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Institutional Factors as Limitation for Biomass Circulation in the Internal Market

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Summary: 1. Introduction. 2. Not a clear definition of Biomass as "derived by-product" or "waste". 3. Possible restriction of Biomass free circulation as "derived by-product" in the internal market. 4. Lack in the EU legal system of Contract types for Agriculture Biomass supply chain to strength the UE strategies for Renewable Energy. 5. Conclusion.

Abstract: *The paper aims to analyse the compatibility between the right of free circulation of goods and Biomass circulation crossing the Internal market and the EU Member States legal systems. Biomass plants need to comply with the policies and rules of the Local Authorities regarding renewable energy, its transport, and to any policy adopted for that particular location which differs in each Member State and at the regional arrangement. As the Biomass as waste shall cease to be waste within the meaning of point (1) of Article 3 of Directive of Waste, when it has undergone a recovery or any operation in which the principal result is the waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to achieve that role, in the plant or the wider economy. Therefore, the scope of the term 'waste' turns on the meaning of the phrase 'discard'. The directive does not provide any decisive criteria for determining the intention of the holder to discard a given substance. The Court of Justice has been asked on some occasions for preliminary rulings on whether various materials are to be regarded as waste. Nevertheless, it has provided some indicators from which it may be possible to infer the holder's intent. Thus, according to EU legal framework and leading case of Court of Justice concept of waste cannot be interpreted restrictively. The question whether or not a given substance is waste must be determined in the light of all the circumstances, and regard being had to the aim of Directive and the need to ensure that its effectiveness is not undermined.*

Keywords: biomass, free circulation of goods, internal market.

1. Introduction.

The paper aims to analyse the compatibility between the right of free circulation of goods and Biomass circulation crossing the Internal market and the EU Member States.

The use of biomass is predicted as a significant measure and must be assessed by political entities. Since an action apparently simple, may have fundamental implications for the economic development of the various EU regions; and it interferes directly with the balance of trade, in job creation, and in the development of new business and growing business competitiveness.

As matter of fact, the EU Member States are required to coordinate their regulatory approaches in a series of issues ranging from the arrangement of the planning procedures to certification with the aim of achieving the target sets in the Renewable Energy Directive (Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC).

National rules, concerning the authorisation and certification procedures, including planning systems for renewable energy installations, should respect the principles of objectivity, transparency, non-discrimination and proportionality (see Article 13 with the Recitals 40, 41 and 42 to the Preamble of the Renewable Energy Directive) so that, while the European Union Legislator has respected the Principle of the Procedural Autonomy of the established.

Thus National legislation on Renewable Energy is important not only from an environmental or social point of view but also from an economic perspective, in the sense that it is closely related to the acceptability of the project by the local society and the creation of legal certainty for the investor. The institutional and administrative legislation may profoundly influence the economic and technical choices.

Indeed, according to European Union policy on the use of energy from renewable sources, biomass utilization as an energy source grants opportunities, related to f.i. a) the exploitation of the endogenous resource, b) to not have endemic dependence from price variations due to constraints in the global

markets and to external geopolitical stability, c) as well as it can contribute appreciably to the making of direct jobs in raw materials management and at supplying energy products to consuming companies. However, this desirability of Biomass use clashes with some institutional limitations. The latter can be identified in main tree non-technical barriers:

1. Not-clear definition of Biomass as "derived by-product" or "waste";
2. Possible restriction of Biomass free circulation as "derived by-product" in the internal market;
3. The lack in the EU legal system of Contract types for Agriculture Biomass supply chain to strength the EU strategies for Renewable Energy.

2. Not a clear definition of Biomass as "derived by-product" or "waste".

In EU law, the Biomass non-clear and univocal meaning is a limitation for its circulation in the internal market and also in the perspective of biomass plants localization. As the matter of fact, Biomass plants also need to comply with the Local Authority policies and rules on renewable energy, its transport, and to any policy adopted for that particular location which differs in each Member State and at the regional arrangement.

Because the sources of waste are so diverse, it is convenient to consider the valorisation of biomass waste for different uses.

The Biomass definition established by Art. 2 of Renewable Energy Directive, is not enough for its qualification as juridical good, which as such can free circulate in the EU market. Its qualification has to be reconstructed by concentric passages, taking into consideration the EU legal framework on the use of Biomass for Energy Production and provide for Waste treatment.

Biomass Definition in EU legal system is like *a matryoshka* doll.

