1%](#) of independent small holders are RSPO or ISPO certified.

-It is very challenging to quantify how much palm oil is likely to be supported as ‘low ILUC risk’ through this derogation, under the current draft delegated act. However, the potential size of land benefitting from the derogation is potentially big.
-There is also no certainty that the certification will benefit smallholders directly and there is a risk that big companies only create an administrative shuffling to continue benefiting from the new EU rules.

2. Recommendations to fix the criteria

The following recommendations have to be understood as a package of measures that are necessary to improve significantly what the Commission has put on the table.

1. The general requirements on additionality

As explained in an earlier [T&E briefing](#), based on a study by Cerulogy, the most robust way to ensure additionality is to apply guidelines and tests used for the Clean Development Mechanism (CDM), a conclusion also shared by the ICCT. The requirement in Article 5.1 (a) (i) is the only requirement that would be close to a proper additionality assessment, to credit only a project additional to a business as usual counterfactual scenario. It states that “*they become financially attractive or face no barrier preventing their implementation only because the biofuels, bioliquids and biomass fuels produced from the additional feedstock can be counted towards the targets for renewable energy under Directive 2009/28/EC or Directive (EU) 2018/2001*”.

-It is crucial that this requirement applies in all cases and not as one of three options. There should be no derogation, exemption to this general principle, to avoid displacement effects.

-We regret that the current draft delegated act makes no mention to the CDM rules, as a minimum, although the accompanying report does. More details should be added, including a direct reference to the CDM additionality assessment.

-This analysis should not refer to Directive 2009/28/EC as the additionality needs to be demonstrated on the basis of the new low ILUC rules.

-The draft report specifies that the new project must go “beyond common practice” but the practicalities are left to the implementing act and certification bodies, without clear guidance on how to count the low-iluc biomass. More details are needed on the type of financial analysis required and how it would be monitored by certification bodies.

2. The case of improved agricultural practices

Setting a robust counter-factual scenario is challenging, especially in the case of yield increases. The Cerulogy report shows how “*annual yield variations due to weather will often be larger than any annual marginal yield increase resulting from a given low ILUC-risk project activity*” and warns that “*this could result in over-crediting in years with good weather and under-crediting in years with poor weather*”. The definition excludes crediting additional production on the basis of “*annual yield fluctuations*” but this is not clear enough to be fully effective.

A dynamic baseline would seem necessary to avoid the risk of over crediting. The accompanying report of the Commission notes that “*comparisons of realised productivity increases with a dynamic baseline would not be implementable*” and essentially supports the exclusion of the yield increase approach, as the biomass amount which does not cause iluc cannot be measured. In an attempt to narrow the risks in an implementable way, an option would be to require a minimum productivity gain to be credited.

- The requirement in Article 5.1 (a) (i) should apply as a minimum to all cases of improved agricultural practices.
- There is a mention that these practices should be conducted “*in a sustainable manner*”. However, the interpretation of this wording can be questioned and it is not clear whether this will really prevent some problematic situations, for ex. increased use of fertilizers.
- We acknowledge that the definitions also exclude crediting additional production on the basis of “*annual yield fluctuations*”. However, this wouldn’t be sufficient to ensure a robust certification is put in place.
- Crediting low ILUC risk production by yield increases will be difficult to implement and this option should be avoided as much as possible.

3. The case of ‘unused, abandoned or degraded’ land:

The lack of proper additionality requirement, as stated in Article 5.1 (a) (1) will lead to a situation where land will be credited under this policy whereas it is likely to be converted for meeting increased demand for food and oleochemicals anyway. Therefore, this wouldn’t have prevented Indirect Land Use Change impacts.

Also, the draft act includes definitions of ‘unused’, ‘abandoned’ and ‘degraded’ lands, but doesn’t mention potential uses by local communities or even ecosystem services provided by land currently not used for crop cultivation or fodder for animals. This definition could also make it possible to use land currently used for other productions, such as cotton or rubber.

