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# EC proposal for a regulation on deforestation-free products

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## What is the current status and planned timeline of the legislative agenda?

In November 2021, the European Commission published a proposal for a Regulation on deforestation-free products. The proposal is currently being debated and revised by the EU Council and the European Parliament. Both will need to agree and approve a final text for the proposal to become legislation. The process of finalising the text for adoption is expected to start in late 2022. The proposal will enter into force 12 months after approval.<sup>1</sup>

## What is the scope of the legislation in terms of commodity and ecosystem coverage and treatment of illegality?

Under the proposal, relevant commodities and products can only be placed on the EU market or exported from the EU if they are (a) deforestation-free; (b) produced in compliance with the relevant legislation of the producer country; and (c) covered by a due diligence statement from an ‘operator’. This ‘operator’ is the entity which first places the goods on the EU market or exports it from the EU. This includes traders (with simplified requirements for traders that are SMEs).

The relevant commodities, listed by HS code in Annex 1 of the proposal, are cattle, cocoa, coffee, oil palm, soy and wood. The wood products are the same as those previously covered by the EU Timber Regulation, which this proposal would repeal. Currently, Annex 1 generally excludes processed and derived commodities, although the proposal allows for their future inclusion as products that contain, have been fed with or have been made using relevant commodities.

1. Microenterprises have 24 months before they need to comply for non-wood commodities.

‘Deforestation’ is defined by reference to the FAO definition – an area of land greater than 0.5 hectares, on which there are trees higher than five metres with a canopy cover of more than 10%. This would not cover most wooded savannahs and grasslands, including some currently active deforestation frontiers.<sup>2</sup> Commodities are considered deforestation-free unless they are produced on land deforested after the cut-off date of 31 December 2020. Wood must be harvested without inducing forest degradation after the same date. The deforestation-free criterion is a major difference from the US and UK approaches, and also likely any approach by China, in that it goes beyond legality.

The proposal includes a review mechanism and the first review (no later than two years after the regulation enters into force) is to include an assessment of the need and feasibility of extending the regulation to other ecosystems and other commodities.

Regulated commodities and products must be produced in accordance with the relevant legislation of the country of production. This is yet to be defined but is likely to cover a specific list of topics in producer country legislation, for example the right to use the land for the production of the commodity.

The due diligence system includes requirements for (a) information; (b) risk assessment; and (c) risk mitigation. It is coupled with a country benchmarking system that tailors due diligence obligations based on risk classification of countries and parts thereof (subnational regions).

## What are the points of (a) common ground and (b) contention by different stakeholders?

The proposal has been broadly welcomed by a wide range of stakeholders in the EU. Outside the EU, a number of industry associations and civil society coalitions have also welcomed the legislation, but highlighted the need for clearer support for independent smallholders, as well as for incentives including financial support, market access and technical assistance.

A number of amendments have been proposed to extend the ecosystem coverage through the FAO framework to also include “Other Wooded Land”, or to include all ecosystems.

The proposed cut-off date of 31 December 2020 is significantly later than that of 2015 proposed by the EU Parliament in its original report. While a later cut-off date enables broader compliance, given the time lag between deforestation and the production and harvesting of a commodity, it means that many commodities entering the EU will be grown on recently deforested land.

2. <https://insights.trase.earth/insights/eu-urged-to-widen-deforestation-law-as-ecosystems-left-at-risk>

A number of EU Member States (forested countries, including Austria, Finland, Sweden and Romania) are concerned about the inclusion of forest degradation. Many stakeholders have criticised the definition of ‘forest degradation’, which is based on “harvesting operations that are not sustainable”, as unclear and operationally infeasible.

Traceability is a key area of contention. There are due diligence requirements to provide the geo-localisation coordinates, latitude and longitude of all plots of land where the relevant commodities and products were produced, as well as the date or time range of production, and to assess the risk of mixing of products with those from unknown origin or plots of land where deforestation has occurred. This has raised concerns from industry around feasibility and cost, particularly in the case of smallholders, who risk exclusion from the market. However, many of these concerns assume the need for physically segregated supply chains, which is not explicit in the proposal.<sup>3</sup>

Civil society has expressed concern about the exclusion of international human rights in the proposal, particularly on land tenure and the rights of indigenous peoples and local communities. The legality criterion relies on producer country legislation that in many cases does not adequately address international human rights.

