

Achieving credible EU-wide verification of biofuel sustainability

The Renewable Energy Directive¹ (RED) and the Fuel Quality Directive² (FQD) aim to promote biofuels³ which comply with certain sustainability criteria⁴. Only sustainable biofuels may be counted towards renewable energy and emission reduction targets and be eligible for State aid⁵.

No matter how strong the sustainability criteria, they will never be effective unless compliance is credibly monitored and enforced. Credible verification of biofuel sustainability gives assurance that public money is not misspent on unsustainable fuels, it makes money available for sustainable ones, and it builds confidence among the public and the authorities that biofuels really meet their claims of sustainability.

But how is biofuel conformity with sustainability criteria checked? The directives state that Member States are responsible for ensuring sustainability criteria are fulfilled, but in practice a plethora of national frameworks and voluntary certification schemes has emerged which lacks coherence, forestalls mutual recognition of claims, hinders the internal market and, most importantly, delivers little assurance that biofuels which benefit from policy promotion and State aid are in fact sustainable.

This briefing proposes that, in the context of biofuels, verification of compliance should rest on the general framework on accreditation and conformity assessment developed in relation to the free movement of goods. After reviewing the rules of the RED and FQD, the briefing suggests that national accreditation bodies should be entrusted the role of monitoring conformity assessment activities related to biofuel sustainability, on the basis of detailed rules to be laid down in a Commission delegated act. In drawing up that act, the Commission should consult the European co-operation for Accreditation, in order to ensure that the technical aspects of biofuel conformity assessment are recognised and addressed. Reporting obligations should facilitate the Commission in evaluating the functioning of the system and, on the basis that information, make proposals for promoting best practice, thereby allowing continuous improvement.

¹ Directive 2009/28/EC, OJ L 140, 5.6.2009, p. 16–62.

² Directive 98/70/EC, OJ L 350, 28.12.1998, p. 58–68, as amended by Directive 2009/30/EC, OJ L 140, 5.6.2009, p. 88–113.

³ References to biofuels made in this briefing should be understood as also referring to bioliquids for the purposes of the RED. The definitions of biofuels and bioliquids are laid down in Art. 2, points (i) and (h), RED, respectively.

⁴ Art. 17 RED and Art. 7b FQD. Sustainability criteria are the same under both directives.

⁵ Art. 17(1) RED and Art. 7b(1) FQD and §§49, 101 of the Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p. 1–33.

Sustainability verification: the status quo

Under the RED and the FQD, Member States must require economic operators, whether or not the biofuels were produced in the EU, to show that the sustainability criteria have been fulfilled⁶.

To this end, Member States must, first of all, ensure that economic operators submit information on compliance with sustainability criteria⁷, and that such information is reliable. Second, they have to require economic operators to disclose, upon request from the authorities, the data substantiating the information. Finally, they must require economic operators to arrange for an adequate standard of independent auditing of the information submitted to ensure, *inter alia*, that the systems used by operators are accurate, reliable and protected against fraud⁸.

Member State systems

Each Member State must transpose the directives in its own legal context, and Member States have chosen different ways for economic operators to show biofuel sustainability. However, Member State systems differ widely.

A plethora of approaches

According to research by ECOFYS and IEEP⁹, twelve Member States have established a system of their own that economic operators can use to demonstrate compliance with sustainability criteria. Of these, seven Member State systems are based on ex post verification of actual data provided by economic operators¹⁰; four link compliance with sustainability criteria to Common Agricultural Policy requirements¹¹.

Six Member States, instead, allow economic operators to only use Commission-recognised voluntary schemes (as will be seen below, certification under those schemes must be mandatorily accepted as proof of sustainability in all Member States, including in those Member States that have introduced a national system). Of these, five require economic operators to report information to the authorities and compliance is verified at the time that biofuels pass the duty point; one (Germany), instead, requires economic operators to report information into an electronic database, which is checked by Member State authorities prior to passing the duty point.

The rules in place in the remaining eight Member States could not be classified by ECOFYS and IEEP, either because responses to their questionnaire were not available or because implementation of the directives had not yet been completed.

The current situation means that an economic operator supplying biofuels which comply with the system of Member State "A", and are therefore considered as sustainable in that Member State, has no guarantee that the same biofuels would be considered as sustainable in Member State "B" (even though the directives' substantive criteria are the same) unless he relies on

⁶ Art. 18(1) RED and Art. 7c(1) FQD.

