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An Update on the EU Deforestation Regulation – The Parliament’s Proposal

In 2021, the European Commission proposed legislation to address deforestation globally. In addition to the resulting loss of ecosystems and habitats, deforestation releases carbon dioxide stored in forest biomass into the atmosphere. According to some studies, deforestation is responsible for approximately 15% of global carbon emissions. This fall, the European Parliament adopted its position, voting to strengthen the Regulation proposed by the Commission. Among other things, the Parliament is seeking to broaden the scope of covered commodities and products and add obligations for financial institutions. In this Alert, we discuss several key aspects of the Parliament’s position on the proposed deforestation Regulation.

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The Parliament’s position was adopted with strong support, by a vote of 453 to 57, with 123 abstentions. Six key Parliament amendments to the Commission’s proposal are discussed in this Alert:

- More expansive definitions of “deforestation” and “forest degradation.”
- A significantly expanded list of covered commodities and products.
- An earlier measurement date for assessing whether products are deforestation-free.
- A new prohibition specific to financial institutions, with associated obligations.
- A requirement that goods be produced in accordance with human rights protected under international law.
- The establishment of a worldwide forest data platform that uses satellite imagery.

The Commission’s proposal is discussed in our earlier Alert [here](#). The text adopted by the Parliament retains many aspects of the Commission’s proposal. However, in addition to the modifications discussed in this Alert, the Parliament text includes, among other things, (1) enhanced stakeholder engagement, due diligence and reporting requirements, (2) obligations for online marketplaces, (3) a requirement that the Commission issue commodity-specific guidelines in support of the Regulation, (4) more robust Member State competent authority compliance monitoring and (5) enhanced penalty provisions and remediation obligations.

The European Council also has adopted a position on the Commission proposal, which occurred this past summer. That position, which is not discussed in this Alert, is in some respects more closely aligned with the Parliament and in other respects more closely aligned with the Commission.

Under the EU’s tripartite legislative process, the final Regulation will require agreement among the Council, Commission and Parliament. Therefore, the final Regulation will differ in at least some respects, and may be substantially different, from their respective published positions. Many commentators expect – and some are hopeful that – political agreement on the Regulation will be announced before the U.N. Biodiversity Conference (COP15), which will take place in Montreal from December 7 to 19.

Expanded Scope of Deforestation and Forest Degradation

As proposed by the Commission, “deforestation” only would have included the conversion of forests to agricultural use. The Parliament proposes to expand the definition to also include the conversion of other wooded land to agricultural use, as well as the conversion to plantation forest.

- **“Other wooded land”** would be defined as land not classified as forest, spanning more than .5 hectares, with trees higher than 5 meters and a canopy cover of 5% to 10%, or trees able to reach these thresholds in situ, or with combined cover of shrubs, bushes and trees above 10%, excluding land that is predominately under agricultural or urban use.
- Although used in the Commission proposal, **“agricultural use”** is not a defined term. The Parliament’s text defines that term as the use of land for any of the following: (1) cultivation of temporary or annual crops that have a growing cycle of one year or less; (2) cultivation of permanent or perennial crops that have a growing cycle of more than one year, including tree crops; (3) cultivation of permanent or temporary meadows or pastures as well as animal husbandry; and (4) temporary fallow land.
- As proposed by the Parliament, **“plantation forest”** would mean a planted forest that is intensively managed and, at planting and stand maturity, consists of (1) one or two species, (2) even age class and (3) regular spacing. It would include short rotation plantations for wood, fiber and energy and forests established through planting or seeding that at stand maturity resemble or will resemble naturally regenerating forests, but would exclude forests planted for protection or ecosystem restoration.

The Parliament also proposes to expand “forest degradation” to include, in addition to forests, “other natural ecosystem degradation.” The definition of forest degradation also has been amended in the Parliament’s proposal to indicate that degradation does not need to be directly caused by humans.

An Expanded List of Relevant Commodities and Products

Under the Parliament’s proposal, relevant commodities would be expanded to include the following seven additional commodities: (1) swine; (2) sheep; (3) goats; (4) poultry; (5) palm-oil based derivatives; (6) maize; and (7) rubber. The Commission draft includes the following commodities, all of which also have been retained in the Parliament’s proposal: (1) cattle; (2) cocoa; (3) coffee; (4) oil palm; (5) soya; and (6) wood.

Under both the Parliament and Commission proposals, Annex I of the Regulation would list relevant products that contain, have been fed with or have been made using relevant commodities. In addition to adding products in each of the new commodity categories, the Parliament has proposed the inclusion of additional relevant products in some of the existing commodity categories, including charcoal and printed paper products (as wood products).

