



The EU Deforestation Due Diligence Proposal: Key issues for the trilogue

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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) may no longer be placed or made available on the EU market or be 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”). The [Council](#) and the [Parliament](#) have put forward amendments to the Proposed Regulation. The so-called trilogue discussions between the three institutions are ongoing with a view to agreeing on the final text of the Regulation.

The below table provides a comparative overview of the negotiating positions of the Commission, the Parliament and the Council, highlighting the key points of disagreement between the three institutions.

Topic	European Commission's Proposal	Council	European Parliament
Product scope	<ul style="list-style-type: none"> Six commodities: wood, cattle (beef), cocoa, coffee, palm oil and soy Certain derived products such as leather, chocolate and furniture 	<ul style="list-style-type: none"> Additional derived products: charcoal and other wood products, including printed paper products 	<ul style="list-style-type: none"> Additional commodities: swine, sheep, goats, poultry, maize, rubber; and additional subheadings for cattle, oil palm products and wood Additional derived products: wood charcoal and printed paper products (e.g. books & newspapers)
Definition of deforestation	<ul style="list-style-type: none"> 'Deforestation' refers to conversion of forest to agricultural use, whether human-induced or not 'Forest' refers to land spanning more than 0,5 ha with trees higher than 5 metres and a canopy cover of more than 10%, or trees able to reach those thresholds in situ, excluding land that is predominantly under agricultural or urban land use 	<ul style="list-style-type: none"> Same definitions as proposed by the Commission 	<ul style="list-style-type: none"> 'Deforestation' refers to conversion, whether human induced or not, of forests or other wooded land to agricultural use or to plantation forest Same definition of forest as proposed by the Commission 'Other wooded land' refers to land not classified as forest, spanning more than 0.5 ha, with trees higher than 5 meters and a canopy cover of 5-10%, or trees able to reach these thresholds in situ, or a combined cover of shrubs, bushes and trees above 10%, excluding land that is predominantly under agricultural or urban land use
Definition of deforestation-free and the cut-off date	<ul style="list-style-type: none"> 'Deforestation-free' refers to products that were produced on land that has not been subject to deforestation after 31 December, 2020 and the wood has been harvested not inducing forest degradation after 31 December 2020 	<ul style="list-style-type: none"> 'Deforestation-free' refers to products that contain, have been fed with or have been made using relevant commodities that were produced on land that has not been subject to deforestation after 31 December 2021 and the wood that has been harvested not inducing forest degradation after 31 December 2021 	<ul style="list-style-type: none"> 'Deforestation-free' refers to products that were produced on land that has not been subject to deforestation, and have not induced or contributed to forest degradation or forest conversion after December 31, 2019
Timeline for expanding the scope	<ul style="list-style-type: none"> First review no later than 2 years after entry into force: evaluate extending the scope to other ecosystems (e.g. high carbon stock and highly biodiverse land), and additional commodities and products 	<ul style="list-style-type: none"> First review no later than 2 years after entry into force: evaluate extending scope to other ecosystems and additional commodities, specifically rubber 	<ul style="list-style-type: none"> Impact assessment 1 year after entry into force, accompanied by a proposal to extend the scope to other natural ecosystems Review 2 years after entry into force: evaluate extending the product scope to additional commodities and derived products, specifically sugar cane, ethanol and mining products

