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Designing an appropriate and inclusive benchmarking approach in the EU Regulation on deforestation-free products

Recommendation paper

Background

Every year, the European Union consumes products linked to more than 200,000 ha of deforestation. This amounts to 16% of the deforestation associated with international trade. In fact, the EU is the world's second largest consumer of agricultural products associated with tropical deforestation.[1] It drives biodiversity loss, climate change and loss of livelihoods for around 250 million people, particularly Indigenous People.[2] An underlying contributor to the deforestation driven by global demand is ineffective governance, linked to poorly enforced land-use policies and uncertain land-tenure regimes, in the countries that produce these goods ('producer countries').[3]

[1] WWF (2021) 'Stepping up? The continuing impact of EU consumption on nature worldwide'. This data includes the United Kingdom.
[2] FAO (2018) 'The State of the World's Forests 2022. Forest pathways to sustainable development'.
[3] European Commission (2019) 'Stepping up EU action to protect and restore the world's forests'.

The proposal for a new EU Regulation on deforestation-free products – presented by the European Commission on 17 November 2021 with the objective of minimising the EU's impact on global deforestation - is not only urgently needed, but a necessary part of global efforts to tackle deforestation.

However, the EU's efforts to reduce its deforestation footprint will bear more fruit if the EU works together with producer countries to implement its new regulation. Conversely, without close collaboration and partnership with producer countries, commodities linked to deforestation risk being sold to other markets with less stringent requirements, or there is a similar risk that producer country farmers shift their production to other forest-risk commodities not covered by the regulation.

Article 27 of the proposed regulation is on country benchmarking – a key mechanism to inform EU competent authorities on the level of risk associated with the origin of certain commodities when conducting checks. Our organisations believe that this benchmarking mechanism should require further engagement with producer country stakeholders than what was currently being proposed by the Commission, and that this would complement cooperation or partnerships concluded by the EU with producer countries (for example, as contemplated by Article 28 of the proposed regulation).

The respective positions on benchmarking of the European Parliament, voted in plenary on 13 September 2022, and of the Council, as presented in its so-called 'general approach', adopted on 28 June 2022, differ greatly from the Commission's position. Both proposals address producer countries' concerns through suggesting a more collaborative approach. However, differences persist, which will eventually need to be resolved through negotiation.

This briefing further sets out the reasons behind our organisations' view that the benchmarking mechanism should integrate greater participation by producer country stakeholders. It provides an analysis of the ways in which the EU could address some of these concerns by strengthening cooperation and partnership within the scope of Article 27, in the context of the compromise to be agreed by representatives of the Parliament, the Council and the Commission during the upcoming trialogue negotiations.

Producer country views

Since November 2021, producer countries have expressed concerns about the Commission's proposal on benchmarking. Some producer country government have expressed fears that it could "generate trade distortion and diplomatic tensions" as well as affect smallholder farmers and SMEs.[4]

Our organisations would consider that the largely unilateral approach to benchmarking fails to build on the bi-lateral and multi-stakeholder approach used under the FLEGT Action Plan. In this flagship EU initiative, stakeholders' involvement is a cornerstone of the process to halt illegal timber harvesting. This is particularly the case for the negotiation and implementation of voluntary partnership agreements (VPAs) that revolve around meaningful dialogues between the EU and partner countries, as well as between a diverse range of national stakeholders. Although they can be lengthy, such processes have paved the way for foundational governance reforms to achieve long-lasting change.[5]

[4] These views were expressed in a joint letter addressed by ambassadors in the EU of fourteen producer countries to several EU representatives on 27 July 2022.
[5] Cerutti PO, Goetghebuer T, Leszczynska N, Newbery J, Almeida B, Tsanga R, Fourmy R and van der Ploeg L. (2022) 'Collecting evidence of FLEGT-VPA impacts: Global synthesis report' – Delivered to INTPA in partial fulfilment of the GML 5.1-FLEGT Working Package. Bogor, Indonesia: CIFOR.

