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# The proposed EU law on deforestation-free products

## What is in the European Commission's proposal and what is left out?

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# Contents

# Top Lines

- The European Commission's proposed regulation on deforestation-free products represents a leap forward in global environmental governance and an important signal for companies trading in forest-risk commodities globally.
- The integrity of the proposed framework rests on a mandatory supply chain due diligence mechanism that includes full supply chain traceability, minimum due diligence requirements, and clear standards for compliance – for operators, traders and their products.
- There are important improvements to the enforcement framework compared to the EU Timber Regulation, including clearer requirements for national enforcement agencies and coordination with customs authorities for imports and exports.
- However, there are equally important weaknesses in the Proposal, such as omissions regarding the coverage of human rights impacts linked to commodity production, coverage of non-forest ecosystems, application to the finance sector, and access to justice for stakeholders harmed by EU supply chains.

# A leap forward in environmental governance

The European Commission's proposal for an EU regulation on deforestation-free products[1] ("**Proposal**") marks a long-overdue leap forward in global environmental governance. The European Commission launched the Proposal on 17 November 2021.[2] It is a flagship initiative under the European Green Deal with the goal to minimise the EU's impact on forests worldwide by establishing a new "deforestation-free" standard for the sale of certain forest-risk commodities in the EU and their export from the EU.

This Proposal is extremely important: EU demand for forest-risk commodities drives agricultural expansion, which is the biggest cause of global deforestation and the biggest driver of biodiversity loss on land[3]. Global deforestation rates, especially in the tropics (where forests have the highest climate and biodiversity value) have remained high for years – or have been increasing[4], and global demand for the commodities linked to that deforestation – like beef, soy, palm oil, cocoa, coffee, timber and rubber, also continues to grow[5]. The conversion of forests to agricultural production often goes hand-in-hand with

[1] COM (2021) 706 final, https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products_en.
[2] https://ec.europa.eu/environment/forests/deforestation-proposal.htm.
[3] FAO (2021) 'COP26: Agricultural expansion drives almost 90 percent of global deforestation', https://www.fao.org/newsroom/detail/cop26-agricultural-expansion-drives-almost-90-percent-of-global-deforestation/en; Staff Working Document – Impact Assessment "Minimising the risk of deforestation and forest degradation associated with products placed on the EU market" Part 1, SWD(2021) 326 final, pp. 7, 10 ff., 16, https://ec.europa.eu/environment/document/download/7ab29a87-09a1-45f9-b83b-cd80765de10f_en.
[4] WRI (2021) 'The Latest Analysis on Global Forests & Tree Cover Loss | Global Forest Review', https://research.wri.org/gfr/forest-pulse; National Geographic (2018) 'Tropical Deforestation Slowed in 2017—To the Second Worst Total Ever', https://www.nationalgeographic.com/science/article/tropical-deforestation-forest-loss-2017; Staff Working Document – Impact Assessment "Minimising the risk of deforestation and forest degradation associated with products placed on the EU market" Part 1, SWD(2021) 326 final, pp. 6, 12 ff, https://ec.europa.eu/environment/document/download/7ab29a87-09a1-45f9-b83b-cd80765de10f_en.
[5] Pendril et al (2019) 'Agricultural and forestry trade drives large share of tropical deforestation emissions', *Global Environmental Change*, Vol. 56 pp.1-10, https://doi.org/10.1016/j.gloenvcha.2019.03.002; WWF (2018) 'What are the biggest drivers of tropical deforestation?', https://www.worldwildlife.org/magazine/issues/summer-2018/articles/what-are-the-biggest-drivers-of-tropical-deforestation; WRI (2018) 'Ending Tropical Deforestation: The

serious human rights violations and violence against forest-defenders, Indigenous Peoples and local communities[6]. Urgent intervention is needed to reverse these global trends. The Commission's Proposal aims to do just that – though does the Proposal go far enough and will it lead to real change?

Compared to the European Parliament's Own-initiative Report on the topic, adopted in October 2020[7], the Commission's Proposal is less ambitious and has some significant omissions. The Parliament's Report sets out the Parliament's agreement on what should be included in the Commission's Proposal and will likely form the basis for the Parliament's review of what the Commission has proposed.

The Commission's Proposal will now be negotiated between the European Parliament and Council of the European Union with the aim of reaching agreement on a final text.

Nevertheless, the Proposal already sends a clear signal to global forest-risk commodity markets that change is coming.

But what exactly does it include? And what has been left out? This briefing provides an overview of several important elements, weaknesses and omissions.

For a comparison of the proposed changes with key elements of the EU Timber Regulation, see our briefing *The proposed EU law on deforestation-free products: What are the changes compared to the EUTR framework?*

# Mandatory supply chain due diligence

At the heart of the Commission's Proposal is a strong supply chain due diligence mechanism to ensure that commodities placed on the EU market are "deforestation-free" and produced in compliance with applicable laws (Arts. 4 and 8-11). It is built on full traceability to the point of production – a fundamental requirement for even basic supply chain due diligence, and clear requirements for operators to demonstrate that their products meet the regulation's requirements before placing them on or exporting them from the EU market (Art. 4(1)).

