

**VAN BAEL & BELLIS**



# **The EU Deforestation Regulation- the Agreed Text**

**|27 January 2023**

On 17 November 2021, the European Commission (“Commission”) published a Proposal for a Regulation on placing on the EU market and exporting from the European Union wood, cattle (beef), cocoa, coffee, palm oil and soy and derived products associated with deforestation and forest degradation (“Proposed Regulation”). According to the Proposed Regulation, those products – irrespective of their origin – can no longer be placed or made available on the EU market or exported from the EU market, unless they are deforestation-free.

The Proposed Regulation, which is subject to the ordinary legislative procedure, must be approved by the European Parliament (“Parliament”) and the Council of the European Union (“Council”). Both the Council and the Parliament have put forward amendments to the Proposed Regulation. There have been trilogue discussions between the three institutions regarding the amendments submitted. Following this process, the three institutions have reached in December 2022 an agreement on a compromise text (“Agreed Text”). The Agreed Text must now be formally approved by respectively the Parliament and the Council, expectedly during the first quarter of 2023. The Regulation will then be published in the Official Journal of the European Union.

This Client Alert sets out the key elements of the Agreed Text that are of interest to producers, traders, importers and exporters of the relevant products.

## **WHAT IS THE PURPOSE OF THE DEFORESTATION DUE DILIGENCE RULES?**

The Agreed Text seeks to curb consumption of commodities and products coming from supply chains associated with deforestation or forest degradation and increase EU demand for “deforestation-free” commodities and products. By addressing deforestation and forest degradation linked to EU consumption and production, the Agreed Text also intends to reduce EU-driven GHG emissions and biodiversity loss.

## **WHAT PRODUCTS ARE TARGETED?**

The Agreed Text covers cattle, cocoa, coffee, palm oil, soya, wood and rubber as well as certain products that contain, have been fed with or have been made using relevant commodities (such as chocolate). The covered commodities and products are listed in Annex I. The Agreed Text provides that, within two years of the Regulation’s entry into force, the Commission shall present an impact assessment as to the appropriateness of amending or extending the list of covered commodities and products, with specific attention to the potential inclusion of maize and biofuels.

## **DEFINITION OF “DEFORESTATION” AND “FOREST DEGRADATION”**

The Agreed Text defines “deforestation” as “the conversion of forest to agricultural use, whether human induced or not” and “forest degradation” as the “structural changes to forest cover, taking the form of the conversion of primary forests or naturally regenerating forests into plantation forests or into other wooded land and the conversion of primary forests into planted forests”.

## PROHIBITION

Under the Agreed Text, the covered products are prohibited to be placed or made available on the EU market, or exported from the EU market, unless (i) they are deforestation-free, i.e. they contain, have been fed with or have been made using commodities that were produced on land that has not been subject to deforestation after 31 December 2020; (ii) they have been produced in accordance with the relevant legislation of the country of production; and (iii) they are covered by a due diligence statement.

This prohibition applies to the covered products originating in any country. No exception applies.

A **benchmarking system** will operate. It will classify all countries, including EU Member States and third countries, as presenting a low, a standard or a high risk of producing covered goods that are not deforestation-free.

At the entry into force of the Regulation, all countries will be assigned a standard level of risk. The Commission will then identify the countries that present a low or a high risk in accordance with criteria listed in the Agreed Text. The list of such countries will be published. The classification of countries will be reviewed and updated if appropriate, as often as necessary. The Commission is required to engage in a specific dialogue with countries that are or risk to be classified as high risk with the objective to reduce their level of risk. The Commission must also formally notify the countries and the competent authorities of its intention to change the existing risk category of that country.

The objective of the benchmarking system is to incentivise countries to ensure stronger forest protection and governance, to facilitate trade and better manage enforcement efforts by helping Member States' competent authorities to focus resources where they are most needed, and to reduce companies' compliance costs. Through the benchmarking system, the Commission will assess the risk that countries or parts thereof are producing covered goods that are not deforestation-free. The obligations for operators and Member States' competent authorities will vary according to the level of risk of the country of production.

## WHICH OPERATORS ARE CONCERNED?

All companies that produce or sell the covered goods within the European Union or export those goods from the European Union must comply. In addition, EU and foreign producers of the covered goods will be impacted because their products must meet the Agreed Text's requirements in order to be sold in or exported from the European Union. For instance, an EU producer of coffee will need to ensure that the supply chain is deforestation-free, and therefore confirmation of that status will have to be obtained from related traders or distributors.

"Operators" are natural or legal persons which, in the course of a commercial activity, place the covered products on the EU market or export them from the EU. A "trader" is defined as any person in the supply chain other than the operator which, in the course of a commercial activity, makes available on the EU market the covered products. They both have obligations under the Agreed Text, but special rules apply when they are SMEs.



## WHAT ARE THE MAIN OBLIGATIONS FOR OPERATORS AND TRADERS?

Operators and traders shall not place the relevant products on the EU market nor export them from the EU (i) if the products have been produced on land that has been subject to deforestation or forest degradation after 31 December 2020; (ii) the products have not been produced in accordance with the relevant legislation of the country of production; or (iii) without prior submission of a due diligence statement.

As part of the due diligence obligations, operators and traders will have to:

- **collect relevant information**, documents and data demonstrating that the relevant products are consistent with the obligations laid down in the Agreed Text;
- **carry-out a risk assessment** to establish whether there is a risk of non-compliance with the requirements of the Agreed Text;
- **adopt risk mitigation procedures and measures** which are adequate to reach no or negligible risk, such as additional information, data or documents, undertaking independent surveys or audits.

Operators and traders which are SMEs are subject to fewer obligations.

In order to exercise their due diligence obligations, operators must establish and keep up to date a framework of procedures and measures to ensure that the relevant products that are placed on or exported from the EU market are deforestation-free and produced in accordance with the legislation of the country of production. The due diligence system must be reviewed once a year. Operators, except SMEs, microenterprises and natural persons, must report annually on their due diligence system.

## CHECKS AND ENFORCEMENT

Enforcement will take place at Member State level. The competent authorities in each country will be responsible for identifying checks to be carried out on a risk-based approach and for establishing through checks, whether any product complies with the requirements. Customs authorities will carry out controls on the customs declarations lodged in relation to relevant products entering or leaving the EU market. Customs authorities and competent authorities will cooperate closely and exchange information.

Competent authorities are also responsible for imposing penalties, such as fines, the confiscation of the covered goods and possibly of revenues, the temporary exclusion from public procurement processes and access to public funding, the temporary prohibition from placing products on the EU market in case of serious infringement or of repeated infringements.

The Agreed Text also provides for a complaint system whereby persons and entities may submit “substantiated concerns” to the competent authorities when they deem that one or more operators or traders are failing to comply with their obligations. The authorities will then have to assess the concerns raised and take the necessary steps, including checks and hearings of operators and traders.

## PUBLICATION AND ENTRY INTO FORCE

The Regulation is expected to be published in the Official Journal of the European Union during the first half of 2023. The entry into force will take place on the 20<sup>th</sup> day following the publication of the Regulation.

Compliance with the Regulation will become mandatory for companies 18 months after its entry into force, while microenterprises and small enterprises established by 31 December 2020 will have 24 months to comply with it.

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