



AN UPDATE: EUROPEAN UNION DRAFT LAW SEEKING TO BAN IMPORTS AND EXPORTS OF COMMODITIES FROM REGIONS AT RISK OF DEFORESTATION

On 28 June 2022, the Council of the European Union adopted its negotiating position on the draft Regulation which would ban the import and export of six core agricultural commodities to and from the European Union where these products have been linked to deforestation.

The policy driver is the belief that ending deforestation is a necessary condition of achieving net zero (negating greenhouse gases, such as carbon and methane, produced by human activity), delivering benefits for all. The commodities in question are beef, soya, palm oil, coffee, cocoa and timber and derived products such as leather, chocolate and furniture.

In November 2021, we published a briefing¹ in which we set out the background and details of the draft Regulation (Regulation) proposed by the European Commission (Commission). We also provided an analysis of the likely implications of the Regulation and future developments in this area.

The Regulation is now at the first reading stage and the Council of the European Union (EU Council) adopted its negotiating position on 28 June 2022. In this article we outline the proposed changes brought about by the EU Council's negotiating position, the considerations that businesses should take into account and the likely next steps.

EU Council position

The EU Council press release², released on 28 June 2022, confirms that it has now adopted its negotiating position (general approach) on the Regulation. This includes “mandatory due diligence rules for all operators and traders who place, make available or export” the six core agricultural commodities to and from the European Union (EU) – beef, soya, palm oil, coffee, cocoa and timber and derived products such as leather, chocolate and furniture.

The EU Council has simplified and clarified the due diligence system to avoid “duplication of obligations” and reduce the “administrative burden for operators and member states’ authorities”. It has also added the possibility for small operators to rely on larger operators to prepare due diligence declarations. In addition, it has proposed a “benchmarking system”, which would assign EU member states and third countries a risk category (high, standard or low) depending on that country’s deforestation risk profile. The EU Council has confirmed that this would result in “enhanced monitoring for high-risk countries and simplified

due diligence for low-risk countries”. The EU Council has also “clarified the control obligations and set quantified objectives of minimum control levels for standard- and high-risk countries”.

The proposed text on penalties and enhanced cooperation with partner countries was maintained. In terms of other changes, the EU Council responded to concerns by heavily forested EU member states that the definition of “forest degradation” in the Commission proposal, as defined in Article 2, was too broad by amending the definition. The EU Council therefore narrowed the scope of the definition to read as follows: “‘forest degradation’ means structural changes to forest cover, taking the form of the conversion of primary forests into plantation forests or into other wooded land” in place of the previous version: “harvesting operations that are not sustainable”. The EU Council also included references to the “United Nations Declaration on the Rights of Indigenous Peoples”.

The changes adopted by the EU Council are perhaps most notable for what they have not included, than what they have included. The scope of “relevant commodities”, as defined in Article 2, has not been increased except insofar as to amend the detailed list of specific products in the annex³. This has received criticism from some campaigners, who believe that the Regulation should go further to cover more commodities, including rubber, and to close loopholes which they claim allow banks to finance deforestation⁴.

Other campaigners argue that the Regulation offers “insufficient protection” to “indigenous communities” and that it has as “many holes as a Swiss cheese”⁵. One argument raised by the environment ministers of some countries is that the Regulation is “too narrow” and that the

definition of “forest degradation” that has been amended by the EU Council should be expanded to cover “other ecosystems” and also “secondary forests”⁶. In the adopted general approach, the EU Council emphasised “the importance of assessing the need and feasibility of extending this scope to other commodities and ecosystems in the first review of the text within two years; the preparatory work for that review is due to start as soon as the text enters into force”. It also highlights that the expansion of the forest degradation definition “will have to be addressed in the first review of the text”⁷.

The simplified due diligence procedure has been criticised by some environmentalists who believe that it will leave loopholes to exploit⁸. For instance, some environmentalists have argued that the same strict requirements should be universally applied, to prevent goods being laundered through low-risk countries⁹.