The clarity provided by the due diligence provisions will provide operators with greater confidence about their legal obligations and empower them to engage with their suppliers to provide the information needed to complete the due diligence procedure. Indeed, the real value of an ambitious EU-wide law is that all operators placing the listed products on the EU market will all start requesting full supply chain traceability from all their suppliers at the same time. This will create the much-needed market demand for full supply chain traceability and provide a level playing field for those operators already investing in traceability along their entire supply chain.

Global Debate About Biofuels and Land-Use Change', https://www.wri.org/research/ending-tropical-deforestation-global-debate-about-biofuels-and-land-use-change; Staff Working Document – Impact Assessment "Minimising the risk of deforestation and forest degradation associated with products placed on the EU market" Part 1, SWD(2021) 326 final, p.18, https://ec.europa.eu/environment/document/download/7ab29a87-09a1-45f9-b83b-cd80765de10f_en.

[6] Client Earth and Global Witness (2021) 'Upholding human rights in the fight against deforestation', https://www.clientearth.org/latest/documents/upholding-human-rights-in-the-fight-against-deforestation/. See also Forests People Programme (2018) 'Closing the gap: rights-based solutions for tackling deforestation'; Human Rights Watch (2019) 'Rainforest Mafias: How violence and impunity fuel deforestation in Brazil's Amazon'; FIAN International (2017) 'Land Grabbing and Human Rights: the role of EU actors abroad'.

[7] EP Procedure 2020/2006(INL), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.html.

## Minimum due diligence requirements

Importantly, the concept of "due diligence" in the Commission's Proposal is not restricted and carries its ordinary meaning. To provide a common baseline of expected conduct, the Proposal includes a number of minimum requirements (set out in articles 9 to 11) to supplement the general requirement of due diligence. This approach will allow operators, national enforcement agencies (called "**competent authorities**") and courts to adopt and apply the prevailing due diligence standards in their jurisdiction with a minimum standard applicable across the EU.

Among those are requirements to gather information on specific topics that is "supported by evidence" (Art. 9(1)), an obligation to "verify and analyse" that information, and to assess the risk that the relevant commodities or products do not comply with the regulation's requirements, taking "special account" of certain risk assessment criteria (in Art. 10(2)).

The information that operators must collect includes "adequate and verifiable information" that their commodities and products are "deforestation-free" and were produced in accordance with the relevant legislation of the country of production (Arts. 9(1)(g) and (h)).

These obligations also apply to traders that are not SMEs (Art. 6(5)), and all traders (including SMEs) must obtain and pass on information that could allow products to be traced back through the EU market to the operator that initially placed them on the market (Art. 6(1) and (2)), though these requirements could be improved (see the section on transparency below).

## Full supply chain traceability

A fundamental requirement for supply chain due diligence is being able to trace your products through your supply chain to their point of origin. This is an essential component of the Commission's Proposal.

EU operators will be required to identify the geolocation coordinates of the parcels of land where the commodities and products in their supply chains were produced, as well as the date or time range of production (Art. 9(1)(d)). This will allow EU operators to use available satellite imagery tools to check the land-use history of the relevant area for deforestation.

The Proposal also includes important checks on the reliability of the supply chain information that EU operators receive from their suppliers. In particular, operators must consider the complexity of their supply chains, the difficulties in connecting commodities to the land where they were produced, and the risk that products of unknown origin or from deforestation areas have been mixed with the commodities in their supply chain, as part of their risk assessment (Art. 10(2)(f) and (g)).

These requirements are central to the integrity of the due diligence procedure that sits at the heart of the Commission's Proposal.

## No reliance on third party certification schemes

An important strength of the due diligence provisions is the inability for operators to rely on third party schemes or assurances to demonstrate their compliance with the due diligence requirements. Such schemes have well-documented structural weaknesses and systemic operational shortcomings[8] and the

[8] See e.g. Greenpeace (2021) 'Destruction Certified', https://www.greenpeace.org/international/publication/46812/destruction-certified/; European Commission (2021) 'Study on certification and verification schemes in the forest sector and for wood-based products',

Commission has rightly ensured that operators are not able to outsource their legal obligations to such schemes or rely on their certificates or assurances as evidence of compliance with their legal obligations.

Operators remain nevertheless free to consider the information provided by third party certification or verification schemes in their due diligence process. The regulation does not need to recognise or even reference such schemes for operators to do this. Indeed, the regulation should not recognise or give preferential treatment to one source of information over another.