An Earlier Measurement Date for Deforestation-Free Commodities and Products

The Commission proposed that relevant commodities and products be required to be produced on land that has not been subject to deforestation after December 31, 2020. The Parliament voted to move this date up by a year, to December 31, 2019.

A New Prohibition – and Related Obligations – for Financial Institutions

As proposed by the Parliament, a financial institution would only be allowed to provide financial services to customers if it concludes that there is no more than a negligible risk that the services potentially provide support directly or indirectly to activities leading to deforestation, forest degradation or forest conversion.

- **“Negligible risk”** would mean the level of risk that applies to relevant commodities and products to be placed on, or exported from, the European Union that shows no cause for concern on grounds of a full assessment of both product-specific and general information on compliance with the Regulation’s prohibitions and the application of the appropriate mitigation measures.

The prohibition would apply to financial institutions headquartered or operating in the European Union that provide financial services to natural or legal persons whose economic activities consist of, or are linked to, the production,

supply, placing on or export from the EU market of relevant commodities and products. The Parliament text indicates that all banking, investment and insurance activities of financial institutions should be included in the scope of the Regulation.

Financial institutions would be required to exercise due diligence prior to providing financial services to customers whose economic activities consist of, or are linked to, trading or placing relevant commodities and products on the EU market. Under the Parliament's proposal, due diligence would include the following:

- The collection of information, documents and data demonstrating the provision of financial services to customers complies with the Regulation's prohibition, specifically:
 - A description of (1) the customer's economic activities, (2) the activities of entities controlled by the customer and (3) the economic activities of the customer's suppliers;
 - Use of relevant commodities and products (for the foregoing activities), including information on the relevant commodities and products effectively used and on the related exercise of due diligence;
 - Policies adopted and implemented by the customer and the foregoing entities and suppliers to ensure their activities do not cause deforestation, forest degradation or forest conversion;
 - Information on the relevant commodities and products placed on, made available on or exported from the EU market and on the related exercise of due diligence; and
 - Identification of the country of production and geo-localization coordinates, latitude and longitude of all plots of land where the relevant commodities and products are to be produced.
- Risk assessment and mitigation measures.

Like operators, financial institutions would be required to verify and analyze the information collected, and any other relevant documentation, and carry out a risk assessment to establish whether there is a risk that the relevant commodities and products are non-compliant with the Regulation.

Additionally, financial institutions would not be able to provide financial services to customers without prior submission of a due diligence statement to the competent authorities (see our prior Alert [here](#) for additional details on the due diligence statement).

If a financial institution had an established, ongoing business relationship with a customer prior to the Regulation's effective date, the financial institution would need to complete its relevant due diligence within the first year after the Regulation takes effect.

Compliance with International Human Rights Protections

As proposed by both the Commission and the Parliament, the Regulation would prohibit operators from placing or making available in the European Union, or exporting from the European Union, relevant commodities and products unless they are produced in accordance with relevant laws and standards.

As noted in the recitals in the Parliament's text, the Parliament believes there is a direct link between deforestation and the conversion of ecosystems and the violation of human rights, in particular, those of indigenous peoples and local communities. Accordingly, the Parliament has proposed to expand the definition of "laws and standards" to include human rights protected under international law, in particular, instruments protecting customary tenure rights and the right to free, prior and informed consent, the right to defend the environment, free from any form of persecution and harassment, and other internationally recognized human rights related to land use, access or ownership.

- **“Free, prior and informed consent”** would be defined as a collective human right of indigenous peoples and local communities to give and withhold their consent prior to the commencement of any activity that may affect their rights, land, resources, territories, livelihoods and food security. The right would be exercised through representatives of their own choosing and in a manner consistent with their own customs, values and norms.

Worldwide Forest Platform

The Parliament’s proposal would require the Commission to establish a platform, using satellite imagery (including Copernicus Sentinel), covering the forest areas worldwide, and featuring tools to enable all parties to quickly move towards no-deforestation across supply chains. The platform would be required to include the following:

- Thematic maps, including a land cover map with time series following December 31, 2019 and a range of classes that allow for the examination of landscape composition.
- An alert system, relying upon a monthly monitoring of forest cover change.
- A range of analyses and user-friendly and secured outputs that depict how supply chains are linked to deforestation.

The platform would be required to be made available to Member State authorities, interested third countries’ authorities, operators and traders.

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