

Guidelines for the implementation of Article 3(3) of the REDII as regards to raw material market distortions

The revised Renewable Energy Directive¹ (REDII) sets a common framework for the promotion of energy from renewable sources such as biomass.

However, to ensure the alignment with the Circular Economy policies the sustainability criteria for the use of biomass for bioenergy production have been significantly reinforced. For this reason, the REDII foresees that in designing national policies and support schemes promoting bioenergy Member States measures have to avoid distortive effects on the raw material markets and respect the waste hierarchy. Member States have to ensure that the production of energy from biomass is not promoted at the expense of uses higher up in the waste hierarchy.

This document intends to provide a methodology to guide Member States in implementing these requirements.

As follows from **Article 3(3)** of the REDII², Member States need to ensure that their national policies promoting the use of energy from renewable sources, including support schemes as well as the fuel suppliers' minimum share obligations in the transport sector set out in Article 25, respect the waste hierarchy set out in Article 4 of the Waste Framework Directive so as to avoid undue distortive effects on the raw material markets.

This provision is further explained in **Recital 21**³ of the REDII, in light of which it is to be interpreted. According to the Recital, Member States shall consider the available sustainable supply of biomass and take due account of the principles of the Circular Economy and of the waste hierarchy in order to avoid unnecessary distortions of raw material markets. When implementing that provision Member States will consequently need to adopt a method for establishing whether their national measures promoting bioenergy generation cause, or risk,

¹ Recast of Renewable Energy Directive https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.328.01.0082.01.ENG&toc=OJ:L:2018:328:TOC

² Article 3(3) - Member States shall ensure that their national policies, including the obligations deriving from Articles 25 to 28 of this Directive, and their support schemes, are designed with due regard to the waste hierarchy as set out in Article 4 of Directive 2008/98/EC to aim to avoid undue distortive effects on the raw material markets. Member States shall grant no support for renewable energy produced from the incineration of waste if the separate collection obligations laid down in that Directive have not been complied with.

³ Recital 21 - When developing support schemes for renewable sources of energy, Member States should consider the available sustainable supply of biomass and take due account of the principles of the circular economy and of the waste hierarchy established in Directive 2008/98/EC of the European Parliament and of the Council (10) in order to avoid unnecessary distortions of raw materials markets. Waste prevention and recycling of waste should be the priority option. Member States should avoid creating support schemes which would be counter to targets on treatment of waste and which would lead to the inefficient use of recyclable waste.

undue distortions on the raw material markets and, if so, whether they are contrary to the waste hierarchy.

1. The method

Under Article 3(3) of the REDII, Member State measures promoting energy from renewable sources shall respect the waste hierarchy so as to avoid undue distortive effects on the raw material markets. In case of distortions on the market of a specific raw material, Member States will have to ensure that the waste hierarchy is respected and bioenergy generation based on this specific raw material is not promoted at the expense of uses higher up in the waste hierarchy.

It follows that the method to be adopted by Member States to ensure compliance with Article 3(3) of the REDII, first needs to establish whether a national measure incentivising the use of a raw material for energy generation cause, or risk causing, distortions on the market for the specific raw material.

It is thus necessary to assess:

1. Whether there are other uses for that raw material than the production of bioenergy;
2. The raw material's available sustainable supply; and
3. The impact of the national measures on the demand for the raw material.

If it is determined that the national measures result in, or risk resulting in, demand exceeding available sustainable supply, those measures cause or risk causing, undue distortions on the market for the raw material concerned.

It will be then necessary to:

4. Determine what level in the waste hierarchy each of the uses of the waste material concerned corresponds to; and
5. Ensure that the national measures incentivising the use of that raw material for bioenergy generation do not result in, or risk resulting in, a shortage of supply of the raw material for the industries using it for it for purposes higher up in the hierarchy.

The main lines of the different steps of the method are further detailed below.

1.1. Assessment of distortions on the raw material markets

Alternative uses

The method should first determine whether there are other uses for the raw material than for generation of bioenergy. If there are no other uses, Member State's national policies do not cause distortive effects on the raw material markets within the meaning of Article 3(3) of the REDII.

In order to establish whether there are alternative uses, Member States should consult relevant databases, such as Eurostat, and public registers and use public information. In addition, where relevant, public consultations should be carried out inviting stakeholders, such as different industry associations, companies, research institutions, and other actors concerned, to submit information on alternative uses.