Unfortunately, the Commission's Proposal does create the potential for operators to give preferential treatment to information provided by third-party schemes, which risks undermining the impartiality of the due diligence procedure. It does so by listing "complementary information on compliance […] which may include information supplied by certification or other third-party-verified schemes" as one of the mandatory risk assessment criteria of which operators are required to "take special account" (Art. 10(2)(j)). The inclusion of information provided by third party schemes as a *risk assessment* criterion creates a structural weakness in the due diligence mechanism and is inappropriate for two main reasons:

a) operators are not restricted in the information they may consider as part of their due diligence procedure – there are minimum requirements but no limits, and so operators are not prevented in any way from considering information provided by certification or verification schemes; and

b) "complementary information on compliance" is not an objective indicator of potential risks of non-compliance (like the other risk assessment criteria in Article 10(2), such as the prevalence of deforestation in the area of production, the level of law enforcement and corruption in the area of production, supply chain complexity etc), and may include information that is incomplete, unreliable or incorrect.

Any "complementary information on compliance" should be verified and supported by evidence (as is required of all other information considered during the due diligence process (Arts. 9(1) and 10(1)) and should be assessed against appropriate risk assessment criteria (such as its source, reliability and validity, as contemplated by the existing risk assessment criterion in Article 10(2)(d)). What is most relevant is evidence of *actual* compliance, not unverified information about compliance.

## 'Results-based' due diligence

The Proposal is clear that an operator's due diligence must produce a specific result before they can place their products on or export their products from the EU market. That specific result is that the risk of non-compliance with the regulation's requirements is nil or negligible.

Where operators cannot conclude that there is "no or only negligible risk" that their products do not meet the regulation's requirements, or they cannot complete the minimum due diligence procedure, their products cannot be placed on or exported from the EU market (Arts. 4(2), 4(5) and 10(1)). Operators must review their risk assessments at least annually (Art. 10(7)) and must notify competent authorities if they become aware of new information that indicates products already placed on or exported from the EU were non-compliant (Art. 4(6)).

https://op.europa.eu/en/publication-detail/-/publication/afa5e0df-fb19-11eb-b520-01aa75ed71a1/language-en; 3keel and LMC International (2018) 'Study on the environmental impact of palm oil consumption and on existing sustainability standards for the European Commission', https://ec.europa.eu/environment/forests/pdf/palm_oil_study_kh0218208enn_new.pdf.

## ‘Simplified due diligence’ – an unfortunate loophole

One obvious shortcoming of the Commission’s proposed due diligence framework is the proposal for ‘simplified due diligence’ that exempts operators from conducting the risk assessment phase of the due diligence process for commodities and products produced in ‘low risk’ countries (or parts thereof) (Art. 12). This exception stops applying if an operator becomes aware of any information that points to a risk of non-compliance.

However, an assessment of generic indicators of deforestation risk aggregated at the national level (or even at the sub-national level) should not exempt operators from assessing the specific risks linked to their supply chains. The same due diligence requirements should apply to all operators regardless of where they source from.

This ‘simplified due diligence’ approach is particularly problematic because:

a) ‘simplified due diligence’ exempts operators from the obligation to conduct due diligence on risks of illegality (even where those risks are very high) simply because the risks of deforestation in the relevant country or sub-national area are low. This is because the country risk assessment provisions are explicitly limited to an assessment of risks of producing commodities that are not ‘deforestation-free’ (Art. 27(1)). (The risk assessment criteria in Article 27(2) are equally focused on indicators of risk that commodities and products produced in a country (or part thereof) are not ‘deforestation-free’, rather than risks of both deforestation and illegality).

b) exempting operators from due diligence requirements on the basis of a country-level or sub-national risk assessment is likely to overlook concentrated risks in key sourcing areas and particular risks associated with a specific supply chain. Such aggregated risk assessments based on general criteria will likely provide a very general indication of risk. As such, these risk assessments will not provide any guarantee that all producers operating in the relevant country (or part thereof) are ‘low risk’.

c) due diligence is an inherently risk-based exercise – where risks are low, the effort required to identify and assess those risks is also relatively low. This makes due diligence a flexible and proportionate approach by design – the action required will reflect the scale and risk profile of the operator’s supply chain. As such, there is little justification to exempt operators from conducting due diligence when they source from ‘low-risk’ geographies.

Any country risk-assessment should at most guide operators in conducting their own due diligence and support competent authorities in focusing their compliance checks.

# Six primary commodities and potentially many 'derived products', but not for several years

The new regulation will apply to cattle, cocoa, coffee, oil palm, soya and wood. Obvious omissions are rubber and maize, which were considered and disregarded in the Commission's Impact Assessment[9] and were included in the scope of commodities in the European Parliament's Own-initiative Report (which also included "meat" in general).[10]

Besides a list of primary commodities, the Proposal purports to cover products "that contain, have been fed with or have been made using" those commodities (known as "**derived products**") (Art. 1). However, the actual products to which the regulation applies must first be listed in Annex I by reference to their HS Code (an international product code system used for trade and customs purposes). Despite the broad language of Article 1, Annex I only includes a very limited list of derived products and falls far short of the European Parliament's recommendation to cover "all intermediate or final products that are derived from these commodities, and products that contain these commodities".[11]

This means that while the regulation purports to cover a very wide scope of derived products, it will initially apply only to a very narrow list.

