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ClientEarth's contribution to the public consultation on the draft Implementing Regulation on the guidance for demonstrating compliance with the sustainability criteria under the Renewable Energy Directive

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ClientEarth welcomes the Commission's draft Implementing Regulation on establishing operational guidance on the evidence for demonstrating compliance with the sustainability criteria for forest biomass laid down in Article 29 of Directive (EU) 2018/2001 ('Renewable Energy Directive' or 'REDII'). However, we must point out some severe shortcomings, which should be seriously considered, at a minimum, in drafting the final version of this Implementing Regulation. In particular, we highlight that the Commission should:

- Rectify the scope of applicability of the criteria for forest biomass set out in Article 29 (6) and (7) of REDII;
- Clarify that neither mere compliance with legal provisions, nor mere legality criteria, allow for forest biomass to be considered as '*sustainable*';
- Establish uniform criteria for pivotal notions under the Implementing Regulation (such as '*significant lack of enforcement*' *etc.*) to ensure uniform implementation and enforcement across the EU;
- Recognise the relevance of the information provided by non-governmental organisations as evidence in the context of demonstrating compliance with the sustainability criteria;
- Clarify the responsibilities of economic operators, Competent Authorities, and certification schemes with regard to the obligation to gather information, as well as the requirements that any potential database must meet to guarantee that the information contained therein ensures compliance with Article 29 of REDII.

1 General remarks concerning the criteria under Article 29(6) of REDII

At the outset, we would like to note that up-to-date scientific knowledge directly contradicts the recognition of forest biomass as a renewable source of energy. Forest biomass is an inefficient and climate- and environment-deteriorating source of energy that cannot, by any means, drive the transition towards a green future. Despite the growing opposition to burning trees for energy purposes, the EU has not yet recognized the destructive role of forest biomass in relation to climate and forests. Being aware of the time that phasing out forest biomass entirely might require, we would like to point out three major concerns in regards to the current shape of the sustainability criteria under Article 29(6) of REDII.

Firstly, the sustainability criteria seem to be dangerously confusing two concepts: the legality of harvesting and sustainable sourcing. The criteria laid down in Article 29(6)(a) of REDII focus on the existence of laws regulating forest logging, but do not guarantee the actual relevance or impact of such laws or the sustainability of the production and harvesting practices that those laws require. The same goes for the requirement to have monitoring and enforcement systems in place, as such systems merely support the execution of existing laws which, as noted above, may provide no guarantees of sustainable harvesting practices. No qualitative assessment of the legal framework in the place of harvest is needed. Indeed, where such laws do not even exist, Article 29(6)(b) provides that forest biomass may nevertheless be treated as sustainable if harvesters have management systems "*in place*" that address particular goals. However, the existence of management systems provides no guarantee as to the sustainability of harvesting operations in practice. Consequently, the sustainability criteria legalise many destructive forestry practices that are permitted under national laws and fail to "*minimise the risk of using forest biomass derived from unsustainable production*" as Article 29(6) suggests they should.

Secondly, the sustainability criteria apply to a very limited number of biomass facilities. The applicability of these criteria covers only installations with a total rated thermal input equal to or exceeding 20 MW in the case of solid biomass fuels, and with a total rated thermal input equal to or exceeding 2 MW in the case of gaseous biomass fuels (Article 29(1)(c) of REDII). This significantly limits the number of biomass facilities subject to the obligations under Article 29(6) of REDII, as biomass plays a crucial role in residential heating[1]. In addition, only certain types of forest biomass remain subject to the criteria, which exclude secondary biomass from wood-processing industries (such as mills), among others.

Thirdly, Article 30 of REDII significantly limits the role and accountability of Member States in assessing compliance with the sustainability criteria, and should therefore be subject to revision. Its vague wording, which merely obliges Member States to "*require economic operators to show that the sustainability and greenhouse gas emissions saving criteria laid down in Article 29(2) to (7) and (10) have been fulfilled"*, and to "*take measures to ensure that economic operators submit reliable information*" does not provide any mechanism to ensure the enforcement of the criteria under Article 29 of REDII.

In light of the above, it should be outlined that compliance with the so-called "*sustainability criteria*" under Article 29(6) of REDII does not mean *per se* that forest biomass is sustainable. **Instead, it only means that it has been produced in compliance with certain minimum criteria making it eligible for the purposes referred to in points (a), (b) and (c) of Article 29(1) of REDII**. This is relevant in order to avoid the misconception that any forest biomass meeting those criteria is *per se* "*sustainable*". Moreover, the REDII must be read in line with the Commission's requirement to ensure coherence of its legislation and compliance with the principle of legal certainty. In particular, the Taxonomy Regulation[2] is supposed to define which activities are sustainable and it already establishes the key principle of "*do no significant harm*" (Cf. Article 2(17), Taxonomy Regulation, though noting that the term "*sustainable*" is itself yet to be defined with clarity). A mismatch between the REDII and the Taxonomy Regulation at any point in time would undermine legal certainty. Therefore, we call on the Commission to revise the sustainability criteria in the REDII upwards, to ensure adherence with the '*do no significant harm*' principle, along with the other principles under Article 191 of the Treaty on the Functioning of the EU ('TFEU').