Available sustainable supply

If the raw material concerned has other uses than the generation of bioenergy, the method shall assess the available sustainable supply of that raw material.

To determine the available sustainable supply of a raw material, Member States should consult relevant databases and public registers, use public information, and carry out public consultations with stakeholders.

The consultations should aim to establish the overall volume of the raw material concerned that is currently used, as well as the, actual and potential, existing volumes of the raw material. Relevant questions that should be taken into account in the assessment include the usable quantities of the raw material for the different identified uses, barriers to trade, elasticity of supply and expected development of demand.

In the assessment, Member States should where relevant take into account the basis for the long-term schedule anticipating the expected allocation of financial support that every Member State shall publish according to Article 6(3) of the REDII and which should be updated on the annual basis or when necessary to reflect market developments.

Furthermore, information from the Commission's bi-annual EU bioenergy sustainability report on energy from biomass should be used in the Assessment.

In addition, it will be necessary to take into consideration of national measures planned or adopted by other Member States incentivising the use of the same raw material for bioenergy production. For this purpose, inter alia the integrated national energy and climate progress reports submitted by the Member States to the Commission, under Article 17 of the Governance Regulation, should be taken into account.

It is recommended that Member States keep an updated public register for available sustainable supply already investigated, in order to ensure transparency and coherence within the Union.

Impact of a national measure on the demand for the relevant raw material

Finally, the method must assess the impact of a national measure incentivising the use of a raw material for energy production, on the demand for the raw material concerned and whether the increased demand will result in, or risk resulting in, demand exceeding the available sustainable supply.

Also in this assessment it will be necessary to consult databases, use public information, and conduct public consultations in all relevant industrial sectors.

1.2. Application of the waste hierarchy

If a national measure incentivising the use of a raw material for bioenergy production causes, or risks causing, undue distortions on the market of that raw material, the method to be adopted by Member States for the implementation of Article 3(3) needs to provide for the establishment of the level of priority according to the waste hierarchy, for each of the uses of the raw material, and the internal order between them.

Article 4(1) of the Waste Framework Directive sets out a five-step waste hierarchy and provides that it shall apply as a priority order: waste prevention, is the best option, followed by re-use, recycling, energy recovery, with disposal such as landfill as the last resort. Priority shall thus be given to the use of a raw material that is higher up in the waste hierarchy since such use constitutes the best overall environmental impact. According to Article 4(2), of the Waste Framework Directive deviation from the waste hierarchy is only allowed for specific waste streams where this is justified by life-cycle thinking on the overall impacts thereon.

Hence, if a raw material is used both for the production of energy and for the production of goods, and there is limited supply of that raw material, Member State must ensure that any national measure adopted to incentivise the use a raw material for energy production respect the waste hierarchy as this would constitute an undue distortion on the raw material market concerned.

Measures in case of distortions, or risk of distortions, on the raw material markets

If it has been determined that a national measure incentivising the production of bioenergy causes, or risks causing, undue distortions on the market of a raw material, and the other uses of that raw material are higher up in the waste hierarchy, the Member State must apply the waste hierarchy and ensure that the measure concerned does not result in, or risk causing in, a shortage of supply of the raw material for industries using it for those purposes that are higher up in the waste hierarchy.

With regards to financial support, Article 6(2) of the REDII provides that Member States may adjust the level of support according to objective criteria, provided that such criteria are established in the original design of support scheme.

It follows from the provision, in conjunction with Article 3(3) and Recital 21, that Member States have to establish objective criteria in the original design of their support schemes, providing for a method assessing whether the support schemes cause, or risk causing, distortions on the material markets and, if so, are contrary to the waste hierarchy. When those criteria are fulfilled, the level of support must be adjusted so as to ensure that they support scheme does not result

in a shortage of supply of the raw material for industries using it for the purposes that are higher up in the waste hierarchy.

2. Procedural questions

It is important that the assessment of whether national measures cause, or risk causing, undue distortions on the raw material markets and are contrary to the waste hierarchy is done in a transparent and open manner, allowing for the participation of the stakeholders, as indicated above under Section 1.1.

The outcomes of the assessments will need to be published and Member States will have to ensure legal remedies allowing for the appeal of the decisions, in order to ensure the judicial protection required under Articles 4(3) and 19(1) of the EU Treaty and Article 47 of the EU Charter of Fundamental rights.