Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels

COMMISSION DELEGATED REGULATION (EU) 2019/807

of 13 March 2019

supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources[(1)], and in particular the fourth subparagraph of Article 26(2) thereof,

Whereas:

(1) In order to address the issue of indirect land use change ('ILUC'), Directive (EU) 2018/2001 requires the Commission to adopt a delegated act to lay down provisions setting out the criteria for determining the high ILUC-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed, and for certifying low ILUC-risk biofuels, bioliquids and biomass fuels. Such provisions should accompany the report on the status of worldwide production expansion of the relevant feedstock ('report on feedstock expansion'), submitted to the European Parliament and to the Council on this date.

(2) ILUC can occur when land previously devoted to food or feed production is converted to produce biofuels, bioliquids and biomass fuels. In that case, food and feed demand still needs to be satisfied, which may lead to the extension of agricultural land into areas with high carbon stock such as forests, wetlands and peat land, causing additional greenhouse gas emissions.

(3) Sustainability and greenhouse gas saving criteria set out in both Directive 2009/28/EC of the European Parliament and of the Council[(2)] and Directive (EU) 2018/2001 do not account for ILUC emissions.

(4) Directive (EU) 2015/1513 of the European Parliament and of the Council[(3)] not only acknowledged the existence of ILUC emissions, but also recognised, despite the uncertainty in calculating them, that the magnitude of greenhouse gas emissions linked

to ILUC can lead to negating some or all of the greenhouse gas emissions savings of individual biofuels, as defined in that Directive, and bioliquids. Therefore, it introduced an overall limit to the amount of those fuels produced from cereal and other starch-rich crops, sugars and oil crops and from crops grown as main crops primarily for energy purposes on agricultural land that can be counted towards targets set out in Directive 2009/28/EC. That limit consists of a 7 % maximum contribution of such fuels towards the final consumption of energy in rail and road transport in each Member State.

(5) Directive (EU) 2018/2001 keeps the limitation on biofuels and biomass fuels produced from food and feed crops consumed in transport and strengthens it by introducing specific national limits for the total contribution of these fuels towards the Union renewable energy target for 2030. Those limits are determined by the 2020 national share of those fuels in final consumption of energy in rail and road transport in each Member State, with the possibility to increase them by one percentage point, up to a maximum of 7 %.

(6) Directive (EU) 2018/2001 also calls for a specific limit to biofuels, bioliquids and biomass fuels produced from food and feed crops with high ILUC-risk and for which a significant expansion of their feedstock production area into land with high carbon stock is observed, in the amount of their level of consumption in each Member State in 2019. Starting from 31 December 2023, their contribution should be gradually reduced to 0 % by 2030 at the latest.

(7) While it is widely acknowledged that there are risks arising from ILUC related to the use of food and feed crops for the production of fuels, scientific literature shows that the level of ILUC emissions depends on a variety of factors, including the type of feedstock used for the renewable fuel production, the level of additional demand for feedstock triggered by the use of biofuels, bioliquids and biomass fuels, and the extent to which land with high-carbon stock is protected worldwide.

(8) Scientific literature also demonstrates that the impact of ILUC on the potential of biofuels, bioliquids and biomass fuels to achieve greenhouse gas emission savings is particularly pronounced for oil crops. Renewable fuels made from such feedstocks are therefore widely considered as having a higher ILUC-risk. This is reflected in Annex VIII, Part A of both Directive 2009/28/EC and Directive (EU) 2018/2001. The report on feedstock expansion, reflecting the latest best available scientific data on the worldwide expansion of the production area of food and feed crops into land with high carbon stock, confirms that these crops are also responsible for an overwhelming majority of the observed worldwide expansion of the production area of food and feed crops into land with high-carbon stock.

(9) The report on feedstock expansion also highlights that the impact of the expansion of the production area of oil crops into land with high-carbon stock on the potential of biofuels, bioliquids and biomass fuels to achieve greenhouse gas emission savings depends on several factors. Among those, the absolute and relative magnitude of the land expansion since a specific reference year compared to the total production area of the relevant crop, the share of this expansion into land with high-carbon stock as well as the type of high-carbon stock area, play a crucial role in determining the significance of such expansion

for the purposes of Directive (EU) 2018/2001. These factors, as well as the specific productivity factors for each group of crop, should therefore be taken into account when laying down the criteria for determining the high ILUC-risk biofuels, bioliquids and biomass fuels produced from food and feed crops for which a significant expansion of the feedstock production area into land with high-carbon stock is observed.

(10) Taking into account all of the foregoing considerations, including all of the relevant scientific information and studies, the differences between the various feedstocks, the global nature of different commodities markets and the manner in which they function, the related risk of unintended or counterproductive deflection or diversion effects, the relative availability of complete data, and the periodic and frequent review of that data, as well as the relevant international obligations of the European Union, the most appropriate, objective and even-handed methodology at this stage of the regulatory process is considered to be one based on the overall worldwide position with respect to each particular feedstock, rather than an approach that would discriminate between particular countries. This represents the best achievable regulatory approach taking into account the competing but complementary objectives pursued by this regulation. Such an approach is further appropriately balanced by the possibility of low ILUC-risk certification.

(11) In accordance with Article 26(2) of Directive (EU) 2018/2001, Member States are required to apply the criteria set out in this Regulation for determining the high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed. They should do so on the basis of the information included in an annex, to be revised in accordance with this Regulation. The Commission should review the report on feedstock expansion regularly, to take into account the evolving circumstances and the latest available scientific evidence. The annex should be amended where appropriate.