2 Applicability of the Implementing Regulation

The scope of the draft Implementing Regulation should be consistent with the scope of applicability of the sustainability criteria for forest biomass set out in Article 29(6) and (7) of REDII. This means that the **exemptions from its scope should not go further** than the exemptions established in Article 29 of REDII. This is directly relevant, for instance, for Article 1 of the draft Implementing Regulation.

Under Article 29(1), fourth sub-paragraph, of REDII: "*Biomass fuels shall fulfil the sustainability and greenhouse gas emissions saving criteria laid down in paragraphs 2 to 7 and 10 if used in installations producing electricity, heating and cooling or fuels with a total rated thermal input equal to or exceeding 20 MW in the case of solid biomass fuels, and with a total rated thermal input equal to or exceeding 2 MW in*

[1] F. Monforti-Ferrario, C. Belis, *Sustainable use of biomass in residential sector - A report prepared in support of the European Union Strategy for the Danube Region* (2018).

[2] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability ‐ related disclosures in the financial services sector (*OJ L 317, 9.12.2019, p. 1–16*), as amended.

the case of gaseous biomass fuels. Member States may apply the sustainability and greenhouse gas emissions saving criteria to installations with lower total rated thermal input".

Firstly, the Commission, in exercising its implementing powers, cannot extend the scope of an exemption set out by the legislation. Article 1(2)(b) of the draft Implementing Regulation provides for an exemption from the application of the Implementing Regulation to gaseous fuels from primary forest biomass composed of methane: this additional exemption has not been foreseen under REDII and should therefore be **removed**.

Secondly, REDII expressly provides for the possibility for Member States to "***apply the sustainability (…) criteria to installations with lower total rated thermal input***"[3]. In order to ensure coherence of EU and national legislation, **the Implementing Regulation should apply consistently to the installations with a lower total rated thermal input to which the sustainability criteria apply on the basis of national law provisions**. The Implementing Regulation should provide expressly for such a case, which would otherwise unduly exempt certain installations from the application of the sustainability criteria.

3 Assessment of compliance with the harvesting criteria

Need for clearer requirements

Article 3(1)(b) of the draft Implementing Regulation should read "*national **and/**or sub-national laws applicable to the area of harvest*" to ensure that, in case there is applicable legislation at both national and sub-national level, economic operators do not cherry-pick the less burdensome. Article 3(1)(b) could even be more precise, to read "*national and, where applicable, sub-national laws..."*

Article 3(1)(b)(iv) and (v) of the draft Implementing Regulation, among others, should include clear criteria to determine whether the goals of these provisions are achieved. Arguably, clarity in this matter and legal certainty are even more relevant when the assessment of the evidence against the criteria is entrusted to non-state actors, such as certification schemes.

Compliance with sustainability criteria – a box-ticking exercise?

According to Article 3(1)(c) of the draft Implementing Regulation, "*economic operators shall carry out a risk-based assessment which provides accurate, up-to-date and verifiable evidence of all the following elements: (…) **the existence** of systems for ensuring monitoring, implementation and enforcement of the national and sub-national laws referred to in paragraph (b), including information on the following elements: authorities competent for carrying out monitoring, implementation and enforcement, sanctions for non-compliance, systems for appealing against decisions, and public access to information*" (emphasis added). Based on this draft provision**, compliance with sustainability criteria will be ultimately measured through a simple box-ticking exercise, which only determines the existence of relevant laws**. As a result, the actual relevance and effectiveness of national and sub-national laws will not be subject to any qualitative assessment.

What amounts to a "*significant*" lack of enforcement?

A lack of uniform criteria

[3] Article 29(1) of REDII.

According to Article 3(1)(d) of the draft Implementing Regulation, economic operators shall carry out a risk-based assessment which provides accurate, up-to-date and verifiable evidence that there is no significant lack of enforcement of the national (or sub-national) laws or regulations referred to in Article 3(1)(b) of the Implementing Regulation. **While the issue of actual effectiveness of national laws should be central in this assessment, the draft Implementing Regulation does not define what constitutes that a "*significant*" lack of enforcement**. Without clarity, this assessment is ultimately left to the subjective determination of individual operators, rendering it effectively unenforceable.

The draft Implementing Regulation should therefore include clear criteria to determine a "*significant*" lack of enforcement pursuant to Article 3(1)(d) of the draft Implementing Regulation. Arguably, clarity in the criteria is even more relevant when the assessment of evidence of non-enforcement by certain Member State authorities is entrusted to non-state actors, such as certification schemes. Notably, in accordance with Article 291 TFEU, the Commission is given implementing powers where the legislature finds necessary that uniform conditions be set out to ensure harmonised implementation of EU law. By failing to defining when a lack of enforcement shall be considered "*significant*", the Commission would fail to make correct use of its implementing powers under REDII and ensure uniform conditions for its implementation across different Member States, potentially undermining the correct functioning of the internal market.