⁷ Additional information on other environmental and social impacts must also be submitted pursuant to Art. 18(3), second subparagraph, RED and Art. 7c(3), second subparagraph, FQD.

⁸ Art. 18(3) RED and Art. 7c(3) FQD.

⁹ Peters D. et al. (ECOFYS and IEEP), Analysis of Member State RED implementation: Final Report (Task 2), December 2012, available at: http://ec.europa.eu/energy/renewables/studies/doc/2013_task2_red_implementation.pdf

¹⁰ Fuel suppliers collect sustainability data from preceding stages in the supply chain. Verification takes place past the point of compliance.

¹¹ Cross compliance, possibly in combination with natural protection legislation or land zoning based on RED-compliant and non RED-compliant areas.

Commission-recognised voluntary certification schemes. Even where biofuels are also accepted as sustainable under the national system of Member State "B", unless the operator has a recognised voluntary scheme, he will still have to demonstrate compliance twice, thereby facing an additional administrative burden which is not justified by added value.

International agreements and voluntary schemes

Apart from Member State systems, the other two instruments that may be used to verify biofuel compliance with sustainability criteria are international agreements¹² and voluntary certification schemes¹³ recognised by the Commission¹⁴.

Where operators submit sustainability certificates issued under agreements or schemes thus recognised, Member States are obliged to accept them as conclusive evidence of compliance with sustainability criteria¹⁵. Clearly, international agreements and voluntary schemes have a big advantage over Member State systems: their certificates of compliance are automatically and mandatorily recognised throughout the Union, thereby ensuring both eligibility for contribution to energy targets and for State aid measures.

Is this advantage justified by the higher level of credibility of sustainability certificates issued under recognised agreements or schemes? Looking at the letter of the law, this is not guaranteed. The criteria against which the Commission should decide whether to recognise the agreements and schemes are vague: the Commission may award recognition if the agreement or scheme meets 'adequate standards of reliability, transparency and independent auditing'¹⁶. The terms 'reliability', 'transparency' and 'independent auditing' are not defined in the directives, nor is it clarified what level of reliability, transparency and independent auditing is adequate¹⁷.

The law thus leaves significant room for discretion to the Commission, and the fourteen voluntary schemes recognised so far appear to differ widely in quality¹⁸. As regards international agreements, none has yet been recognised by the Commission.

Given that certification under any of the fourteen schemes offers the exact same advantages to economic operators (access to State aid schemes and eligibility for targets), and that

¹² Art. 18(4), first subparagraph, RED and Art. 7c(4), first subparagraph, FQD require the EU to endeavour to conclude bilateral or multilateral international agreements with third countries containing provisions on sustainability criteria corresponding to those of the directives. Where such agreements are concluded, the Commission may recognise them in accordance with the same rules and to the same effects described in relation to voluntary certification schemes.

¹³ Art. 18(4), second subparagraph, RED and Art. 7c(4), second subparagraph, FQD define voluntary certification schemes as voluntary national or international schemes set up by private parties that set standards for the production of biomass products.

¹⁴ Art. 18(3), first, second and third subparagraphs, RED and Art. 7c(3), first, second and third subparagraphs, FQD. Pursuant to Art. 18(6) RED and Art. 7c(6) FQD, the Commission may recognise agreements and voluntary schemes in accordance with the advisory procedure referred to in Art. 25(3) RED and in Art. 11(3) FQD.

¹⁵ Art. 18(7) RED and Art. 7c(7) FQD.

¹⁶ Art. 18(5) RED and Art. 7c(5) FQD.

¹⁷ Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability scheme (OJ C 160, 19.6.2010, p. 1–7) sets out how the Commission intends to carry out its recognition task. The Communication adds some detail to the concept of independent auditing, clarifying that auditors must be external to economic operators and schemes, they must be independent and possess the generic and specific skills appropriate for performing audits. Some examples are given of what this means, e.g. experience in carrying out audits in conformity with the standard ISO 19011 (See §2.2.2). However, while the Communication indicates that schemes should cover certain headline items (e.g. independence of auditors), it stops short of setting out what is required, as a minimum, under each headline (e.g. the Communication does require auditors to be accredited against specific ISO standard). Importantly, because the Communication is not binding, the Commission cannot be held to comply with its provisions. The reverse is also true: were the Commission to deny recognition to a scheme on the basis (not of the directives but) of the Communication, its decision would be amenable to legal challenge.