'Biomass' is the biodegradable fraction of products, waste, and residues from the biological origin from agriculture (including vegetal and animal substances), forestry and related industries including fisheries and aquaculture, as well as the biodegradable fraction of industrial and municipal waste (art. Art. 2 of Directive 2009/28/EC).

The same legislative definition of Biomass incorporates the concept of waste. However waste is a concept even broader than the definition of 'Biomass' present in the Art. 2 above mentioned because it applies to any Biomass derived-by product.

Thus, starting from the previous EU framework on Biomass Legislation likened to the Energy production and according to Art. 2, par.1 and 2, Directive 2008/98/EC on waste, biomass is not waste, but goods moving free in the internal market, if it is:

- 1) Fecal matter, if it is not covered by paragraph 2(b) of Art. 2 Directive 2008/98/EC on waste. The reference to the letter b) of art. 2 cited refers to the concept of "land (*in situ*) including unexcavated contaminated soil and buildings permanently connected with land";
- 2) Straw and other natural non-hazardous agricultural or forestry material used in farming, forestry;
- 3) Straw and other natural non-hazardous agricultural or forestry material utilized for the production of energy (if this is biomass not processed), but also if the production of energy is realized starting from such biomass processed by methods which do not harm the environment or endanger human health.
- 4) Animal by-products including processed products covered by Regulation (EC) No 1774/2002 (Animal –by-products Regulation), except those which are destined for incineration, landfilling or use in a biogas or composting plant;
- 5) carcasses of animals that have died other than by being slaughtered, including animals killed to eradicate epizootic diseases, and that are disposed of by Regulation (EC) No 1774/2002.

It should be underlined as Regulation (EC) No 1774/2002 (Animal by-products Regulation) is now repealed by Regulation (EC) No 1069/2009.

According to the 'Consideration' 12 of Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation (EC) No 1069/2009 of the European Parliament and the Council, laying down health rules in regards to animal by-products and derived products that are not intended for human consumption), in the interests of coherence of Union legislation, the processes whereby animal by-products and derived products are transformed into biogas and composted should comply with the health rules laid down in the above mentioned Regulation as well as the measures for the protection of the

environment, defined in Directive 2008/98/EC Animal by-products destined for use in a biogas. Out of the previous list, biomass has to be considered as waste.

It is understood when referring to the stratified system of rules above that the system does not make it easy for the increased use of biomass for energy production and, even more, actually discourages the entrance of raw materials management for power generation for Biomass holders/producers in the agriculture sector, often small farmers, into the market..

3. Possible restriction of Biomass free circulation as "derived by-product" in the internal market.

As waste, in any case, the biomass can still have a second life.

Specified waste materials or raw materials resulting from an extraction or manufacturing process, in which it is not the primarily intention to produce, may be regarded not as a residue, but as a by-product, which the undertaking does not seek to throw away according to Art 3 of the Directive of the Waste (Directive 2006/12/EC of The European Parliament and of the Council Of 5 April 2006).

It is the moment in which the circulation in the internal market may suffer severe limitations. Waste is perhaps a concept even broader than the definition above because it applies to any biomass-derived by-product (CHEYNE I., 2002).

According to Art 3 of the Directive of the Waste, "waste" means any substance or object that the holder discards or intends to or is required to discard.

Therefore, the scope of the term 'waste' turns on the meaning of the word 'discard' (Case C-129/96 *Inter-Environment Wallonie* [1997] ECR I-7411, paragraph 26). It follows that the concept of waste cannot be interpreted restrictively.

The directive does not provide any decisive criteria for determining the intention of the holder to discard a given substance. The Court of Justice has been asked on some occasions for preliminary rulings on whether various materials are to be regarded as waste. Nevertheless, it has provided some indicators from which it may be possible to infer the holder's intent. The question whether or not a given substance is waste must be determined in the light of all the circumstances (*C-9/00, Palin Granit*), regard being had to the aim of Directive and the need to ensure that its effectiveness is not undermined (*ARCO Chemie Nederland*, paragraphs 73, 88 and 97). However, the concept of waste cannot be interpreted restrictively.

As the Biomass as waste shall cease to be waste, within the meaning of point (1) of Article 3, when it has undergone a recovery or operation in which the principal result is the waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to achieve that function, in the plant or in the wider economy.