Limited scope of evidence

Article 3(2) of the draft Implementing Regulation indicates the types of evidence that shall be taken into account when investigating the quality of enforcement (*e.g.*, legal assessments and reports prepared by national or international governmental organisations) and at the same time implies that information that has not been included in such official documents will not be considered as a reliable source of proof. This provision would significantly limit the scope of admissible evidence of enforcement (and of lack thereof). This would constitute a major shortcoming for the following reasons.

- Firstly, the investigative work exposing destructive forests practices and breaches of relevant environmental laws is mainly done by civil society organisations. The wording of Article 3(2) of the draft Implementing Regulation introduces a vailed requirement that – to be considered as reliable evidence in the context of Article 3(1)(d) of the draft Implementing Regulation – such legal assessments or reports would first have to be officially acknowledged by state or international bodies. While international organisations will report on the most alarming cases, national public authorities rarely deal with infringements detected in other countries and may avoid assessing law enforcement in sub-national jurisdictions where sub-national governments retain law making and enforcement authority over forestry matters. This stems from both monitoring capacity and political sensitivities around issuing such documents. Consequently, **the draft Implementing Regulation creates the peculiar situation where the evidence that must be considered to assess a lack of law enforcement is likely to be subject to the assessment of the alleged infringers of enforcement obligations (state authorities involved in forest management)**. It assumes that national legal assessments or reports exist, are independent, and would include all relevant information about gaps in domestic law enforcement.

- Secondly, in regards to the second and third sentences of Article 3(2) of the Implementing Regulation, we highlight that **a lack of proper law enforcement does not automatically lead to the Commission's legal action or a ruling of the Court of Justice**. Quite the opposite – although the proceedings at EU level concern cases of severe infringements, the decision to launch a legal

action against a Member State lies at the discretion of the Commission and is influenced by various political factors. Therefore, whilst this type of information is certainly relevant for the assessment of a lack of enforcement, only to a limited extent would it reflect the actual infringements.

Importantly, the Implementing Regulation should clarify that non-governmental organisations play a vital role in ensuring compliance with obligations under EU environmental law. Since this was already acknowledged by the Commission[4], it should be reflected in the Implementing Regulation by considering the information submitted by civil society organisations as **evidence to be taken into account when assessing any type of evidence against the sustainability criteria** (not only with regard to the lack of enforcement). Given the overarching requirement that operators carry out a "*risk based assessment*" that provides verifiable evidence of the criteria listed in Article 3(1), information published by civil society organisations that is relevant to an operator's compliance with the harvesting criteria should be recognised as a relevant indicator of risk that warrants verification. To ensure high quality of such information, the Implementing Regulation could enshrine a list of elements that the admissible evidence of an alleged enforcement gap should consist of.

Blurring the responsibility for incomplete or outdated information

According to Article 3(3) of the draft Implementing Regulation, Member States may establish public databases with up-to-date information on certain elements in order to minimise the administrative burden for economic operators. This potentially blurs the responsibility for gathering reliable information that economic operators should bear. When economic operators provide the information (instead of relying on publicly available databases), Member States gather potentially new information, which enable them to verify the information provided by the operator against the information held by the Member State.

In addition, and despite the current requirement to do so in the draft Implementing Regulation, some Member States may maintain databases with information that is *not* necessarily "*up-to-date*", which could cause potentially dramatic consequences, resulting in using biomass from areas excluded from logging. If at all necessary to have Member States establishing databases that can be relied on by economic operators, these should, therefore, result in a clear and enforceable obligation for Member States to update the information in a way that takes into account the actual situation of the sourcing area at the moment of potential harvesting. Moreover, a way should be set out for third parties (including civil society organisations) to provide relevant information for inclusion in those databases.

In summary, the draft Implementing Regulation should not weaken the responsibilities on economic operators. In case of pursuing the concept of public databases, the draft Implementing Regulation should expressly **oblige Member States to conduct a systematic review of information published therein and to report results of such reviews to the Commission**. Aside from information about relevant laws, the national databases should include governmental legal assessments and reports, and information about infringement proceedings and rulings of the Court of Justice referred to in Article 3(2) of the draft Implementing Regulation, as well as other types of information about forest management (including alleged breaches of law) submitted by third parties (*e.g.*, civil society organisations).

[4] Communication from the Commission of 28 April 2017 on Access to Justice in Environmental Matters, par. 38.

4 Auditing and verification

The draft Implementing Regulation **falls short of providing guidance as to how Member States are expected to implement their role of ensuring adherence to the sustainability criteria under Article 29 of REDII.** In particular, the Implementing Regulation should explain how Member States are to check the correctness of the information received from economic operators, and to verify its reliability (*e.g.*, in a form of an exemplary catalogue of measures that Member States can take to ensure reliability of information on the basis of Article 30(3) of REDII).

ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.