Questions have been raised about how the regulation’s country benchmarking system would function. This would categorise countries and parts thereof (i.e. subnational regions) as low, standard or high risk, based on criteria that include deforestation, commodity production and expansion, and relevant policies and laws that address deforestation. Low-risk regions would be subject to simplified due diligence requirements, raising concerns that this could be insufficiently stringent to ensure deforestation-free supply, depending on how such areas are identified. Conversely, high-risk regions would face higher levels of checks by competent authorities, which EU Member States fear may be unduly burdensome. A robust subnational benchmarking system could help address both concerns.<sup>4</sup>

## What are the main risks the legislation will not achieve its objectives?

The stated objectives of the legislation are “to curb deforestation and forest degradation that is provoked by EU consumption and production. This, in turn, is expected to reduce GHG emissions and global biodiversity loss. The initiative aims to minimise consumption of products coming from supply chains associated with deforestation or forest degradation – and increase EU demand for and trade in legal and ‘deforestation free’ commodities and products”.

An assumption here is that minimising deforestation associated with EU supply chains will in turn reduce global loss. The EU is the third largest international market for forest-risk commodities after China and India, so this regulation sends an important market

3. [https://www.clientearth.org/media/mdzplo2q/getting-to-deforestation-free\\_clarifying-the-traceability-requirements-in-the-eu-deforestation-regulation\\_clientearth.pdf](https://www.clientearth.org/media/mdzplo2q/getting-to-deforestation-free_clarifying-the-traceability-requirements-in-the-eu-deforestation-regulation_clientearth.pdf)

4. <https://insights.trase.earth/insights/strengthening-the-eu-regulation-on-deforestation-free-products/>

signal. However, where the EU is a relatively small market, there is a risk that even as traders ensure compliance for this market segment, the regulation may not address or reduce demand for commodities associated with deforestation, or curb deforestation in places where deforestation is highest (i.e. occurring after the 2020 cut-off date). To mitigate this risk, the EU can implement incentives for individual operators to become deforestation-free suppliers rather than addressing only their individual supply chains.

While the proposed regulation includes an article on cooperation with producer countries to facilitate compliance, the extent and ambition of this support remains unclear. Furthermore, without incentives for producers or regions that are non-compliant or high risk, there is a risk that the legislation will not impact deforestation in regions of greatest concern.

The scope of legislation in terms of its cut-off date, definition of forests and commodity coverage will also impact its objectives in terms of curbing deforestation.

## What are the main barriers to implementation on the ground?

As discussed above, industry has expressed concern about traceability requirements, particularly for supply chains with significant numbers of smallholders and a high proportion of indirect supply (palm oil, coffee, cocoa). A number of these concerns are based on assumptions regarding requirements for physical segregation that are not explicitly outlined in the proposal.<sup>5</sup> Compliance with legal requirements will be challenging due to the complexities of legal systems and accessibility of data in producer countries. However, the scope of legislation in this regard is still unclear.

Another concern is the capacity of enforcement agencies to assess compliance, in terms of access to necessary data and the likely huge volume of information in due diligence submissions. The experience of legal timber trade enforcement suggests a need for tight definitions of harms and what constitutes negligible risk.<sup>6</sup>

5. <https://www.clientearth.org/latest/documents/getting-to-deforestation-free-clarifying-the-traceability-requirements-in-the-proposed-eu-deforestation-regulation/>
6. [https://www.forest-trends.org/wp-content/uploads/2020/09/10\\_Steps\\_Due\\_Diligence.pdf](https://www.forest-trends.org/wp-content/uploads/2020/09/10_Steps_Due_Diligence.pdf)

## Annex

	EC proposal	US FOREST Act	UK Environment Act – Schedule 17
<b>Overview of prohibition/standard</b>	Commodities or products in scope cannot be placed on EU markets unless they are deforestation- and forest degradation-free (after 31 December 2020), have been produced in accordance with local legislation, and are covered by a due diligence statement.	It will be unlawful to import any product made wholly or in part from a commodity in scope that is produced from land that undergoes illegal deforestation after the date of enactment.	Prohibition on using deforestation-linked commodities and their derivatives that have not been produced in accordance with local laws relating to the ownership and/or use of land. No specific cut-off dates currently defined.
<b>Commodities in scope</b>	Cattle, cocoa, coffee, oil palm, soya and wood products covered under the EU Timber Regulation.	Products "made wholly or in part from" palm oil, soybeans, cocoa, cattle, rubber, and wood pulp.	Cattle (beef & leather), cocoa, coffee, maize, palm oil, rubber and soy could all be within scope, but secondary legislation is necessary to determine this. Introduction could be staged over time.
<b>Forest definition</b>	Using FAO Forest Resource Assessment definition of "forest" to define deforestation. "An area of land greater than 0.5 hectare on which there are trees higher than five metres with a canopy cover of more than 10%".	A "natural forest" is defined as "a natural arboreal ecosystem that (A) has a species composition a significant percentage of which is native species; and (B) includes (in alignment with FAO definitions) – (i) a native tree canopy cover of more than 10 percent over an area of not less than 0.5 hectares; or (ii) other wooded land with a combined cover of shrubs, bushes, and trees of more than 10 percent over an area of not less than 0.5 hectares.	"Forest" defined in alignment with FAO definition as "areas of land of more than 0.5 hectares with a tree canopy cover of at least 10%".
<b>Deforestation definition</b>	The conversion of forest to agricultural use, whether human-induced or not (see definition of "forests" above). Forest degradation is also in scope for wood products. The scope of legislation also includes relevant legislation in producer countries (although the scope of this is not yet clear).	Loss of natural forest resulting from the whole or partial conversion of natural forest to (A) agricultural use or another non-forest land use; or (B) a tree plantation. Only if commodities are grown on deforested land according to the definitions in the bill would importers need to consider legality.	Scope of legislation is defined by compliance with local land use laws, which are not necessarily only relevant for forest ecosystems.

