

EU Regulation on deforestation-free products: What's in the new proposal and what does it mean

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On 17 November 2021, the European Commission released its proposal for a [Regulation on deforestation-free products](#). It aims to prevent certain commodities and derived products from entering the European Union (EU) market if they are produced illegally or cause deforestation. The proposal will be discussed by the European Parliament and the Council throughout the course of 2022, before becoming a law. So what does the proposal include — and what are its weak and strong points?

THE DRAFT REGULATION – IN BRIEF

The Regulation targets six commodities: coffee, cocoa, cattle, palm oil, soy and wood, as well as derived products such as leather, chocolate and furniture. It proposes that prior to placing any of these on the EU market, operators and traders must exercise due diligence by demonstrating that the commodities were not grown or raised on land that was deforested or degraded after 31 December 2020, and that they have been produced according to producer country laws.

Among other things, the due diligence process requires companies to declare to authorities the precise geo-location coordinates of where the product was produced. Companies must gather information, conduct a risk assessment, and undertake mitigation measures where necessary.

Producer countries or sub-national regions will be assigned a risk level according to a three-tiered risk rating system (low, medium and high). Products coming from high risk countries will require a higher degree of checks by Competent Authorities, and companies sourcing from high risk countries will have more steps to fulfil as part of due diligence. Countries will be given their risk rating through a separate implementing regulation, taking into account issues such as deforestation rates, commodity production trends, national legal frameworks in producer countries, and whether emissions related to Agriculture, Forestry and other Land Use (AFOLU) are included in the country's Nationally Determined Contributions (NDC) to the Paris Climate Agreement. The risk rating will also consider whether the producer country and the EU have and are implementing an agreement which would help facilitate compliance with the Regulation on deforestation-free products. Such agreements would have to involve local communities, producer country NGOs, and smallholders.

Member States' Competent Authorities would be accountable for carrying out checks to establish whether commodities comply with the Regulation, as well as the operators that place them on the EU market and the traders that subsequently buy and sell them. The Authorities will conduct more frequent checks on products coming from high risk countries and operators with a bad track record. At a minimum, each Authority must check at least five per cent of operators handling relevant commodities as well as five per cent of each of the relevant commodities. This increases to 15 per cent in high risk cases.

Penalties for infringements would include fines, confiscation of the commodity, confiscation of the revenue and/or exclusion from procurement contracts.

FERN'S RAPID ASSESSMENT OF THE REGULATION

✓ NO GREEN LANE FOR CERTIFICATION

Companies can use certification as part of their procedure for conducting a risk assessment—but certification cannot be used as a substitute for undertaking due diligence. Full traceability of the supply chain is required. This is good news as countless investigations have found deforestation and other violations linked to products certified by even the most “reputable” certification bodies. Giving a “green lane” to certification would create a major loophole in the Regulation.

✓ STRONGER ENFORCEMENT MECHANISMS THAN THE EU TIMBER REGULATION

The Regulation's enforcement mechanisms are much stronger than those provided in the EU Timber Regulation (EUTR). This is important as the EUTR has faced enforcement issues. The Regulation includes new requirements, such as the need for companies to proactively demonstrate compliance to Competent Authorities (the due diligence statement); having to provide geo-locations (so as to link the commodities and products to the plot of land where they were produced), increased cooperation with customs; and minimum inspection levels. The introduction of an import declaration will provide information to hold operators accountable.

✓ BUILDING ON OTHER KEY TOOLS FOR ENSURING TIMBER LEGALITY

The EU has announced that their flagship Forest Law Enforcement, Governance and Trade (FLEGT) Regulation and its accompanying Voluntary Partnership Agreements (VPA) will be maintained and that the Regulation on deforestation-free products and FLEGT will work in tandem. This is a positive step as it means the new Regulation can build on previous successful efforts to increase forest governance and curb illegal logging.

The new Regulation stipulates that FLEGT licenses only provide evidence of legality, meaning that timber-exporting companies will have to demonstrate that timber production has also not led to deforestation and forest degradation. It is important to recognise that countries that have entered into VPAs with the EU have devoted significant time and resources to complying with the FLEGT Regulation and may now feel that the goal posts are changing. This should not, of course, mean the new Regulation should be weakened, but rather that the Commission should offer adequate support for VPA countries to demonstrate and/or ensure that their licensing system also complies with the deforestation-free criterion of the new Regulation.

— PROBLEMATIC DEFINITIONS

The new Regulation's proposed definitions include several weaknesses that need to be addressed. For example, the forest definition does not make a clear distinction between natural forests and plantations, meaning that the conversion of forests into tree plantations would not qualify as deforestation – though it could be considered forest degradation. Unfortunately, the definition of forest degradation is also so vague that it will be largely inoperable - thereby opening up the risk that drivers of forest degradation, such as the over-harvesting of timber from European forests, will not be tackled.

— CONCERNING EXEMPTIONS FOR SOME COMPANIES, INCLUDING THE FINANCIAL SECTOR

Although the Regulation requires that all operators gather information, do a risk assessment and undertake mitigation measures, operators that are Small to Medium Enterprises (SME) do not have to do annual public reporting on their due diligence system. This could create loopholes, as 99 per cent of enterprises in the EU are considered SMEs. This may seem a surprising statistic, but SMEs may have up to 250 employees, and an annual turnover of €40 million. Another important omission is the lack of requirements for the finance and investment sectors.

A final likely loophole is opened by not requiring operators sourcing from low-risk countries to carry out the due diligence process' risk assessment and risk mitigation steps. This could lead to products from high-risk countries being laundered in low-risk countries.