(12) Under certain circumstances, the ILUC impacts of biofuels, bioliquids and biomass fuels generally considered as high ILUC-risk can be avoided and the cultivation of the related feedstock can even prove to be beneficial for the relevant production areas. For such cases, it is necessary to lay down criteria to allow the identification and certification as low ILUC-risk biofuels, bioliquids and biomass fuels. Certified low ILUC-risk biofuels, bioliquids or biomass fuels should be exempted from the limit and gradual reduction set for high ILUC-risk biofuels, bioliquids and biomass fuels produced from food and feed crops, provided that they meet the relevant sustainability and greenhouse gas emissions saving criteria laid down in Article 29 of Directive (EU) 2018/2001.

(13) Biofuels, bioliquids or biomass fuels should be considered low ILUC-risk only if the feedstock used for their production is cultivated as a result of the application of duly verifiable measures to increase productivity beyond the increases which would be already achieved in a business-as-usual scenario. In addition, these measures should ensure sustainability of feedstock in view of all requirements set in Directive 2009/28/EC or Directive (EU) 2018/2001 in relation to renewable energy targets.

(14) As a further guarantee of the positive effects of low ILUC-risk certification, the additional feedstock to be used for low ILUC-risk fuels should be taken into account

only if resulting from a limited category of measures. In particular, only measures that are financially attractive because they allow to reap the financial premium arising from such certification should be considered, in analogy with the financial additionality criteria applied under the Clean Development Mechanism of the Kyoto Protocol.

(15) Furthermore, it is appropriate not to apply the financial additionality criterion to the additional feedstock cultivated on abandoned or severely degraded land or by independent small farm holders. This would in fact amount to an unreasonable administrative burden in light of the significant potential for productivity improvements and the barriers faced to finance the necessary investments. Therefore, measures taken on abandoned or severely degraded land or by independent small farm holders should be exempted from proving compliance with the financial additionality criteria, without prejudice to the requirement of producing additional feedstock and complying with the sustainability criteria. In light of the statistical work carried out in several analyses, including the FAO smallholders data-portrait, holdings below 2 hectares should be considered small in this context.

(16) Only actual increases in productivity in existing or new projects resulting from measures that aim to achieve additional yields should be considered. Therefore, the certification period should be limited to a reasonable time and scope allowing for the full amortisation of the relevant investment and for the existence of robust procedures to monitor the effectiveness of the certification.

(17) In order to ensure a smooth certification process for low ILUC-risk biofuels, bioliquids or biomass fuels, economic operators should be able to rely on robust and reliable certification rules. These rules should take into account the role of voluntary national or international schemes in line with the recast text of Article 30 of Directive (EU) 2018/2001, which strengthened the robustness of the verification that they are tasked to perform in comparison with the corresponding provisions set out in Directive 2009/28/EC. In addition to the national schemes recognised by the Commission in accordance to Article 30(6) of Directive (EU) 2018/2001, voluntary schemes may certify low ILUC-risk biofuels, bioliquids and biomass fuels as they do for the purpose of certifying compliance with the sustainability criteria set out in Article 29 of Directive (EU) 2018/2001.

(18) In order to ensure that the information provided by economic operators is transparent, accurate, reliable and protected against fraud, overarching rules should be introduced on certification of low indirect land-use change-risk biofuels, bioliquids or biomass fuels providing for an adequate standard of independent auditing of the claims submitted by economic operators. Such rules, including on group certification, may be further specified and harmonised by virtue of the adoption of implementing acts in accordance with Article 30(8) of Directive (EU) 2018/2001,

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation lays down the criteria for determining the high ILUC-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed, and for certifying low ILUC-risk biofuels, bioliquids and biomass fuels.

Article 2

Definitions

For the purposes of this Regulation, the following definitions apply:

(1) 'oil crops' means food and feed crops such as rapeseed, palm, soybeans and sunflower, that are not starch rich crops and sugar crops that are commonly used as feedstock for the production of biofuels, bioliquids and biomass fuels;

(2) 'unused land' means areas which, for a consecutive period of at least 5 years before the start of cultivation of the feedstock used for the production of biofuels, bioliquids and biomass fuels, were neither used for the cultivation of food and feed crops, other energy crops nor any substantial amount of fodder for grazing animals;

(3) 'abandoned land' means unused land, which was used in the past for the cultivation of food and feed crops but where the cultivation of food and feed crops was stopped due to biophysical or socioeconomic constraints;

(4) 'severely degraded land' means land as defined in point 9 of Annex V, part C to Directive (EU) 2018/2001;

(5) 'additionality measure' means any improvement of agricultural practices leading, in a sustainable manner, to an increase in yields of food and feed crops on land that is already used for the cultivation of food and feed crops; and any action that enables the cultivation of food and feed crops on unused land, including abandoned land, for the production of biofuels, bioliquids and biomass fuels;

(6) 'additional feedstock' means the additional amount of a food and feed crop produced in a clearly delineated area compared to the dynamic yield baseline and that is the direct result of applying an additionality measure;

(7) 'dynamic yield baseline' means the average yield from the delineated area where an additionality measure has been taken, calculated over the 3-year period immediately preceding the year of the application of such measure, taking into account the average yield increase observed for that feedstock over the previous decade and the yield curves over the life time in case of permanent crops, excluding yield fluctuations;

(8) 'land with high-carbon stock' means wetlands, including peatland, and continuously forested areas within the meaning of Article 29(4)(a), (b) and (c) of Directive (EU) 2018/2001;

(9) 'small holders' means farmers who conduct independently an agricultural activity on a holding with an agricultural area of less than 2 hectares for which they hold ownership, tenure rights or any equivalent title granting them control over land, and who are not