Civil society organisations, the private sector (in particular SMEs) and Indigenous Peoples and local communities are on the front line of deforestation. Their perspective is unique, and their voice should be heard.

The importance of an appropriate benchmarking mechanism

Despite shortcomings, the inclusion of an appropriate benchmarking mechanism offers many benefits: it would provide a clear process for the Commission to assess producer countries and assign them a risk rating based on set, listed criteria; it would provide guidance to operators, traders as well as competent authorities in implementing their obligations according to the level if rusk given to the country of production or parts of it; the risk level assigned to a producer country would inform operators when conducting due diligence on products from that country; and the risk assessments would guide competent authorities when planning and conducting checks on products entering their jurisdiction, with more checks required on products from high-risk areas.

We believe in the importance of benchmarking as a system that could provide a strong incentive for producer countries to strengthen their forest governance systems to reduce deforestation associated with forest-risk commodities. In addition to helping competent authorities to focus their checks on commodities produced in countries classified as high-risk, the benchmarking assessment can serve as a basis to identify producer countries' needs, in the context of cooperation and partnership with the EU, to facilitate targeted assistance that creates tangible improvements in forest governance.

We are therefore pleased to note that both the Council and the Parliament have proposed to reinforce the benchmarking system, and to include appropriate safeguards.

Comparing the proposals on benchmarking

The benchmarking assessment primarily revolves around the collection of information from producer countries on set assessment criteria.

In Article 27, as proposed by the European Commission, the benchmarking assessment is solely based on risks of listed commodities being produced in a way that does not comply with the 'deforestation-free' requirement (i.e. no deforestation or forest degradation has occurred in the production of the commodity after a specified date). It does not include criteria aimed to consider the risks that listed commodities are produced in a way that does not comply with the 'legality requirement' (i.e. that production is done legally, based on the laws of the country of production). By default, and until first assessments are concluded, all countries would be considered as standard risk.

Under the Commission's proposal, benchmarking would revolve around both statistical information - such as the rate of deforestation and forest degradation, and rate of expansion of agriculture land for relevant commodities - and governance information - such as the implementation of international agreements and the implementation and enforcement of a national legal framework to avoid and sanction activities leading to deforestation and forest degradation. It would also consider whether the country's nationally determined contributions (NDCs) account for emissions from deforestation and forest degradation, which may not be directly relevant to assess compliance with either the sustainability or legality criteria.

The Commission's proposal sets out two ways to engage with producer countries in the benchmarking process. On the one hand, the Commission must take into account information provided by the country concerned. On the other hand, the Commission must notify the country concerned prior to any change in the existing risk category and invite them to provide information, including on measures taken by the country to remedy the situation in case its status or the status of parts of the country might be changed to a higher risk category.[6]

The Commission's proposal is complemented by the Parliament, that adds to the benchmarking assessment criteria: (i) the existence, implementation and enforcement of laws including instruments protecting customary tenure rights and the right to free, prior and informed consent (FPIC), as set out in the UN Declaration on the Rights of Indigenous Peoples, the UN Permanent Forum on Indigenous Issues and existing binding international agreements, the Indigenous and Tribal Peoples Convention (No 169, 1989); (ii) whether law and policy reforms aimed at tackling deforestation, forest degradation, forest conversion, land rights violations and illegal production are conducted with the meaningful engagement[7] of all relevant stakeholders, including civil society, Indigenous Peoples and local communities, and the private sector, including micro enterprises, SMEs and smallholders; and (iii) whether relevant data is available transparently. The Parliament's position does not go so far as to propose that the assessment should more comprehensively consider the risks that listed commodities are produced in a way that does not meet with the legality requirement.

To ensure that producer country stakeholders' involvement in the benchmarking process is not token participation, the Parliament proposes some further additions to the Commission's proposal. Under Article 27(3), it provides that prior to changing the risk rating of a country of production, relevant stakeholders in producer countries shall be invited to provide information to the EU Commission during a public consultation. Such provision must be extended to the decision to first allocate a risk category to producer countries or parts thereof.