Nevertheless, the Court of Justice has provided some indicators from which it may be possible to infer the holder's intent. Therefore, it appears that in addition to the criterion of whether a substance constitutes a production residue, a second relevant test for determining whether or not that substance is a waste according to the above mentioned Directive is the degree of likelihood that that substance will be reused, without any further processing prior to its reuse.

If in addition to the mere possibility of reusing the material, there is also a financial advantage to the holder in so doing, the likelihood of reuse is high.

In such circumstances, the substance in question must no longer be regarded as waste that its holder seeks to 'discard', but as a genuine product.

Because from the holder's intention derives the waste qualification as Biomass "derived-by-products", its interpretation by public power affected the Biomass free movement restriction in the internal market.

Firstly, in many of the Member States legal systems the burden of proof is by the demonstration of the nature of the biomass-derived by-product moves on the holder assuming judicial or administrative contestation (f.i. in the Italian legal system according to the criminal case Cass. Pen. Sez. III n.16200/2014). Because the waste qualification not as discard, but as biomass derived by-products is a derogation from the general rule established by law, the burden of proof about the existence of the conditions because it is possible the qualification of biomass as derived by-product must be performed by on who requires the application of the exception.

Secondly, the limitation may be imposed properly by government decision (HANSEN W., CHRISTOPHER M., VERBUECHELN M., 2002).

If according to the Article 35 TFEU, waste for recovery should be free to circulate within the EU market without restrictions, any possible limitation could be based on the respect of fundamental requirements concerning waste management that is set out in Article 13 of the Waste Directive). Thus, Waste management is carried out without endangering human health, without harming the environment. As it is explained in Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraphs 36 to 40, the term 'discard' must be interpreted in light of the aim of Directive 75/442 (old Waste Directive reformed on 2006). This one, according to its third recital, is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. Also, the Art. 191 TFEU (old Article 174(2) EC) provides that Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken (*EDWARD V.*, 2013).

It must, therefore, be concluded that waste, whether recyclable or not, is to be regarded as "goods" the movement of which, by Article 30 of the Treaty, must in principle not be prevented (Case C-2/90 *Commission of the European Communities v Kingdom of Belgium*).

Even if the national measure could be justified by reasons relating to the protection of the environment (Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*), no action of purely economic nature can justify barriers to the fundamental principle of the free movement of goods (Case C-120/95 *Decker* [1998] ECR I-0000, paragraph 39) (*ENGLE E.*, 2008).

In this case, the EU should be verifiable in the compatibility of national or regional legislative decisions with the fundamental freedom of the circulation of goods in the internal market.

From a public law perspective, enlargements of raw materials for energy purposes, if acted on at a district scale, agreed upon the supply of regional energy needs for manufacturing, and it represented a strategy on the reindustrialization of the regions, mainly contributing appreciably to the making of direct jobs in raw materials management and at energy products supply to consuming companies.

4. Lack in the EU legal system of Contract types for Agriculture Biomass supply chain to strength the EU strategies for Renewable Energy.

The potential for renewable energy proceedings from agriculture is greatest when the use of a non-edible portion of crops is considered.

Because the biomass provider is usually a small farmer, and the term Biomass has an unclear and univocal meaning which has an impact on the contracts for biomass storage, treatment processing or supply chains related to agricultural products. In the same time, farmers are faced with a new set of legal problems when deciding to provide a Renewable Energy producer with their biomass.

While there is much research investigating technology and logistic questions, organization and contracting decisions remains an area less represented in the current literature. The contracting aspects are complex and not developed.

For this complex system of rules and a market characterized by high levels of technics and professional skills (*PIRES A., MARTINHO G., CHANG N.*, 2001), the farmer - as Biomass holder - could not be treated as a contractual party presumed that they have traded with the same conditions, as in the traditional protection assigned to the contract parties by the Private Law (*CIPPITANI R.*, 2007).

The USA jurisprudence, "have looked at the length of time the farmer has been engaged in the selling of the particular commodity, the degree of the farmer's business understanding, the farmer's knowledge of agricultural markets, and the farmer's experience with the customs and practices of selling commodity" (*GOERINGER L.P., GOODWIN H.L., POPP M.*, 2013) (*Colorado-Kansas Grain Co. v. Reifschneider*, 817 P.2d 637, 640 (Colo. App. 1991)).