¹⁸ http://ec.europa.eu/energy/renewables/biofuels/sustainability_schemes_en.htm

certification does not command a market premium from end-consumers (because it is not publicised at filling stations), the schemes compete against each other solely on the basis of price, to the detriment of quality. The market signal given is therefore to reduce costs of certification as much as possible (e.g. use remote document review instead of on-site audits). This is quite concerning when one sees that recognised voluntary schemes have been *de facto* delegated the task of enforcing EU law (sustainability criteria are binding provisions of EU directives) and trigger Member State and consumer expenditures through State aid and higher fuel prices.

Reforming sustainability verification

Verification of biofuel compliance with sustainability criteria would become more credible, effective and cheaper if the different instruments were able to compete on the market on the basis of uniform common requirements which would become stronger over time to reflect new best practice.

Independently of any possible change to the substance of sustainability criteria, the mechanisms for checking compliance with them should be reformed to:

1. Improve the credibility of sustainability certificates by laying down essential requirements with all international agreements, voluntary schemes and Member States systems would have to meet in order to obtain recognition;
2. Ensure mutual recognition of sustainability claims made under any of the recognised agreements, schemes and systems;
3. Enhance the transparency of both the recognition process and the results of verification activities for the benefit of economic operators as well as the general public;
4. Ensure that information on the results (and shortcomings) of verification under recognised agreements, schemes and systems is received by the Commission, which, on the basis of that information, should be encouraged to make periodic proposals for promoting best practice in verification, thereby building a continuous learning mechanism into the framework.

We suggest that these objectives could be achieved by relying on rules and mechanisms already established in the context of the free movement of goods. We believe that these rules could legitimately and impactfully be used in the biofuels context, providing a number of advantages and contributing to achieving the four objectives stated above.

Free movement of goods and accreditation

The Treaty forbids Member States from introducing quantitative restrictions to import and export¹⁹. When it comes to national technical regulations (i.e. any requirement that products must *de jure* or *de facto* meet in order to lawfully be placed on the market), they do not formally restrict trade, however, they can in fact hinder intra-European trade. To address market fragmentation due to technical standards, while maintaining a common level of protection of general interests such as environmental protection, the EU has invested in harmonisation of laws. Since the mid-80's, harmonisation legislation has normally limited itself to setting out fundamental principles on the protection of public interests, while the drawing up of detailed technical specification is entrusted to technically competent standardisation bodies.

Understandably, whether or not products comply with harmonised standards cannot simply be stated by the economic operator (a "self-declaration") - it has to be checked by competent conformity assessment bodies. Thus the credibility of the conformity assessment, (i.e. the process by which compliance with specified requirements relating to a product, system, person or body is demonstrated) is fundamentally important.

Conformity assessment activities, which include certification, are performed by conformity assessment bodies. It goes without saying that the credibility of conformity assessment results depends on the competence, experience and independence of conformity assessment bodies and their personnel. Here lies the importance of accreditation -- the attestation of competence of a conformity assessment body delivered by a national accreditation body subject to the conditions, rules and oversight of Regulation No 765/2008, which lays down binding rules and procedures for accreditation. By ensuring the rigour in accreditation throughout the Union, the Regulation strengthens mutual confidence between Member States about the competence of conformity assessment bodies and, consequently, the certificates issued by them. Mutual recognition of conformity statements can thus be built on mutual trust.

We suggest that the approach employed in relation to harmonisation, conformity assessment and accreditation in the field of the free movement of goods could usefully be applied in the context of biofuel sustainability verification.

This suggestion is not unorthodox, since sustainability criteria - although not framed as conditions for placing biofuels on the market - do constitute harmonisation measures, as they are based on Art. 95 TEC (now Art. 114 TFEU).

Moreover, the approach of the RED and FQD is already somewhat similar to that of harmonisation legislation: the directives only set substantive criteria, which represent the essential principles needed to safeguard the public interest of environmental protection. For the rest, notably detailed rules implementing the criteria and the mechanisms for verifying compliance, the directives refer to international agreements, voluntary schemes and Member State systems, which thus perform a similar role to standards in the free movement context.