The Parliament also adds a deadline for the completion of the initial benchmarking. The wording proposed provides that the Commission should complete the benchmarking process for all producer countries within six months of the Regulation entering into force.

The Council's proposal is less ambitious with regards to stakeholders' involvement; it only requires country benchmarking to be based on "internationally recognised sources and on the latest scientific evidence" (Art. 27(2)). This language would exclude many national civil society sources. While we agree that country benchmarking should be based on a robust methodology and backed by unbiased data, it must also be inclusive.

One should also note that beyond the benchmarking assessment process, the Council's proposal sets out that the EU Commission must engage in dialogue with countries classified as high-risk, as well as with countries likely to be classified as high-risk to help reduce the risk level and prevent a change of risk category (art. 27(2b)).

High risk, as well as low risk and standard risk, are defined by the Council, although the definitions proposed do not provide more clarity than the proposed benchmarking criteria. 'High risk' refers to

[6] Art. 27(3), Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.
[7] Meaningful engagement is defined by the Parliament as "understanding the concerns and interests of relevant stakeholders, in particular the most vulnerable groups such as smallholders and indigenous peoples, as well as local communities, including women, by consulting them directly in a manner that takes into account potential barriers to effective engagement."

countries, or parts of them, for which the assessment would result in the identification of “an exceptionally high risk of producing [commodities that are not ‘deforestation-free’] in such countries”; ‘low risk’ are countries or parts of countries for which the benchmarking assessment concludes that there is “a sufficient assurance that instances of producing [commodities that are not ‘deforestation-free’] in such countries are exceptional”; ‘standard risk’ would mean countries that fall neither in the ‘high risk’ nor in the ‘low risk’ category (Art. 27 (1)).

In addition, the Council proposes that the assessment should consider whether national laws are in place and accompanied with effective enforcement measures to tackle the root causes of deforestation and forest degradation.

Finally, similarly to the Parliament, the Council adds a deadline for the completion of the initial benchmarking, set at 18 months after the Regulation enters into force. It also requires a review “as often as necessary, and at least every two years, in light of new evidence-based information provided by Member States or third countries, international organisations and bodies, research institutes, or other relevant stakeholders.”

Our preferred outcome

- **Involving producer countries meaningfully in the initial risk category allocation and subsequent changes**

It is important to recognise that, from the producer country standpoint, being assigned a rating by a third party (even when you have generally consented to assessment) can be a sensitive exercise. It is therefore crucial to go about this with the meaningful involvement of the country concerned.

Regarding producer countries’ information sharing, the Regulation should explicitly support civil society, Indigenous Peoples, local communities and other customary tenure rights holders as well as national private sector stakeholders, to engage in the country assessment as proposed by both the Council and the Parliament proposals. In doing so, the Regulation should explicitly list these stakeholders as ‘internationally recognised sources’ as well as requiring the Commission to carry out a public and multi-stakeholder consultation with sufficient time and regularity to gather the views of such recognised sources, prior to the initial benchmarking and any subsequent change to the risk category.

Such a change could have a great impact. It would increase ownership and legitimacy of the benchmarking process in producer countries, in addition to strengthening its credibility. Involving national stakeholders would additionally contribute to fostering reforms to improve forest governance beyond the scope of the proposed Regulation. This should be tailored to national contexts. In some contexts, direct consultation of non-government producer country stakeholders separately from government during the initial benchmarking may not be politically astute. In other contexts, it could be unsafe for community or civil society stakeholders to express themselves openly with government or industry representatives present. A multi-stakeholder consultation could constitute a more appropriate mechanism.

EU representatives engaged in the trialogue should consider whether the benchmarking provision should also explicitly include on-the-ground independent forest monitoring (IFM) as a credible source of information, alongside satellite imagery. IFM could play a key role in monitoring potentially unsustainable or illegal practices linked to forest-risk commodities, and equally help the benchmarking assessment to be tailored to the agricultural commodities covered by the Regulation.