The Impact Assessment that accompanied the Proposal states that this is primarily because the Commission lacked the capacity to adequately assess the potential impact if the regulation would apply to the full suite of derived products, despite acknowledging that such an approach would increase the effectiveness of the regulation and that the overwhelming majority of NGOs and prominent industry associations called for coverage of all derived products from commencement.[12] A 2019 Impact Assessment for the revision of the product scope of the EU Timber Regulation[13] also concluded that "effectiveness increases when expanding product scope" (though the product scope of the EU Timber Regulation was not expanded following that review).

Instead, the Proposal contemplates a review of the list of covered commodities (Art. 32(1)) and derived products listed in Annex I (Art. 32(3)) within at least two years of the regulation's commencement, with any proposed changes being subject to any objection by the European Parliament or Council.

However, this incremental approach has major limitations:

a) the exclusion of the vast majority of derived products for at least the first two years of the regulation's application risks creating significant market distortions (e.g. by driving greater EU

[9] Staff Working Document – Impact Assessment "Minimising the risk of deforestation and forest degradation associated with products placed on the EU market" Part 1, SWD(2021) 326 final, pp.32-33, https://ec.europa.eu/environment/document/download/7ab29a87-09a1-45f9-b83b-cd80765de10f_en.
[10] See Article 2 of the Annex to the Parliament's INL Report, EP Procedure 2020/2006(INL), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.html.
[11] See Article 2 of the Annex to the Parliament's INL Report, EP Procedure 2020/2006(INL), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.html.
[12] Staff Working Document – Impact Assessment "Minimising the risk of deforestation and forest degradation associated with products placed on the EU market" Part 1, SWD(2021) 326 final, p. 34, https://ec.europa.eu/environment/document/download/7ab29a87-09a1-45f9-b83b-cd80765de10f_en.
[13] European Commission (2019) 'Impact assessment study for the revision of the product scope of the EU timber regulation', https://op.europa.eu/en/publication-detail/-/publication/fd26ad03-9895-11e9-b2f2-01aa75ed71a1/language-en#:~:text=The%20EUTR%20defines%20its%20product,consequent%20impacts%20from%20such%20revisions, at p. 102.

trade in derived products to avoid the obligations applicable to covered commodities), risks significantly undermining the Regulation's effectiveness, and would likely critically undermine consumer confidence in the sustainability of the EU market and EU businesses;

b) it relies on the active identification and listing of specific products rather than a catch-all approach, which means that identifying the countless derived products within the scope of the regulation will depend on the Commission's capacity to actively identify and list all derived products individually[14], while producers are best placed to know which commodities are contained in their products; and

c) listing products by reference to the HS Code system risks embedding a structural weakness into the regulation as many consumer and retail goods contain derived products due to manufacturer choice, not because of necessity, meaning that there cannot be a general determination on whether a certain product category contains derived products or not. In addition, new products may not yet be included in the HS Code system.

# A new "deforestation-free" standard – for deforestation after 2020

The core of the Commission's Proposal is a restriction on selected products if they are linked to illegal *or legal* deforestation that happened after a certain cut-off date (proposed as 31 December 2020). The Proposal requires operators and large traders to check that their products are not linked to any deforestation and are thereby "deforestation-free" (defined in Art. 2(8)) before they may be placed, traded on or exported from the EU market. Wood products seem to – curiously – fall outside the definition of "deforestation", but are covered by a "forest degradation" limb of the "deforestation-free" requirement (see below).

Tackling 'all deforestation' (illegal and legal) may seem like common sense, yet it is a departure from 'business as usual' in global environmental governance which has, so far, focused only on 'illegal deforestation' – deforestation defined as illegal under the laws in force in the jurisdiction where it occurs. The EU is the first jurisdiction in the world to propose an objective science-based standard for deforestation *in addition to* a legality requirement. In contrast, just one week before the Commission published its Proposal, the UK parliament passed the Environment Act 2021[15] which adopts a legality requirement as the basis for its equivalent rules on forest-risk commodities, and the US is considering a similar proposal also based on a legality requirement. However, relying on producer-country legal definitions has its risks, such as casting producer-country environmental protection as a trade-off for export market access and creating perverse incentives for producer-country governments to weaken forest protection laws.

[14] The EUTR provides a pertinent example of the limitation of this approach as many products that contain wood along with other materials are not included in the product list in its Annex. Considering that this is a widely recognised weakness of the EUTR that has been acknowledged by the Commission and that a revision of the Annex was already the subject of an Impact Assessment Study in 2019, it is surprising and disappointing that Annex I to the Deforestation Proposal does not include an expansion to the scope of timber products covered by the EUTR.

[15] See Schedule 17, available at https://www.legislation.gov.uk/ukpga/2021/30/contents/enacted.