¹⁹ Art. 34 and Art. 35 TFEU, respectively.

However, unlike in the classic case of harmonisation for the free movement of goods, the standards set by international agreements, voluntary schemes and Member State systems do not really deliver harmonisation, as they can differ significantly from one another, and therefore Member States do not mutually recognise claims.

In addition - again unlike the classic harmonisation case - the competence, experience and independence of conformity assessment bodies used in the biofuels context, which constitute the foundation of the whole system of verification, are not guaranteed. The directives' criteria are vague, conformity assessment bodies may or may not be regulated and accredited, and there is no oversight of their activities.

Details of the proposed reformed system

Sustainability criteria would continue to be set out in the RED and FQD, as is the case now. However, in order to ensure the desired level of credibility in verification and create the necessary trust for mutual recognition, a delegated act should lay down the common rules that all international agreements, voluntary schemes and Member State systems should meet in order to obtain recognition. The delegated act, adopted by the Commission, would thus function as a binding meta-standard against which international agreements, voluntary schemes and Member State systems would be benchmarked. This would create a flexible system which would allow the Commission to set the bar for quality verification. Indeed, the Commission should use this tool to periodically raise the bar and promote best practice in biofuel sustainability verification.

The delegated act should not only focus on whether or not an agreement, scheme or system covers in full or part the directives' sustainability criteria. It is also important that the delegated act lay down rules for ensuring that the procedures for verifying biofuel conformity with substantive criteria are credible. In consideration of the technical character of the delegated act to be adopted, the Commission should be required to consult the European co-operation for Accreditation on the basis of Art. 13 of Regulation No 765/2008 in drawing it up. The delegated act would thus enhance the transparency of the recognition process and increase clarity about requirements for obtaining recognition.

The delegated act should lay down common requirements of competence, independence and experience applicable to all conformity assessment bodies and auditors delivering services under any recognised agreement, scheme or system. Accreditation in accordance with Art. 5 of Regulation No 765/2008 should become mandatory, with the consequence that oversight functions over conformity assessment bodies will be entrusted to the technically competent national accreditation bodies established pursuant to Art. 3 of that Regulation. As regards conformity assessment bodies established outside the EU, their services would be recognised on the basis of Mutual Recognition Agreements. While some such agreements have already been concluded with third countries (e.g. the US), an additional incentive would be provided for other countries to negotiate such agreements with the EU.

Within the framework set by the delegated act to ensure the desired level of credibility and transparency, it would be for international agreements, voluntary schemes and Member State systems to lay down their own detailed provisions regarding how those provisions are defined

and changed over time, who does the auditing, how compliance is verified and certified. Moreover, it would be for the agreements, schemes and systems to define the specific principles, criteria and indicators that need to be fulfilled in order to obtain certification, as well as the rules for tracking sustainability characteristics through the supply chain (chain of custody system). The Commission would recognise agreements, schemes and systems in accordance with the provisions of the delegated act.

Sustainability statements issued under any of the international agreements, voluntary schemes or Member State systems thus recognised would mandatorily be accepted by competent national authorities in any other Member State as establishing a valid presumption of biofuel conformity with sustainability criteria.

In line with Art. 11 of Regulation No 765/2008, any claim made at any step of the supply chain, as well as the final attestation of conformity submitted to Member State competent authorities, would only establish a presumption of compliance with sustainability criteria, thereby allowing authorities to consider contrary evidence and conduct enquiries (Art. 18(7) RED and Art. 7c(7) FQD should be reformed accordingly).

An obligation would be placed on conformity assessment bodies to report each year to national accreditation bodies on the results of conformity assessment activities performed in the year, including as regards the identification of instances of non-compliance and how these were addressed and resolved. They would be further required to establish, in consultation with the national accreditation body, a plan for improving performance and resolving outstanding cases of non-compliance in the following year.