- **Using credible sources of information**

In order to ensure it is credible and non-biased, the benchmarking must be based on objective and credible sources and on the latest scientific evidence. When using national government data, the Commission should especially consider how to ensure it is objective and non-biased.

- **Going beyond deforestation rates to include compliance with the relevant legislation**

The benchmarking assessment criteria should go beyond statistical data showing the level of deforestation to include the governance criteria proposed by the Parliament. It should also include a criterion aimed at assessing the production of commodities in accordance with the relevant legislation of the country of production. Not only would this help EU competent authorities enforce this muddier part of companies' obligations under the new deforestation law, it would also create a greater incentive for producer countries to undertake the foundational law reform that will be needed to effectively and permanently halt deforestation linked to forest-risk commodities across the country and close the potential for loopholes like those identified in the introduction.

Such amendment should be complemented by a robust definition of 'relevant law' under Article 2(28) which includes criteria proposed by the Parliament and the Council, respectively, to ensure that international human rights standards, particularly those protecting the rights of Indigenous Peoples, are upheld and that national laws are in place and accompanied with effective enforcement measures to tackle the local drivers of deforestation and forest degradation.

- **Considering efforts undertaken by producer countries to tackle deforestation and forest degradation**

Building on the EU-FLEGT Action Plan in promoting stakeholders' meaningful participation in forest governance processes and transparency, producer country benchmarking must include criteria on law reforms aimed at tackling deforestation, the existence of a credible & transparent national traceability system, land rights violations and illegal production with the meaningful engagement of all relevant stakeholders, including civil society, Indigenous Peoples and local communities, and the private sector, including micro enterprises, SMEs and smallholders.

- **Setting a reasonable deadline for the completion of the initial benchmarking and regular review**

We encourage the inclusion of a deadline for the completion of the initial benchmarking as well as for periodic reviews in order to initiate and continue dialogue between the EU and producer countries on reforms to improve forest governance in producer countries, particularly where countries are likely to be classified as high-risk (see next point).

The initial benchmarking timeframe should take into account the time needed to allow stakeholders' meaningful contributions to public consultations.

The periodic benchmarking review, proposed by the Council, could form part of review processes provided for under Article 32. It could be particularly useful in collecting information that would feed in the assessment of the impact of the Regulation on farmers, in particular smallholders, Indigenous Peoples, and local communities in producer countries (Article 32(2)).

- **Providing for strong engagement with countries classified as high-risk and likely to be classified as such**

We support the proposal that the EU Commission engages in dialogue with both countries classified as high-risk, as well as with countries likely to be classified as high-risk to help reduce the risk level and prevent change of risk category. Such a provision could be linked to Article 28 and lead to tailored EU support with a view to launch national dialogues to address the drivers of deforestation and forest degradation linked to a producer country's weak governance systems - and thereby help countries to progress in the risk-rating scale.

Conclusion

The proposed EU Regulation on Deforestation-free Products focuses primarily on the responsibility of operators and large traders in the EU to reform their supply chains and de-couple agricultural production from deforestation and forest degradation. This is laudable and correct. However, additions proposed by the Parliament and the Council towards a greater cooperation and support from the EU to producer countries beyond Article 28 are crucial to ensure the proper implementation of the Regulation. Article 28 opens the door for tailored partnership and cooperation to be developed around the specific drivers of deforestation and forest degradation linked to weaknesses in a producer country's governance and law enforcement systems. The proposed additional methods for producer countries' engagement in the benchmarking system of the Regulation, explained in this briefing, as well as its enlarged scope would open the door even further, in order to minimise leakage from the EU into other less-ambitious consumer countries, as well as to address underlying drivers of deforestation. Importantly, it should contribute to alleviating some of the concerns raised by producer countries through a clear and meaningful process of open dialogue.

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