Typically, the biomass plant owner will present a farmer with a written biomass production contract. "This is not just wise to provide a record of parties' agreement, but will also be legally required. Usually, the biomass plant will want multi-year commitments from the farmer to ensure a sufficient supply of biomass to operate the facility. Accordingly, typical contracts will require deliveries of biomass over the course of many years and the statute of frauds, which requires all contracts that cannot be performed within one year to be in writing and signed by both parties, will apply" (*GOERINGER L.P., GOODWIN H.L., POPP M.*, 2013).

The farmer as Biomass holder may not be able to find sufficient and efficient protection in the traditional instruments for protection provided by the present legal system. Therefore, “row crop waste and energy crop biomass supply channels will have significant hurdles to overcome in the shift from ad hoc supply systems involving informal contracting and barter systems to more formal systems that renewable energy processors are likely to utilize” (ALTMAN I., 2007).

European Commission Communication “A better functioning food supply chain” in 2009, crossing to the constitution of the High Level Forum for a Better Functioning Food Supply Chain in late 2011, Council Regulation (EC) No 1234/2007, Regulation (EU) No 1306/2013, the Regulation (EU) 1308/2013 of the European Parliament and of The Council of 17 December recognised that producer organisations should be able to negotiate, subject to quantitative limits, the terms of delivery contracts for some or all of their members' production. They also provided that producer organizations pursue one or more of the objectives of concentrating supply, for placing on the market of the products produced by its members and optimizing production costs overall contribute to the fulfillment of the objectives of Article 39 TFEU.

A Proposal for a Council Regulation on applying certain rules of competition to production of and trade in agricultural products (COM/2005/0613- CNS 2005/0231), explains in its Memorandum how “in the context of a people’s Europe, the Commission attaches great importance to simplifying and clarifying Community law so as to make it clearer and more accessible to the ordinary citizen, thus giving him new opportunities and the chance to make use of the specific rights it gives him”. Thus a codification for applying certain rules of competition to production of and trade in the agricultural product could be a good point to start. However, still now any “facilities” or common framework for contracts or joint agreements for biomass storage, treatment processing or supply chains related to agricultural products in EU legal system exist.

Even though the context above mentioned displaces on the contract and regulatory strategies of the EU and national markets in the EU legal systems, there is considerable uncertainty about Biomass Supply contracts.

Integrating private law instruments, gains a role in the promotion of contractual relations between the entrepreneurship and the interested community, social or economic, just before or in correspondence of the public proceedings.

5. Conclusion.

As illustrated in previous parts of the present document various barriers prevent a realization of a potential project for a biomass plant and the function required in this market, the farmer as biomass holder/producer. This situation inhibits the energy market from choosing the best option with respect to environmental impacts and sustainable development (CARRIE L. SONNEBORN, 2004).

For instance, legislation rules may pose barriers to the deployment of Biomass Plants and authorisations for the installation of biomass plants may be difficult to obtain, or this may be a very slow process. As a matter of fact, choosing the location site for localising Renewable Energy Plants, especially large-scale ones, is a delicate and complex decision that needs to be taken also considering the authorisation and legislative framework at national and local level. In some countries, the supply chain could be complex and fragmented. Many suppliers remain small and medium enterprises. These suppliers tend to lack the necessary skills to promote their products of biomass adequately that not favor small-scale, decentralized solutions, which may be one of their business models.

Starting for above consideration, it is the importance of non-technical barriers (RÖSCH C., KALTSCHMITT, 1999).

So, it could be relevant for the facilitation of the free circulation of Biomass providing an overview of the most common certification schemes available for sustainability certification of Biomass for Energy Production. Certification schemes are being developed and further detailed, in many cases with the involvement of a variety of stakeholders. Last but not least, both European and national governments are considering proposals for (mandatory or voluntary) sustainability requirements for solid biomass used for energy production.

But also, it could be relevant for the facilitation of the free circulation of Biomass realizing contracting framework/clauses or jurisprudential interpretation/orientation taking in count the nature of weaker contracting party in when the provider of biomass is a farmer, as far back in the USA legal system. The Uniform Commercial Code provided rules dedicate to the Contract for Biomass supply chain. Starting for

the Codex above mentioned, local Courts take into consideration the "substantially impaired" between the farmer as biomass provider and the Biomass Plant owner.

These rules find its *raison d'être* in the necessity to protect the farmer as part of a Biomass contract from any element of surprise, and it is offered as an instrument of protection that holds in due consideration the peculiar nature of this kind of trading, as ruled for subcontracting.

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