Benchmarking and risk assessment	<ul style="list-style-type: none"> • A three-tier system for assessing countries or parts thereof: low risk, high risk and standard risk 	<ul style="list-style-type: none"> • A three-tier system for assessing countries or subnational jurisdictions thereof: low risk, high risk and standard risk • Definitions of 'low', 'high' and 'standard' risk • Clarification that benchmarking system must apply to both EU Member States and third countries 	<ul style="list-style-type: none"> • A three-tier system for assessing countries or parts thereof: low risk, high risk and standard risk • Rate of forest conversion to be taken into account • Before assigning a change of the existing risk category, the Commission must inform the country concerned, regional authorities, operators and traders and carry out public consultations • Additional assessment criteria (e.g. transparency of data in the country concerned)
Obligations for financial institutions	<ul style="list-style-type: none"> • None 	<ul style="list-style-type: none"> • None 	<ul style="list-style-type: none"> • Due diligence obligation for financial institutions before providing financial services to customers, whose activities are linked to trading/placing on the market relevant commodities and products. If the risk of non-compliance is not negligible – no financial services may be provided
Who is subject to due diligence obligations if an operator placing a commodity/product on the market is established in a third country	<ul style="list-style-type: none"> • If the covered commodity or product is placed on the EU market by a natural or legal person established in a third country, the person established in the EU who buys or takes possession of that commodity or product is considered an operator subject to due diligence obligations 	<ul style="list-style-type: none"> • If the covered commodity or product is placed on the EU market by a natural or legal person established in a third country, the person established in the EU who buys or takes possession of that commodity or product is considered an operator subject to due diligence obligations 	<ul style="list-style-type: none"> • If the covered commodity or product is placed on the EU market by a natural or legal person, regardless of size, established in a third country, the person established in the EU who buys or takes possession of that commodity or product is considered an operator subject to due diligence obligations • If no manufacturer or importer is established in the EU, on-line marketplaces are subject to due diligence obligations for products and commodities for which they facilitate the sale

Checks by competent authorities	<ul style="list-style-type: none"> • Annual checks by Member States' competent authorities must cover: <ul style="list-style-type: none"> ➤ at least 5% of the operators placing on or exporting from the EU market each of the relevant commodities on that Member State's market as well as 5% of the quantity of each of the relevant commodities placed on or exported from their market ➤ if commodities or products originate in high-risk countries or if there is a risk of relevant commodities or products produced in those countries entering the relevant supply chain, the share of operators and products/commodities to be checked must be 15% 	<ul style="list-style-type: none"> • Annual checks by Member States' competent authorities must cover: <ul style="list-style-type: none"> ➤ at least 1% of operators, and traders that are not SMEs, where products or commodities used to produce those products originate in standard risk countries ➤ if commodities or products originate in high-risk countries, at least 5% of the operators, and traders that are not SMEs • Based on a risk-based approach, the competent authorities must identify situations where relevant products call for immediate action 	<ul style="list-style-type: none"> • Annual checks by Member States' competent authorities must cover, at the national level: <ul style="list-style-type: none"> ➤ at least 10% of the operators placing on or exporting from the EU market each of the relevant commodities and products on that Member State's market as well as 10% of the quantity of each of the relevant commodities and products placed on or exported from their market ➤ if commodities or products originate in low-risk countries, the share of operators and products subject to checks may be reduced to 5% ➤ if commodities or products originate in high-risk countries, the share of operators and products subject to checks must be at least 20%
Enforcement	<ul style="list-style-type: none"> • Fines proportionate to the environmental damage and the value of the relevant commodities • Max. amount of fines: at least 4% of the operator's or trader's annual turnover in the Member State(s) concerned • Confiscation of relevant commodities and products • Confiscation of revenues gained by the operator from a transaction with relevant commodities and products • Temporary exclusion from public procurement processes 	<ul style="list-style-type: none"> • Same penalties as proposed by the Commission, but temporary exclusion from public procurement processes is capped at max. 12 months 	<ul style="list-style-type: none"> • Max. amount of fines: at least 8% of the operator's or trader's annual turnover in the European Union (can be increased to ensure that it exceeds the potential economic advantage) • Exclusion from public procurement processes and from access to public funding • In case of serious or repeated infringements, temporary or permanent prohibition on placing or making available relevant commodities and products on the EU market, or exporting them from the European Union • Additional obligations: restore the environment; compensate for damage done to any natural or legal person that could have been avoided through due diligence) • Prohibition on using the simplified due diligence procedure

For additional information on the EU Deforestation Due Diligence Proposal, you may also be interested to consult the following additional resources prepared by our team:

- [European Commission proposes deforestation due diligence rules](#), VBB Client Alert, 24 November 2021
- [The EU deforestation due diligence proposal: How will it affect Swiss business](#), VBB Client Alert, 2 December 2021
- [The EU Deforestation Due Diligence Proposal: update on the positions of EU institutions](#), VBB Client Alert, 24 August 2022

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