In contrast, the proposed 'all deforestation' approach adopts an objective deforestation standard that applies regardless of the laws of a product's jurisdiction of origin, making compliance by EU businesses and enforcement by competent authorities much easier.

Despite the 31 December 2020 cut-off date, the coverage of all deforestation (as well as forest degradation for wood products – see below) has the potential to drive real change in global agricultural production *and consumption* – if done right. While existing EU forest-risk commodity supply chains will effectively be 'grandfathered' by the cut-off date (i.e. commodities from land already under agricultural production as of the cut-off date will be "deforestation-free" by definition, regardless of their links to any deforestation that occurred prior to the cut-off date), the adoption of an objective deforestation standard for key agricultural commodities and derived products by the world's largest single market has the potential to drive global change.

# No "forest degradation" linked to wood products – but what does that mean?

The rules for wood products seem to differ from those that apply to agricultural products and need clarification. The EU Timber Regulation, which currently governs the trade of timber products in the EU, will be replaced by the new regulation when its substantive provisions come into force (Art. 35). Timber products will be subject to the same legality requirement (which applies to all covered commodities and products – see below) and must be harvested without inducing "forest degradation" after the cut-off date to meet the "deforestation-free" requirement. However, the definitions regarding forest, timber harvesting, deforestation and forest degradation are not entirely clear.

It appears the Commission has sought to exclude timber harvesting from the definition of "deforestation" (in Art. 2(1)) by limiting that definition to conversion of forest "to agricultural use" (but not "forestry") and by implicitly *including* timber plantations in the definition of "forest" (defined in Art. 2(2) as excluding "agricultural plantations", which explicitly does *not* include timber plantations). Under this approach, the conversion of natural forest to a timber plantation would not constitute "deforestation", despite clearly being deforestation in reality. While this would likely constitute "forest degradation" (though may not, given the gaps in the definition of "forest degradation" mentioned below), a simpler and logical approach would be to make a clear distinction between forests and timber plantations and clarifying that the conversion of forest to timber plantation constitutes deforestation.

Regardless of how forest degradation is defined, the apparent position that the clearing of a natural forest to establish a plantation forest does not qualify as "deforestation" seems counter-productive and contradicts the European Parliament's position that definitions should be formulated as to prevent the replacement of natural forests with tree plantations.[16]

Likewise, it also appears the Commission has sought to exclude "sustainable" timber harvesting operations from the definition of "forest degradation", which exclusively focuses on "harvesting operations that are not sustainable" and does not include degradation caused by other activities (such as any non-harvesting operations), natural causes (such as fire) or caused *indirectly* by human activity (including harvesting operations). The elements of the "forest degradation" definition are also vague and would be difficult, if not impossible, to apply and enforce in practice (e.g. there must be harvesting operations that are not "sustainable harvesting operations" that "cause" a reduction of biological or economic "productivity and complexity" that results in a "long-term" reduction of the "overall supply of

[16] See Article 3.3 of the Annex to the Parliament's INL Report, EP Procedure 2020/2006(INL), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.html.

benefits from [the] forest"). Given the likely difficulty in completing the required due diligence process on these elements, timber operators may instead focus on demonstrating that their products come from "sustainable harvesting operations".

Unfortunately, the definition of "sustainable harvesting operations" (Art. 2(7)) includes a large degree of flexibility and ambiguity. It refers to harvesting carried out in a way "considering" the maintenance of soil quality and biodiversity (but not requiring it), "with the aim of" minimising negative impacts (but not restricting them), "in a way that avoids" degradation of primary forests or their conversion to plantation forest (without requiring avoidance), "minimising" large clear-cuts (without restricting them), and ensures "requirements to use logging systems that minimise impacts" on biodiversity features and habitats (without requiring such impacts are minimised). Definitions of "plantation forest" and "planted forest" have been added to provide more detail, although no definition of "primary forest" is included.

All these definitions may be difficult, perhaps impossible, to implement and monitor in practice.

# Products must be produced legally

In addition to the 'deforestation-free' requirement, operators and large traders must also ensure that their products were produced in accordance with the "relevant legislation of the country of production" (Art. 3(b)). However, the definition of "relevant legislation of the country of production" (Art. 2(28)) has two significant limitations:

a) It only includes a limited scope of laws ("rules applicable in the country of production concerning the legal status of the area of production in terms of land use rights, environmental protection, third parties' rights and relevant trade and customs regulations"), as opposed to all laws applicable to the production of the relevant commodity or product.

   In fact, the scope of laws covered by this requirement seems even narrower than the equivalent requirement under the EU Timber Regulation, which expressly includes legislation covering harvesting rights (e.g. permits and licenses), harvesting practices (e.g. operational requirements), payments for harvest rights (e.g. fees and bribery) and payments for harvested products, including duties.[17]

b) It only includes laws applicable under the "legislation framework" in the country of production, which unnecessarily excludes relevant rules set by non-legislative sources of law (such as common law / judge-made law, judicial or executive decrees, administrative instruments, and customary law).

