

Annex - Revision of the EU RED (RED II): Compatibility of Amendment 307 of the European Parliament with WTO law – Key elements of legal analysis

I. Introduction

The Plenary's amendment, which constitutes the Parliament's position in the upcoming trilogue negotiations, proposes that palm oil biofuels be phased-out from the contributions to the RED II renewable energy targets in transport as of 2021, while allowing other food or feed-based biofuels to continue to be consumed up to a certain ceiling, without subjecting them to any reduction targets. While not formally prohibiting imports of palm oil-based biofuels, this mechanism would discourage consumption of such biofuels, in particular by excluding them from possible support schemes and financial incentives in Member States.

II. Legal analysis

This analysis examines the compatibility of the Parliament's amendment with WTO law. It first looks at possible instances of discrimination followed by possible justifications.

A key question to establish whether the Parliament's position entails discrimination within the meaning of the GATT relates to the issue of likeness between palm oil-based biofuels and other food or feed crops-based biofuels such as rapeseed oil-based biofuels. WTO law requires that like products be afforded equally favourable treatment but allows for differential treatment between products that do not meet the likeness test.

Likeness is typically based on consideration of a number of factors, namely products' (i) properties, nature and quality; (ii) end-uses; (iii) consumers' tastes and habits; and (iv) tariff classification. As far as these factors are concerned, palm oil biofuels do not seem to present differences with respect to other biofuels from food or feed crops and therefore appear to be like.

The main difference between palm oil-based and e.g. rapeseed oil-based biofuel is the feedstock used, which can be considered a process and production method of the biofuel. Process and production methods that have an impact on the final product as per the factors listed above can be taken into consideration for the likeness test between final products, while process and production methods that do not have such impact are not normally taken into account. In the case at hand, to the extent that the use of palm oil as a feedstock does not significantly impact on the biofuel, differentiated and less favourable treatment between palm oil-based and e.g. rapeseed oil-based biofuel would in principle not be allowed. Indeed, it seems questionable that carbon emissions derived from the production and sourcing of the feedstock should be considered when assessing likeness between the final products given that they do not appear to have an impact on any of the key factors listed above.

Having said this, it is true that products' likeness especially where process and production methods are at stake has to be determined on a case-by-case basis and largely depends on the specifics of each measure. In the present case, arguments that palm oil as a biofuel feedstock has an impact on the characteristics and performance of the biofuel, that it has a significant impact on climate change or that it shapes consumers' behaviour and determines their preferences in the biofuel market appear possible but cannot be guaranteed to succeed. It would be prudent, therefore, to assume they are like for the purpose of the analysis.

Assuming that palm oil-based biofuels and other food or feed crops-based biofuels are like products, the most-favoured nation (MFN) principle enshrined in Article I of the GATT requires that any advantage granted to products originating from one country be immediately and unconditionally accorded to the like products originating in all other countries. The Parliament's position would exclude palm oil-based biofuels from support schemes and financial incentives in Member States, from which the like products imported from other countries (e.g. soybean oil-based biofuels) would continue to benefit. At this stage it is relevant that the oil palm can only grow in specific areas of the

globe and not in the EU, while other oil crops (e.g. soybean oil) grow in other third countries and yet others (e.g. rapeseed oil, sunflower oil) grow in the EU. By affording such differential and less advantageous treatment to palm oil-based biofuels, the Parliament's position would arguably amount to discriminatory treatment from the MFN perspective.

Similarly, the Parliament's position would also appear to discriminate between imported and domestic goods, to the extent that certain imported goods (palm oil-based biofuels) would be granted treatment less favourable than like products of domestic origin (e.g. rapeseed oil-based biofuels). The Parliament's position would in this way also violate the national treatment principle in Article III:4 of the GATT.

Possible justifications

Violations of the above provisions may be tolerated if they are covered by the general exceptions under Article XX of the GATT. In this case, the Parliament's position could arguably be considered "*necessary to protect human, animal or plant life or health*" as covered by Article XX(b) or "*relating to the conservation of exhaustible natural resources if [...] made effective in conjunction with restrictions on domestic production or consumption*" as provided by Article XX(g).

In order to be covered by subparagraph (b), the measure at hand would need to be necessary for the protection of life or health. This provision encompasses a very strict, direct and effective contribution requirement of the measure to the objective of life or health protection. In the event of a WTO dispute, the EU would bear the onus of defending that excluding palm oil-based biofuels from the contributions, while allowing other food and feed-based biofuels, is strictly necessary for the protection of life or health. The EU would need to put forward solid scientific evidence in this sense which, despite the recognised degree of uncertainty around these issues, appears difficult to gather. Hence, it does not appear that excluding one type only of oil-based biofuel from the RED II contributions, while allowing other oil-based biofuels, would be covered by Article XX(b) of the GATT, unless that is done on the basis of solid scientific factual analysis.

Subparagraph (g) encompasses a looser standard by only requiring that the measure relates to the objective of conservation of exhaustible natural resources. The environment or clean air would be considered as such. This subparagraph also requires that "*measures are made effective in conjunction with restrictions on domestic production or consumption*". Again, in the event of WTO dispute settlement, the EU would bear the burden of proof in showing that its measure is covered by this subparagraph. In order for the EU to put forward credible arguments, similar restrictions would need to be applied on other food or feed-based biofuels, both produced and consumed in the EU, for example based on their carbon emissions. While there is some evidence that palm oil creates, on average, more carbon emissions than other oil crops, certain sources of palm oil may have associated emissions below that average. Other types of crops also vary in terms of emissions and, depending on circumstances, could have higher associated emissions than certain sources of palm oil. The Parliament position does not take this issue into account. This is something that could clearly undermine any EU argument under subparagraph (g).

In the event that solid arguments could be made to defend that the Parliament's measure would be provisionally covered by any of the subparagraphs of Article XX of the GATT, the measure would still need to be covered by the chapeau, which requires that the measure not constitute "*arbitrary or unjustifiable discrimination*" or "*a disguised restriction on international trade*". In the case at hand, the EU would need to construct arguments that the discriminatory element of the measure is related to the legitimate objective of life and health protection or protection of exhaustible natural resources. The fact that other food or feed-based biofuels would be subject to more nuanced measures based on e.g. their carbon emissions, would not help the EU in convincing that this is a legitimate measure and dispelling the appearance of protectionism.

Based on the foregoing, it appears that the Parliament's position would arguably be discriminatory vis-à-vis other imported and domestic products and thus be inconsistent with GATT.