— LIMITED NUMBER OF COMMODITIES ARE COVERED

Beef, cocoa, coffee, palm oil, soy and timber are all covered by the Regulation, as well as derived products such as chocolate, leather and furniture. Problematic commodities such as rubber are missing. Rubber was not included due to data taken from the European Commission Impact Assessment, but rubber experts and academics have shown that the data in this Assessment is flawed and the rubber has a far higher impact on deforestation than is stated. It is also concerning that canned meat is excluded.

— UNCLEAR AND INCOMPLETE COUNTRY RISK RATING

The Regulation states that the European Commission will assign a three-tier risk rating to third countries or sub-national regions. The rating will be defined through a separate implementing regulation, taking into account issues such as deforestation rates, commodity production trends, national legal frameworks in producer countries, and whether land use emissions are included in the country's NDC. The risk rating will also consider whether the producer

country and the EU also have and are implementing an agreement which would facilitate compliance with the Regulation on deforestation-free products (such as a VPA). Such agreements would have to involve local communities, civil society in producer countries, and smallholders. The proposal is that this assessment will be done by the European Commission, unilaterally, though it does state that it will inform countries of any plans to change the risk rating and give them time to respond.

Since the Regulation requires compliance with both deforestation-free and legality requirements, both areas should be considered in the process of defining a country's risk. The proposal includes some benchmarking criteria on national laws, but only those referring to deforestation and forest degradation. It does not mention national laws or international standards on tenure rights, Free, Prior and Informed Consent (FPIC), transparency or community benefit-sharing. Countries could therefore be defined as low risk—significantly lightening due diligence requirements - despite being at high risk of, for example, land rights violations.

It is also important that benchmarking does not merely reward the existence of an agreement, but rather its implementation. And there are many questions that need to be clarified such as whether the risk rating will be done at a national or a sub-national level and whether it will be done per commodity.

— **TEPID VISION FOR PARTNERSHIPS**

The Regulation recognises the need for collaboration with producer countries to identify support measures, strengthen capacities and discuss government policies. It also recognises that these partnerships need to include stakeholders and rights-holders. The proposed Regulation's text, however, is too vague to provide a clear sense of what these partnerships will look like. To be effective, they should include trade incentives and support for local livelihoods, as well as roadmaps of changes to happen in-country. They must also be developed through a multi-stakeholder process including women, Indigenous Peoples, Local Communities (IPLCs), and smallholders.

— **LATE CUT-OFF DATE**

The proposed Regulation states that only products associated with deforestation that took place after 30 December 2020 should be denied market access. This is five years later than the date proposed by the European Parliament and would reward recent deforestation. The soy moratorium and the Forest Code in Brazil use much earlier dates, and it is important that the Regulation does not undermine these.

Photo : Cocoa nursery in Cameroon, by Ollivier Girard / CIFOR, Flickr/cc



THE REGULATION ONLY AIMS TO CLEAN UP EU SUPPLY CHAINS

Article 1 of the Regulation states clearly that the purpose of the legislation is to **minimise the EU's contribution** to deforestation, forest degradation, greenhouse gas emissions and global biodiversity loss.

This restricted focus means that the Regulation will stimulate segregated supply chains whereby "clean" products head to the EU, but global deforestation continues.

FAILURE TO INCLUDE INTERNATIONAL STANDARDS ON CUSTOMARY TENURE

It is of great concern that the Regulation is based on compliance with national law rather than respect for international standards on customary tenure rights (notably the rights of IPLCs). National statutory legislation is often unclear or conflicts with customary law or international law and so using it as the basis of regulation risks creating legal confusion for companies and competent authorities. Respect for international human rights standards, notably community customary tenure rights, should therefore be explicit in the Regulation. In addition, Article 28 ("cooperation with third countries") should state that partnerships with third countries should include a process to demarcate and recognise community tenure rights in line with the internationally accepted Voluntary Guidelines for the Governance of Tenure (VGGT). This will help clarify the domestic legal situation so that companies' obligations are clear and Competent Authorities know what to check for.

LIMITED SCOPE OF ECOSYSTEMS

It is not just natural forests, but also savannahs, wetlands and high biodiversity grasslands that are threatened by soy and cattle production. In the case of palm oil, peatlands are in particular danger. Once the new Regulation starts working to protect forests, there is a risk that destruction of these ecosystems will increase. It is therefore positive that the proposed Regulation includes a review of its potential application to other ecosystems no later than two years after its entry into force.

NO ACCESS TO JUSTICE

The definition of penalties is a clear improvement on the definition in the EUTR. The new Regulation creates the opportunity for substantiated concerns, and provides for court access to review any substantiated concerns that the party considers have not been fully considered and deal with.

The Regulation includes an Article 30 on "access to justice", but unfortunately little to make this article work. There is no mechanism for communities whose rights have been violated by infringements of the Regulation to obtain compensation, and penalties only relate to environmental damage rather than damage related to infringements of producer country domestic law. It is also not clear who will receive penalties paid by companies that infringe the Regulation, but it looks likely to remain with the Competent Authority since the stated purpose of the penalties is to "effectively deprive those responsible [for the environmental damage] of the economic benefits derived from their infringements", rather than to compensate those negatively affected.

INSUFFICIENT SUPPORT AND ACCOMPANYING MEASURES FOR SMALLHOLDERS

The Regulation contains very little by way of measures to support smallholders to meet the requirements. In some sectors, like cocoa and palm oil, smallholders are responsible for a significant part of production. The producer country agreements mentioned in the Regulation should focus on supporting smallholders and the Regulation should require operators, as part of their due diligence, to take reasonable efforts to support smallholders to comply. All relevant information generated during negotiation and implementation of the Regulation (including maps) should be accessible and owned by the smallholders to which it pertains. For more details on how to take a smallholder-friendly approach, see our briefing [Including smallholders in EU action to protect and restore the world's forests](#).