The EU Council has maintained the Commission’s proposal to require traceability information for all volumes sourced by operators. Geolocation and traceability requirements are a core part of the Regulation. In practice, commentators indicate that would require mapping farms with precise GPS coordinates, checking that against evidence of deforestation using satellite images, inspecting the fields, tracing products digitally from farm to factory and putting in place deforestation risk assessment and mitigation measures. This may raise challenges for commodities such as palm oil where mills typically process fruit from a number of different farms which they blend. In addition, collecting geolocation data of smallholders and co-operatives could raise significant challenges.

Other concerns relating to the EU’s traceability plans have been raised

1 <https://www.hfw.com/EC-introduces-draft-law-seeking-to-ban-imports-and-exports-from-regions-at-risk-of-deforestation>

2 [Council agrees on new rules to drive down deforestation and forest degradation globally - Consilium \(europa.eu\)](#)

3 [Environment ministers seal Council positions on CBAM, deforestation - Borderlex](#)

4 [EU governments miss chance to strengthen anti-deforestation law, letting banks and the tyre lobby off the hook | Global Witness](#)

5 [Ministers back draft EU anti-deforestation law derided as ‘Swiss cheese’ by campaigners – EURACTIV.com](#)

6 Ibid

7 [Environment ministers seal Council positions on CBAM, deforestation - Borderlex](#)

8 [‘Full of more holes than Swiss cheese’? Europe accused of watering down its deforestation due diligence regulation \(foodnavigator.com\)](#)

9 Ibid

“The Regulation will now commence the next stage of the legislative process and will have its first reading in the European Parliament.”

by industry associations including COCERAL, FEDIOL and FEFAC¹⁰. They have argued that the traceability requirements, which have been included as part of the operator’s risk assessment, impose an obligation on the operator to consider the “*risk of mixing with products of unknown origin or produced in areas where deforestation or forest degradation has occurred or is occurring*”. They claim that the separation of verified and non-verified products will have a disruptive effect on supply chains and would also require the building of new infrastructure. This could have the potential to undermine existing deforestation efforts in high-risk countries as operators switch to more low-risk areas¹¹. Whilst these plans have the potential to be costly, they have received support from some NGOs¹².

One further proposed change that was made was to amend the applicable timeline contained within the definition of “*deforestation-free*” from 31 December 2020 to 31 December 2021¹³. Importers should therefore consider that the qualification of deforestation-free products applies for land not

deforested since 31 December 2021 and not the original date of 31 December 2020. Whilst this imposes less of a retrospective obligation on importers, and would likely be welcomed by importers for that reason, it would still be necessary to undertake a retrospective analysis of land producing the relevant commodities.

Next Steps

The Regulation will now commence the next stage of the legislative process and will have its first reading in the European Parliament. The European Parliament is expected to adopt its position on the Regulation in the plenary session on 12 September 2022, before engaging in further discussions with the EU Council¹⁴ in the latter stages of 2022 to agree the final text.

As we stated in our first briefing¹⁵, if approval is 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 18 months from the entry into force of the Regulation.

For further information please contact:



ANTHONY WOOLICH

Partner, London

T +44 (0)20 7264 8033

E anthony.woolich@hfw.com



EIRINI ROUSSOU

Senior Associate, Brussels

T +32 (0) 2643 3410

E eirini.roussou@hfw.com.

Assistance provided by
Robert Shorrock, Trainee Solicitor.

¹⁰ EU deforestation effort draws some concerns | World Grain (world-grain.com)

¹¹ Industry groups still find fault with proposed EU deforestation law (feednavigator.com)

¹² Industry warns against EU’s traceability plans to prevent deforestation – POLITICO

¹³ Environment ministers seal Council positions on CBAM, deforestation - Borderlex

¹⁴ Industry groups still find fault with proposed EU deforestation law (feednavigator.com)

¹⁵ <https://www.hfw.com/EC-introduces-draft-law-seeking-to-ban-imports-and-exports-from-regions-at-risk-of-deforestation>

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