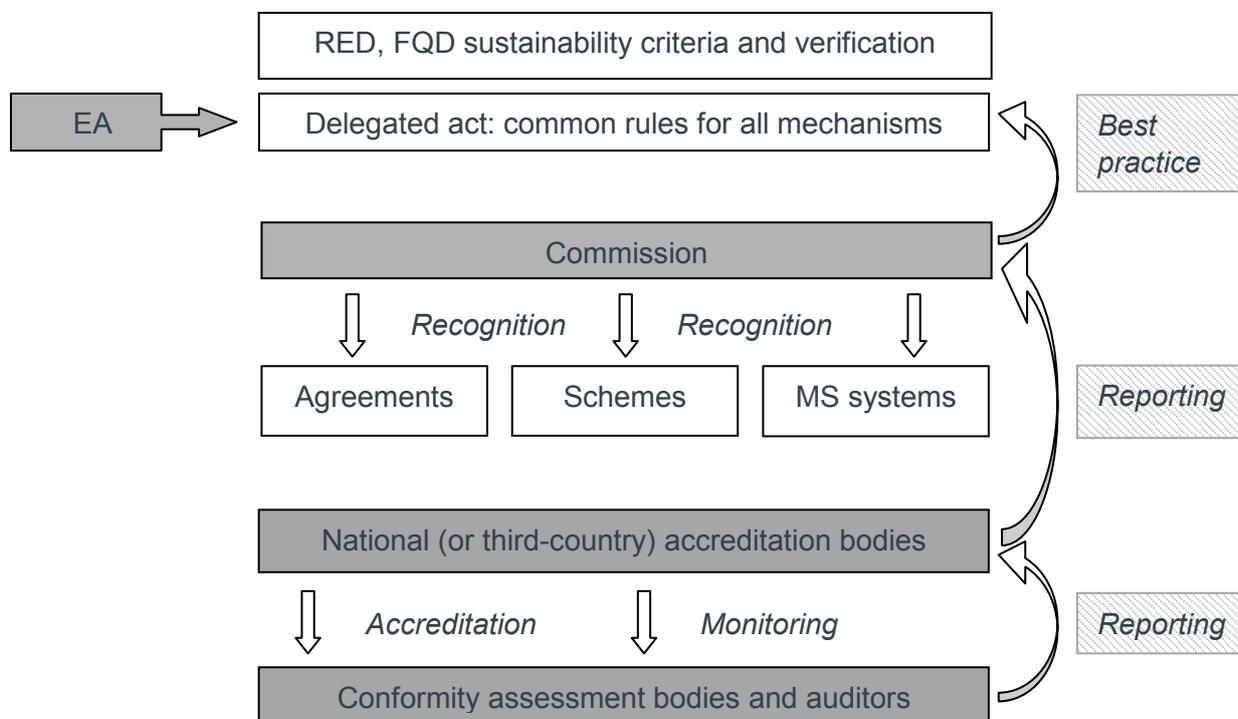
National accreditation bodies would report this information to the Commission. Should it emerge that cases of non-compliance were not resolved during a period identified as appropriate by the conformity assessment body, the Commission would be required to suspend or withdraw recognition of the relevant agreement, scheme or system.

On the basis of information received or otherwise available, the Commission should make periodic proposals for promoting best practice in verification.

It could also be envisaged that recognised agreements, schemes and systems that exceed the benchmark set in the delegated act (e.g. because they cover additional sustainability criteria or set higher thresholds for existing ones) would guarantee a higher reward for biofuels certified under those agreements, schemes or systems. This way, a positive incentive for going beyond the minimum would be established²⁰.

²⁰ See Soliman A. and Roggeveen I., Global Solutions for Biofuel Certification Schemes: A Comparative Analysis, City University of Hong Kong Law Review, Vol 2(3), 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140375

The proposed system could be illustrated as follows:



Conclusion: The advantages of the proposed reform

The proposed reform would introduce a framework based on three layers. First, the RED and FQD would continue to lay down sustainability criteria and the fundamental principles of verification of compliance. Second, a delegated act - drawn up by the Commission after gathering the expertise of the European co-ordination for accreditation - would provide the common requirements that international agreements, voluntary certification schemes and Member State systems would have to meet in order to obtain recognition. Third, technically competent national accreditation bodies (or equivalent bodies under Mutual Recognition Agreements) would be attributed an oversight over bodies assessing biofuel conformity with recognised agreements, schemes or systems.

Reporting obligations would help the Commission oversee the functioning of verification systems in place and periodically make proposals to promote best practice in verification. Additional rewards (such as higher State aid intensity or contribution to target accounting) could be given to biofuels certified under recognised agreements, schemes and systems that go beyond the benchmarks set in the delegated act. This way, biofuel sustainability verification could become a positive example for the use of certification in other areas of environmental protection.

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