<b>Businesses in scope</b>	All operators (which includes large traders) placing in-scope goods on or exporting them from the EU market would be subject to the regulation. However, reduced due diligence requirements present for small and medium-sized enterprises traders as well as operators and those who are microenterprises who have 24 months to comply, whereas all other operators have 12 months.	Applicable to all importing companies.	Only large companies will be in scope, with the turnover threshold to be set in secondary legislation. Will apply to any large companies using in-scope commodities in the UK no matter their supply chain position. Exemptions for companies handling small volumes.
<b>Domestic commodity production coverage</b>	Yes; production within EU markets, including for exports, is within scope.	No; applies only to imported material.	Requirement for compliance with local laws suggests domestic commodity production would be in scope.
<b>Due diligence expectations</b>	Establishment of a system to identify and obtain information about commodities, assess risk and mitigate. Information supplied must demonstrate no or negligible risk of deforestation, forest degradation and illegality.	Importers must take "reasonable care" (an existing principle in US customs law) to assess and mitigate risks that commodities were produced on illegally deforested land. Customs and Border Protection is instructed to publish within 90 days of enactment guidance on what constitutes reasonable care, which may be commodity-specific if warranted.	Requires the establishment of a system to identify and obtain information about commodities, assess risk of non-compliance with local laws and mitigate risk. Exact details to be outlined in secondary legislation.
<b>Risk benchmarking</b>	Yes; low-, standard- or high-risk sourcing locations to be defined at time of enactment and reviewed periodically. Simplified due diligence processes for low-risk areas, enhanced checks for high risk regions. Benchmarking at national and subnational levels (but granularity unknown at subnational).	Yes; default and high risk, with simplified import declaration requirements for default-risk countries.	No indication that benchmarking will be used.
<b>Supply chain information requirements</b>	Geolocation of plot-level points of production required for sourcing across all risk levels.  Additional information must demonstrate that the absence of deforestation and forest degradation and legality requirements are fulfilled. A due diligence statement is required.	Import declaration with point of production (or all possible points) for designated commodities from high-risk countries only (with risk level defined on a commodity-by-commodity basis), identified by the smallest administrative unit of land possible (concession, farm, ranch etc).  Additional information is required documenting steps taken to mitigate risks.	Traceability requirements currently unclear; requirements expected to be defined during the development of secondary legislation.  Companies must establish and implement a due diligence system to identify and obtain information about that commodity; assess risk that relevant local laws were not complied with; and mitigate risk.

<b>Public reporting requirements</b>	Operators (excluding SMEs) are expected to publicly report on an annual basis on their due diligence processes (including risk assessment and mitigation).	No public reporting required of companies. Import declaration information will later be made public (subject to protections for confidentiality) by Customs and Border Protection.	Companies must provide the regulating authority with an annual report on actions taken by the company to establish and implement due diligence. Expectation that at least parts will be made publicly available.
<b>Penalties</b>	Penalties to be established by Member States, but with should include as a minimum fines (of up to 4% of annual turnover), confiscation of materials, temporary exclusion from public procurement.	Penalties could include seizure and fines, following existing civil and criminal penalties under US Customs Law.	Potential sanctions, including fines with current suggested maximum of £250,000 (but to be defined in secondary legislation).
<b>Audits</b>	"Competent authorities" at Member State level must carry out annual checks covering at least 5% of operators and 5% of quantity of relevant commodities. This moves to 15% for high-risk regions.	Random audits of importer filings carried out by US Department of Agriculture; Customs and Border Protection has broad discretion for auditing and must report annually to Congress on audits and investigations carried out.	Auditing process to be set out within secondary legislation.
<b>Evidence from third parties</b>	"Substantiated concerns" may be submitted to competent authorities by any "natural or legal persons".	Formal mechanism to receive information from outside sources to be established by Customs and Border Protection within six months.	Not specified to date.



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