   In particular, it is unclear whether international conventions and treaties to which a producer country has acceded, and that are deemed by its national constitution to apply domestically, would be considered rules applicable under the country's "legislation framework".

These ambiguities should be resolved in favour of a requirement that the production of the relevant commodities and products complied with all applicable laws.

[17] For a more comprehensive comparison of proposed changes compared to the EU Timber Regulation, see our briefing *The proposed EU law on deforestation-free products: What are the changes compared to the EUTR Framework?*, available at https://www.clientearth.org/latest/documents/the-proposed-eu-law-on-deforestation-free-products-how-does-it-compare-to-the-eutr-framework.

# Nothing on human rights, non-forest ecosystems, finance or access to justice – big omissions from the European Parliament's INL Report

The European Parliament's 2020 Own-initiative Report (or 'INL Report')[18] on 'an EU legal framework to halt and reverse EU-driven global deforestation' sets out the Parliament's expectations for the Commission's Proposal and represents the compromise agreed by the Parliament on the topic – a compromise that many MEPs would be reluctant to renegotiate.

The most obvious differences between what the Commission has proposed and the Parliament's INL Report are the absence of human rights requirements, particularly concerning the land tenure rights of Indigenous Peoples, the inclusion of important non-forest ecosystems (like savannahs, wetlands and peatlands), coverage of the financial sector, and inclusion of an access to justice mechanism.

## Human rights

The question of human rights is particularly relevant to commodity-driven deforestation, as the conversion of forests to agricultural production often goes hand in hand with land-grabbing, threats and violence against forest defenders and local communities, displacement of Indigenous Peoples and forest-based communities, and violations of their human rights.

While the Explanatory Memorandum to the Commission's Proposal suggests that international human rights will need to be taken into account in supply chain due diligence, this is only the case if the legislative framework in the country of origin makes those international human rights requirements part of the national legal framework *and* requires commodity producers to respect them. This is not the case in most major forest-risk commodity producing countries. In practice, compliance with the laws of producing countries offers very little protection for the rights of Indigenous Peoples, forest defenders, and local communities. Producer-country laws can also be changed to remove important human rights protections and legalise practices that increase human rights risks (for example, recent legislative changes in Indonesia[19] and Brazil[20]).

For these reasons, the European Parliament recommended to require compliance with international human rights standards in addition to national laws.[21]

By omitting human rights standards, the Commission's Proposal also fails to recognise the important role that Indigenous Peoples and local communities play in safeguarding forests. The European Parliament's report rightly points out that operators should consult with potentially-impacted local stakeholders and take Indigenous and local knowledge and concerns into account in their due diligence measures.[22]

[18] EP Procedure 2020/2006(INL), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.html.
[19] Mongabay (2021) 'Indonesian omnibus law's 'whitewash' of illegal palm oil shocks its architects', https://news.mongabay.com/2021/05/indonesian-omnibus-laws-whitewash-of-illegal-palm-oil-shocks-its-architects/.
[20] ClientEarth (2021) 'Policy briefing: Brazilian legal reforms and implications for the UK's proposed law on forest risk commodities', https://www.clientearth.org/latest/documents/policy-briefing-brazilian-legal-reforms-and-implications-for-the-uk-s-proposed-law-on-forest-risk-commodities/.
[21] See Paragraphs 61, 63, and 113 of the Parliament's INL Report.
[22] See Article 4.2(e) of the Annex to the Parliament's INL Report.

## Non-forest ecosystems

The recitals to the Commission's Proposal note that the protection of forests should not push the expansion of agriculture into other climate and biodiversity-critical ecosystems. However, the Proposal does not include any requirements for their protection, and focuses exclusively on forests. Instead, the Proposal requires that an evaluation of the need and feasibility of extending coverage to other ecosystems should be undertaken within two years of regulation entering into force.

This omission stands in stark contrast with the European Parliament's INL Report, which calls for the new law to cover high-carbon stock and biodiverse ecosystems other than forests, such as marine and coastal ecosystems, wetlands, peatlands or savannahs.[23]

## Finance

The Proposal does not cover the financial sector or investments. The Explanatory Memorandum to the Proposal states that "[e]xisting initiatives in the area of sustainable finance, such as the implementation of the EU Taxonomy Regulation and the future Corporate Sustainability Reporting Directive, CSRD (current Non-Financial Reporting Directive, NFRD) are well suited to address the deforestation impacts of the finance and investment sectors". However, those initiatives require little more than basic reporting – they do not create mandatory obligations for financiers or investors doing business with forest-risk sectors to ensure their financial services are not linked to deforestation or human rights violations.