The most stringent option would be to rely only on the degraded land option only - it is already possible under the current RED - and not allow unused land or abandoned land, even with an economic assessment as presented in Article 5.1 (a) (1).

- To improve the current text, the possibility to account for additional production should only be linked to the use of ‘abandoned’ land and ‘severely degraded’ land, not ‘unused’ land. Unused lands have important ecosystem services and can be in fact currently used for other purposes.
- Expand the economic analysis from Article 5.1 (a) (1) to cover also the option of using land not previously used. Without this, the expansion to abandoned land or degraded land use of biofuels cannot be considered additional to a business as usual situation.

4. The case of smallholders:

It is important for the EU to work with producing countries and set up systems to improve the way of living of smallholders in producing countries. There is also potential to increase yield in smallholder farms as yields are estimated to be 47-80% lower than on estate farms. However, these improvements should be framed in the context of an increased demand for food. This is why attempts to improve yields at smallholders' level should be directed at the food markets, not an artificial biofuels demand.

The draft delegated act is unlikely to prevent ILUC impacts caused by smallholders and anyway does not provide all the necessary information and robust system to ensure that the smallholders would be the ones benefiting from the system. Changes could be made regarding the definition of smallholders, e.g. choosing a smaller size of land than 5 hectares and go to 2 hectares and strengthening wording on definition and independence. However, this wouldn't have any real impact on whether the draft act avoids displacement effects and wouldn't provide more certainty on whether the smallholders are really the ones benefiting from this new certification system.

The derogation on smallholders should be deleted altogether and discussions to improve their livelihood and practices should continue to take place with producing countries but in another policy context, not this biofuels policy.

5. Strengthen certification, monitoring & verification requirements

The EU's certification system for the sustainability of biofuels has been criticized as 'not fully reliable', according to the European Court of Auditors (ECA), the independent EU body in charge of scrutinising Europe's public spending. In a [report from July 2016](#) they found that the certification system 'did not adequately cover some important aspects necessary to ensure the sustainability of biofuels'.

The commission (or member state officials) has limited power to check that schemes are operating properly after the Commission granted its approval, which happens for a maximum of 5 years. Annual report needs to be provided, but the possibility to act remains limited based on the analysis of the ECA. The Commission would need to expand its powers on these schemes as well as strengthen the ones of member states, to be able to request for further details at any given time on any specific certification.

For certifying low-iluc risk biofuels the same system will be used, with less oversight from the commission as the low-iluc requirements are not as detailed as the sustainability criteria. How this process of certification will happen will be based on an implementing act due 30 June 2021. Essentially the certification schemes could develop their own standards in compliance with the details of the REDII and this delegated act, which is concerning.

Article 5(1) b needs a change in wording to mean that the granted low-ILUC status should remain for a maximum of years (as it currently stands it is easy to misinterpret this provision to mean something else). But we suggest 5 years instead of 10 years. This would avoid potential issues arising with certification weaknesses and in line with the period of time that the Commission recognizes EU voluntary schemes. It should also be noted that the implementation of the projects would need to be implemented after this delegated act enters into force, after 2021.

- Clarify the length of the low-iluc status to maximum 5 years after the start of the project.
- Ensure only projects starting after 2021, the implementation date of the delegated act can be credited.

-The mass balance system involves big risks of fraud and should be avoided. A segregated supply chain approach should be proposed instead.

-The use of voluntary schemes is only a possibility according to the draft act ('may'). This should be changed and as a minimum, voluntary schemes 'shall' be used, to avoid the use of national systems with even weaker standards.

-A safeguard clause should be inserted to suspend the use of low ILUC risk certification and even cancel previous credits. This safeguard clause can be activated on the basis of observed deforestation in a specific region (if expansion of crops in high carbon stocks is observed, the entire region/country shouldn't be subject to low ILUC risk certification) or on the basis of a complaint mechanism (disqualification if non-compliance is suspected).

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