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The EU Deforestation Regulation Is Coming Soon – Will Your Products Be Deforestation-free?

The EU is on the verge of adopting a broadly applicable Deforestation Regulation. A stated impetus for the legislation is the environmental, economic and social benefits of forests.

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The Regulation will prohibit specified commodities and products from being imported into, exported from or made available in the European Union, unless they are deforestation-free and produced in accordance with relevant legislation in the country of production. The Regulation will require due diligence, as well as reporting. In this Alert, we discuss many of the features of the Regulation.

“Deforestation-free” under the Regulation

To be deforestation-free, relevant products must contain, have been fed with or have been made using relevant commodities that were produced on land not subject to deforestation. In addition, for products that contain or have been made using wood, the wood must have been harvested from the forest without inducing forest degradation.

“**Deforestation**” is defined in the Regulation as the conversion of forest to agricultural use, whether human-induced or not. This definition is in line with the European Commission’s original proposal.

- A “**forest**” is land spanning more than 0.5 hectares with trees higher than five meters and a canopy cover of more than 10%, or trees able to reach those thresholds *in situ*. Land that is predominantly under agricultural or urban land use is excluded.
- “**Agricultural use**” is the use of land for the purpose of agriculture, including for agricultural plantations and set-aside agricultural areas, and for rearing livestock. Under the Regulation, the Commission is instructed to develop guidelines that clarify this definition, in particular in relation to the conversion of forest to land that is used for purposes other than agricultural use.

“**Forest degradation**” is defined as structural changes to forest cover that involve the conversion of (1) primary forests or naturally regenerating forests into plantation forests or other wooded land and (2) primary forests into planted forests.

The Regulation contemplates its possible expansion in the relatively near term. Under the Regulation, the Commission is required to evaluate whether to extend the Regulation’s scope to “other wooded land” no later than one year after the Regulation enters into force. It also is required to consider expansion to other ecosystems, including land with high carbon stocks and with a high biodiversity value (such as grasslands, peatlands and wetlands), no later than two years after the Regulation enters into force.

Measurement Date for Deforestation-free Commodities and Products

A look-back date – December 31, 2020 – is to be applied for determining whether relevant products or commodities are deforestation-free. More specifically, to be deforestation-free, products must contain, have been fed with or have been made using relevant commodities that were produced on land that was not been subject to deforestation after December 31, 2020, and, in the case of wood, the wood has been harvested from the forest without inducing forest degradation after December 31, 2020.

The EU Parliament had proposed a December 31, 2019 look-back date. The final Regulation retains the date originally proposed by the Commission.

Relevant Commodities and Products

The Regulation will apply only to specified commodities and products, which are referred to in the Regulation as “relevant commodities” and “relevant products.” **“Relevant commodities”** are:

- Cattle
- Cocoa
- Coffee
- Oil palm
- Rubber
- Soy(a) and
- Wood

The included commodities largely mirror those in the Commission’s initial proposal. In an expansion from that proposal, rubber was added. However, swine, sheep, goats, poultry and maize, which were proposed for inclusion by the Parliament, did not make it into the final Regulation.

“Relevant products” are goods that contain, have been fed with or have been made using relevant commodities. Examples include chocolate, beef, furniture, charcoal and printed books and newspapers. The full list of relevant products are listed in Annex I of the Regulation.

The Commission will be required to carry out a review no later than two years after the Regulation enters into force to determine if other commodities and/or products should be covered, including maize.

The Regulation will supersede the more limited EU Timber Regulation.

Due Diligence

The Regulation will place due diligence obligations on operators. An **“operator”** is a person who, in the course of a commercial activity, places relevant products on the EU market or exports them. Prior to doing so, operators will be required to exercise due diligence. Due diligence will include the following:

- Satisfying the information requirements specified in the Regulation
- Assessing risk and
- Mitigating identified risks.

Operators generally will be required to submit a prescribed due diligence statement to the applicable competent authorities. Among other things, the due diligence statement will be required to contain country of production and geolocation information. An electronic reporting system will be established.

Operators will be required to establish and keep up to date a framework of procedures and measures to ensure relevant products comply with the Regulation. The due diligence system will be required to be reviewed at least annually. Operators also generally will be required to publicly report annually, including via the internet, on their due diligence system and the steps taken to fulfill their due diligence obligations.

Most of the requirements under the Regulation also apply to traders with respect to the relevant products they make available on the EU market. A “trader” is any person in the supply chain other than an operator who, in the course of a commercial activity, makes relevant products available on the EU market. For brevity (and consistent with the way the Regulation is set up), this Alert generally refers only to operators and the requirements specified for operators.