In contrast, the European Parliament called for mandatory due diligence obligations for financial institutions to ensure they respect the regulation's requirements if they provide finance, investment or other services to companies that produce, process, trade or sell the covered commodities or products.[24]

## Access to justice

Another major omission is the lack of legal liability for harm linked to non-compliance and access to justice for victims. Members of the public, consumers and businesses that suffer harm due to an operator's non-compliance have no right of remedy against the responsible operator (unless based on existing law) and must depend on competent authorities and other enforcement agencies to take action. People harmed by the production of commodities or products that are placed on the EU market, like forest defenders and Indigenous Peoples forced off their lands, displaced, attacked or harmed by expanding agricultural production, have no means to hold EU companies accountable for the harm linked to their supply chains or access justice in the EU.

While these stakeholders could submit complaints about non-compliance (called "substantiated concerns") to competent authorities, the investigation of those complaints will, at most, trigger the application of the enforcement provisions and national implementing regulations (e.g. administrative or criminal fines, confiscation of commodities or revenues). However, these processes are neither intended to nor capable of providing adequate redress or justice for persons suffering harm caused by non-compliance or linked to EU supply chains.

While the Proposal includes an important provision allowing for the independent review of a competent authority's acts and omissions (Art. 30), this provides at best an indirect way to address an operator's non-compliance through a review of the relevant authority's actions.

[23] See Paragraph 30 of the Parliament's INL Report.
[24] See Article 2 of the Annex to the Parliament's INL Report.

This is a major shortcoming compared to the European Parliament's INL Report, which argues for clear access to justice provisions, including civil liability, criminal liability, as well as the corresponding right for damaged parties to access effective judicial remedies.[25]

The absence of any redress mechanism available to victims of non-compliance also creates a fundamental gap in the Proposal's enforcement framework. Experience gained from the EU Timber Regulation shows that when enforcement is left exclusively in the hands of Member States, results can vary wildly across the EU. This lack of consistency creates loopholes that undermine protections for forests and the local communities who depend on them, as well as disrupting the level playing field of the EU market.

Instead, forest defenders, local communities and civil society organisations should be able to hold companies directly accountable for deforestation, environmental destruction and human rights violations linked to their supply chains. Indigenous Peoples and local communities in forest-risk commodity production areas are often the most effective forest guardians and watchdogs. Enabling them to access European courts to hold companies accountable for their role in driving deforestation would give the regulation real teeth.

# Clearer and clever enforcement mechanisms

The Commission's Proposal includes several valuable improvements compared to the enforcement framework under the EU Timber Regulation.

These include greater clarity and detail about the compliance checks that competent authorities in Member States need to carry out, for example:

a) regarding the prioritisation of checks according to risk assessments (Art. 14(3) - (5));

b) no prior notice of checks to operators and traders (Art. 14(12));

c) requirements to carry out checks upon notice of potential non-compliance (Art. 14(11));

d) what needs to be checked (Art 15);

e) the ability to order a short delay in high-risk commodities being placed on or exported from the market to allow their compliance to be checked (Art. 14(6) and (7));

f) immediate action on potential non-compliance and high-risk shipments (Art. 14(6) and 21);

g) cooperation with customs authorities (Art. 24) and enforcement agencies in other Member States (Art. 18); and

h) minimum annual checks based on numbers of operators and commodity volumes (Art. 14(9)) with higher requirements for operators and commodities linked to 'high risk' areas (Art. 20).

Importantly, the Proposal also includes minimum requirements on Member States to ensure that their competent authorities have adequate powers and resources to perform their obligations (Art. 13(4)).

Likewise, the provisions on penalties have been strengthened (Art. 23), including requirements on Member States to establish effective, proportionate and dissuasive penalties that include consideration

[25] See Articles 5.2(a)(i), (ii) and 5.1(a)(v) of the Annex to the Parliament's INL Report and Paragraphs 24 and 65 of the Parliament's INL Report.

of the relevant environmental damage and set the floor for the maximum amount of fines at 4% of the annual turnover of the responsible operator or trader in the relevant Member State (Art. 23(2)(a)).

To the Commission's credit, the Proposal includes several other clever enforcement mechanisms that will both support the work of national competent authorities and create additional compliance incentives. These include the requirement on operators to lodge a "due diligence statement" with competent authorities before placing their products on or exporting them from the EU market (Art. 4(2)), obligations to notify competent authorities if they receive new information that their products are non-compliant (Art. 4(6)), and the ability for competent authorities to recover the costs of enforcement against non-compliant operators and traders (Art. 17(1)).

However, two powerful compliance tools that were included in an earlier version of the Proposal[26] and missing in the final Proposal are

a) a public 'name and shame list' of operators and traders found in violation of the regulation. Such a public list can provide a powerful compliance incentive and support responsible consumer choices; and

b) the potential for serious violations to constitute a criminal offence under the Environmental Crime Directive (Directive 2008/99/EC). The potential for criminal liability for serious violations would escalate such non-compliance within Member State law enforcement frameworks by engaging criminal prosecution and law enforcement agencies.

