



## EUROPEAN COMMISSION INTRODUCES A DRAFT LAW SEEKING TO BAN IMPORTS AND EXPORTS OF COMMODITIES FROM REGIONS AT RISK OF DEFORESTATION

The European Commission (**Commission**) has introduced a draft law which would ban the import and export of six core agricultural commodities to and from the European Union (**EU**) – beef, soya, palm oil, coffee, cocoa and timber—where these products have been linked to deforestation. The draft law would require companies to prove that the products they are importing into or exporting from the EU single market have not contributed to the processes of deforestation and forest degradation.

## Background

Following UN COP26, where world leaders from over 100 nations promised to halt global deforestation by 2030, the Commission on 17 November 2021 introduced a draft Regulation entitled '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 [laying down the obligations of operators who place timber and timber products on the market]'.

The European Commissioner for the Environment, Virginijus Sinkevičius, stated *"we are taking our responsibility and walking the talk by lowering our global impact on pollution and biodiversity loss"*. The draft law is part of the wider European Green Deal, which looks to reduce the climate impact of the EU.

The six commodities addressed in the draft law account for 19% of commodity imports into the EU, with the proposed ban seeking to reduce the impact of European consumer demand on the world's most vulnerable forests.

## The Regulation

The draft law seeks to minimise the EU's contribution to global deforestation and forest degradation. The proposed Regulation outlines rules regarding the import and export of beef, cocoa, coffee, palm oil, soya and timber to and from the EU market. These agricultural products are defined as 'relevant commodities' under the draft law.

The draft law states that deforestation means the conversion of forest to agricultural use. Forests are defined to be land spanning more than 0,5 hectares with trees higher than 5 metres and a canopy cover of more than 10%. Agricultural tree plantations are not within this definition.

The proposed Regulation will apply to operators and traders of the relevant commodities on the EU market. Operators are defined as any natural or legal persons who in the course of commercial activity place the relevant commodities on the EU

market or export them from that market. Traders are defined as natural or legal persons in the supply chain other than operators who place the relevant commodities on or export them from the EU market.

## Placing deforestation free goods on the market

As stated in Article 2 of the draft law, products are qualified as deforestation free when the relevant commodities have been produced on land that has not been subject to deforestation or forest degradation after 31 December 2020. This means that no commodities or products in the scope of the draft Regulation may be allowed to enter or exit the single market if they were produced on land subject to deforestation or degradation after this date.

Article 3 states that the relevant commodities under the Regulation may only be placed on the EU market if the commodities are deforestation free, they have been produced in accordance with the relevant legislation of the country of production and they are covered by the due diligence statement laid down within the draft law.

## Due diligence and risk assessments

The draft law obliges operators within the commodities industry to exercise due diligence prior to placing the relevant commodities on the EU market, to ensure that the relevant commodities are compliant with the Regulation. Furthermore, the draft law requires operators to make a due diligence statement available to the competent authorities via an information system which will be established by the Commission. Once this due diligence statement is available and the statement confirms no or negligible risk of the relevant commodities being produced on deforested land, then the commodities may be placed on the EU market.

Article 9 of the draft law requires operators to collect information, data and documents that demonstrate that the relevant commodities comply with the Regulation. The draft law requires eight elements of information concerning the relevant commodities, supported by evidence. These categories include descriptions of the relevant

commodities, identification of the country of production and geo-localisation coordinates of all plots of land where the relevant commodities are produced, alongside the date or time range of production.

Under Article 10 of the Regulation operators must use this information to carry out a risk assessment to establish whether there is a risk that the relevant commodities and products intended to be placed on or exported from the EU market are non-compliant with the requirements of the Regulation. If the operators cannot demonstrate that the risk of non-compliance is negligible, they must not place the relevant commodities on the EU market nor export them from that market. Operators must retain this information for five years and provide this information to the competent authorities upon request.

The draft law further requires that traders which are small and medium sized enterprises (SMEs) must only make products available to the EU market if they are in possession of specified information concerning operators or traders who have supplied the relevant commodities to them. Such information includes but is not limited to the operator's name, registered trademark and address of the operator. SME's must retain this information for five years and provide this information to the competent authorities upon request.

## Competent authorities, reporting and checks on operators

The draft law provides that member states shall designate competent authorities responsible for carrying out the obligations arising from the Regulation. The competent authorities shall carry out checks to establish whether operators and traders comply with their obligations under the Regulation and whether the relevant commodities are deforestation free. These authorities will be responsible for the overall enforcement of the Regulation.

Competent authorities will have the power to carry out checks on operators and traders, examining due diligence systems and risk assessment procedures. This may include examining document records showing compliance, examining due diligence statements and can include

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on the ground examinations of commodities and technical analysis to determine that the relevant commodities are deforestation free. Such searches can include the use of Earth observation data and programs.

The draft law would empower competent authorities to engage in market surveillance to monitor the activities of operators and traders concerning the relevant commodities. Competent authorities will have the power to require operators and traders to take appropriate and proportionate corrective actions to bring non-compliance to an end.

## Penalties

Member states will set out penalties applicable to infringements of the Regulation, which should be effective, proportionate and dissuasive. However, the draft law sets out that as a minimum these penalties should include:

- fines proportionate to the environmental damage and the value of the relevant commodities or products concerned. These fines should gradually increase for repeated infringement. Maximum fines should be at least 4% of the operator or trader’s annual turnover in all member states concerned;
- confiscation of the relevant commodities concerned;
- confiscation of the revenues gained by the operator or trader from a transaction in the relevant commodities; and

- temporary exclusion of the party in breach of the Regulation from public procurement processes.

## Implications and future developments

Commodities operators and traders should be aware of possible penalties and requirements under the Regulation when importing the relevant commodities to the EU. Reviews of supply chains and actions to confirm that the relevant commodities are not produced on land which is subject to deforestation should be undertaken in preparation for the possible imposition of this draft law. It is important that importers consider that the qualification of deforestation free products applies for land not deforested since 31 December 2020, and so retrospective analysis of land producing the relevant commodities should be undertaken.

Mr Sinkevičius and some MEPs have stated that rubber may also be included within the draft law as part of negotiations with the European Parliament and member states. The current exclusion of rubber has been criticised by a number of environmental groups. Close monitoring of revisions and developments of the draft law would be prudent, so that commodities importers are prepared for the inclusion of other agricultural goods within the scope of the Regulation.

Following COP26 and the ongoing European Green Deal, it is likely that further regulations on deforestation and measures to reduce the environmental impact of the agricultural sector will be proposed

by the Commission. Companies should increasingly consider how they regulate and monitor their import process and supply chain, ensuring that they are prepared for future developments and restrictions.

## What happens next?

The draft law will need to be approved by EU member state governments and the European Parliament before it comes into force.

Should approval be obtained, the Regulation will enter into force on the twentieth day following its publication in the Official Journal of the European Union. The main provisions of the Regulation will apply 12 months from the entry into force of the Regulation.

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