Information Requirements

Operators will be required to collect information, documents and data that demonstrate relevant products comply with the Regulation.

The Regulation indicates the specific information operators will need to collect. Among other things, this will include quantity, country of production, geolocation and supplier information, as well as adequately conclusive and verifiable information that relevant products are deforestation-free and relevant commodities have been produced in accordance with country of production legislation. This information will be required to be made available to the competent authorities upon request.

Assessing Risk

Operators will be required to verify and analyze the information collected and conduct a risk assessment to determine whether there is a risk that relevant products are non-compliant. Operators only will be permitted to place relevant products on the EU market or export them if the risk assessment indicates no or only a negligible risk of non-compliance.

The Regulation contains a detailed, non-exhaustive list of criteria the risk assessment is required to take into account. Among other information, risks and concerns, this includes country and subnational risk, the presence of forests and indigenous peoples, the prevalence of deforestation or forest degradation in the country or area of production and supply chain characteristics.

Operators must document and review the risk assessment at least annually. The risk assessment must be made available to competent authorities upon request. Operators will need to be able to demonstrate how information was gathered and checked against the Regulation’s risk assessment criteria and how the degree of risk was determined.

Risk Mitigation

Unless a risk assessment indicates there was no or only a negligible risk that relevant products are non-compliant, prior to placing the relevant products on the EU market or exporting them, the operator will be required to adopt risk mitigation procedures and measures to achieve no or only a negligible level of risk. The Regulation indicates that procedures and measures may include, among other things, requiring additional information, carrying out independent audits or supporting supplier compliance through capacity building and investments.

The Regulation further indicates that operators will be required to have in place adequate and proportionate policies, controls and procedures to mitigate and manage the risks of non-compliant relevant products. These generally will be required to include (1) model risk management practices, reporting, record-keeping, internal controls and compliance management, including the appointment of a management-level compliance officer, and (2) an independent audit function to check internal policies, controls and procedures.

Decisions on risk mitigation procedures and measures will be required to be documented and reviewed on an annual basis. Relevant information will be required to be made available to the competent authorities on request, and operators will be required to demonstrate how decisions on risk mitigation procedures and measures were taken.

Simplified Due Diligence

Simplified due diligence will be permitted if the operator concludes that relevant commodities and products were produced in countries or parts thereof classified as low risk, after assessing the complexity of the relevant supply chain, the risk of circumvention of the Regulation and the risk of mixing with products of unknown origin or originating in countries or parts thereof that are not low risk. If simplified due diligence is permitted, the risk assessment and risk mitigation requirements described above will not apply.

Risk Benchmarking System

To assist with risk assessments and compliance, the Commission will establish a benchmarking system that classifies countries (or parts thereof) as low risk, standard risk or high risk with regard to deforestation and forest degradation. As of the effective date of the Regulation, all countries will be considered standard risk, but countries will be formally classified within 18 months after the Regulation enters into force.

Penalties for Non-compliance

Member states will be required to set penalties for non-compliance that are proportionate to the environmental damage and the value of the relevant commodities or products. The Regulation contemplates the following:

- Fines; maximum fines are to be at least 4% of the operator's or trader's annual EU turnover.
- Confiscation of revenues from the relevant transaction.
- Temporary exclusion from public procurement and access to public funding for a maximum period of 12 months.
- In the case of a serious infringement or repeated infringements, temporary suspension from placing or making available on the EU market or exporting relevant commodities/products and a prohibition from exercising simplified due diligence.

Member state authorities will be required to carry out checks on a specified percentage of their operators and traders, depending upon a country's risk category: 9% of the operators for high-risk countries; 3% for standard-risk countries; and 1% for low-risk countries. In addition, for high-risk countries, member state authorities will be required to perform checks on 9% of the quantity of each of the relevant products that contain or were made using relevant commodities produced in a country or part thereof classified as high risk.

In addition, under the Regulation, persons may submit to competent authorities substantiated concerns of non-compliance by operators or traders. These will be required to be assessed by the competent authorities.

Next Steps

Last December, provisional agreement on the Regulation was reached. This April, the European Parliament formally approved the Regulation. European Council approval occurred on May 16. The Regulation is now awaiting signature. Once signed, the Regulation will be published in the Official Journal of the European Union.

Twenty days after signature, the Regulation will go into effect. Once the Regulation is in force, operators and traders generally will have 18 months before they are required to comply with the Regulation. Micro and small undertakings will have a 24-month compliance period.

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