For a more comprehensive comparison of proposed changes compared to the EU Timber Regulation, see our briefing *The proposed EU law on deforestation-free products: What are the changes compared to the EUTR Framework?*

# Greater transparency required

Public transparency goes hand in hand with accountability and public confidence. Unfortunately, the Commission's Proposal includes very few possibilities for the public to access meaningful information about where the products on their supermarket shelves come from or what EU companies are doing to comply with the regulation.

The main publicly available information on compliance will come in the form of annual reports published by large operators and traders on their due diligence system and "the steps taken by them to implement their obligations" (Art. 11(2)). However, this reporting requirement has significant limitations:

a) it is subject to any superseding provisions in other EU legislation "regarding sustainability value chain due diligence" (a reference to the legislative proposal expected under the Sustainable Corporate Governance initiative[27]);

b) it does not apply to SMEs; and

[26] Available at https://www.contexte.com/article/environnement/info-contexte-comment-la-commission-europeenne-envisage-de-freiner-la-deforestation-importee_139115.html?share_email=info%40contexte.com&share_date=1633016986.5456607&share_days=1&share_key=71e744908758a90c345908c6a9f02d38.
[27] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.

c) it does not appear to require disclosure of meaningful information about the actual due diligence carried out, in which case these reports would not need to include information about an operator's supply chains, the risks identified during their due diligence or their assessment of them.

Indeed, a report about "the steps taken" to implement the obligations under the regulation, as opposed to a report on the actual implementation of those obligations – the due diligence carried out and its results, may disclose only superficial information without providing any detail about how EU companies are implementing the regulation.

Although Member States will also be required to report annually on the implementation and enforcement of the regulation in their jurisdiction, and the Commission will publish an annual EU-wide overview, these reports will disclose aggregated data and are not required to identify individual companies involved in enforcement activities (Art. 19). The information system used to record the due diligence statements submitted by operators will also only be publicly available in an anonymised format (Art. 31). To provide meaningful information that can drive informed consumer behaviour and greater compliance, these public reporting requirements should cover all operators and provide detailed information to the public on implementation, enforcement and non-compliant companies and products.

Likewise, the due diligence provisions should also be strengthened to require operators to identify all the participants in their supply chain – information that is missing from the minimum information gathering requirements (Art. 9(1)). Operators should be obliged to include that information in their due diligence statements (and annual reports) and to convey that information to their buyers. Likewise, all traders should be obliged to disclose this supply chain information to their buyers, rather than only the identity of their direct seller (Art. 6(2)), so that goods are easily traceable as they move through the EU market to the end consumer. This supply chain information will be particularly helpful for operators, enforcement agencies and the public alike, as identifying upstream supply chain participants, and especially the responsible producer, is an easy way to identify risks of deforestation, illegality and human rights violations or, vice versa, give confidence that products are sustainable.

# Voluntary Partnership Agreements continued, though their future is uncertain

Leaked versions of the Commission's proposal indicated that the Voluntary Partnership Agreement ("**VPA**") framework[28] would be discontinued. Indeed, the results of the 2021 FLEGT Fitness Check published together with the Commission's Proposal[29] indicate that the Commission considers the VPA approach is not fit-for-purpose and is unsuitable to be adapted to the deforestation-free requirement and cross-commodity scope of the new regulation.

In the end, the Commission chose to maintain the approach under the EU Timber Regulation: timber products covered by a FLEGT licence will be taken to meet the legality requirement under the new

[28] A framework established under the Forest Law, Enforcement, Governance and Trade ('FLEGT') Regulation (Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community) which allows the EU to work together with timber-producing countries to improve national forest laws, their enforcement, and forest governance in participatory ways and with a view to establishing national timber licensing schemes that can issue licences, known as FLEGT licences, that demonstrate compliance with harvesting requirements under the EU Timber Regulation.
[29] Staff Working Document – Fitness Check on the EU Timber Regulation and the FLEGT Regulation, SWD(2021) 328 final, https://ec.europa.eu/environment/document/download/44d4ef8b-8c76-4535-9d04-b65be3479887_en.

regulation (Art. 10(3)). This approach will be a relief to governments and civil society organisations in countries with or negotiating a VPA with the EU. However, given timber products will also need to satisfy the objective 'deforestation-free' requirement, it is unclear how the new regulation and existing VPA arrangements will interact. This may need to be assessed on a case by case basis.

Another positive element in this regard is the inclusion of a requirement on the Commission "to engage" with producer countries to develop partnerships and cooperation to jointly address deforestation, including the transition to sustainable commodity production. These partnerships and cooperation "should allow the full participation of all stakeholders, including civil society, indigenous peoples, local communities and the private sector, including SMEs and smallholders" (Art. 28). This provision leaves the door open for further formal engagement between the EU and producer countries in a similar fashion to the VPA framework, which will be essential to address the complex and structural drivers of deforestation at the local level. A key part of this puzzle is ensuring secure tenure rights for Indigenous Peoples and local communities in forest areas, which any partnerships and cooperation conducted under the auspices of the new regulation will be required to promote (Art. 28(3)).

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