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## **The draft European regulation on imported deforestation: the limits of an undifferentiated approach**

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### *Summary:*

*This contribution analyzes the European Commission's draft regulation presented in November 2021, revised in June 2022, and amended by the European Parliament in September 2022, which aims to prevent the placing on the European market of products whose production is linked to deforestation. The cornerstone of the project is the "due diligence" obligation imposed on importers. However, the project contains questionable elements, notably the "universal" definition of the forest, which poses a problem because it will prohibit the import of products that are legal in the country of origin but unacceptable in terms of the EU definition of the forest. The European project goes further than comparable legislation adopted or in the process of being adopted in the United Kingdom or the United States, which are aligned with the legality criteria in force in the producing countries.*

*Finally, the country risk "benchmarking" mechanism carries a risk of collectively penalizing all producers, regardless of their practices.*

*An alternative solution would be to adopt a "graduated response", based on "zero deforestation" certifications and modulating customs duties upon entry into the EU. The public authorities would contribute to the evolution of private certifications by labeling those that integrate, among other criteria, a zero-deforestation approach corresponding to European objectives and whose verification mechanisms are credible. A tax differential between zero deforestation products and others could be introduced. This would require an increase in some tariffs, and a revision of existing and future bilateral trade agreements. The revenues generated could be used to fund programs that help small-scale producers in exporting countries adopt sustainable practices and obtain certification. The goal would be for the EU to eventually import only certified zero deforestation products, with the most favorable tariffs.*

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The European Commission's (EC) plan to address deforestation associated with certain imported agricultural products was unveiled on November 17, 2021<sup>1</sup>. Around 20-25% of global deforestation is linked to international trade<sup>2</sup>, and the European Union (plus the UK) was estimated to have, in 2004, an annual "footprint" of about 730,000 hectares<sup>3</sup>.

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<sup>1</sup> [https://environment.ec.europa.eu/publications/proposal-regulation-deforestation-free-products\\_en](https://environment.ec.europa.eu/publications/proposal-regulation-deforestation-free-products_en)

<sup>2</sup> Pendrill et al. (2019). Agriculture and forestry trade drives large share of tropical deforestation emissions. *Global Environmental Change* 56, 1-10

<sup>3</sup> <https://ec.europa.eu/environment/forests/pdf/1.%20Report%20analysis%20of%20impact.pdf>

### **The due diligence obligation for importers**

The EC proposal states that before placing a product on the European market, each company must guarantee that it is not linked to a territory that has been deforested after December 31, 2020, by geolocating the plots of lands from which it comes and by setting up a traceability system. The products concerned are palm oil, soy, cocoa, coffee, beef and wood. Surprisingly, natural rubber from rubber plantations is not concerned, even though it is one of the drivers of deforestation, although not the most important one. Perhaps because a rubber plantation is a "forest" in the FAO definition, which the EC relies on. The EC draft also omitted monospecific fast-growing tree plantations, which are a major driver of deforestation in Asia. However, the European Parliament has proposed, through amendments voted in September 2022, to include swine, sheep and goats, poultry, corn and natural rubber, as well as charcoal and printed paper products, and to advance the deadline by one year to December 31, 2019. The European Parliament also voted to extend the scope of the Regulation to "other wooded lands", beyond forests as defined by the FAO, and in particular to wooded savannahs, with the aim of protecting the Brazilian *cerrados*, ecosystems that combine dry grasslands, wetlands and woodlands. These ecosystems are under pressure from soy producers, who have redeployed outside the Amazon biome since a moratorium on the trade of soy from deforested areas, initiated by agribusiness firms and NGOs. This moratorium, which came into effect in 2006, contributed to the slowing down of deforestation in the Brazilian Amazon, until the resumption of heavy deforestation for livestock in recent years.

The cornerstone of this project is the obligation of "due diligence" for importers, that is, the set of verifications that they must carry out to ensure the origin of the product to be imported, its legality and the conditions of its production, thus reducing the risk of marketing products involved in deforestation. The European Parliament, through its vote in September 2022, requested that due diligence also take into account "human rights abuses associated with deforestation, forest degradation and conversion, including violations of the rights of indigenous peoples, local communities and land rights holders". The Parliament's amendments still need to be approved by member states.

### **A broad "amnesty" for recent deforestation**

One of the main elements of this draft regulation is the mention of a "cut-off date" on deforestation set at 31/12/2020. The EU Environment Council of 28 June 2022 even proposed to extend this date to 31 December 2021. Concretely, this means that if the conversion of forest space has taken place before this date, these products are not considered as being linked to deforestation. The date of the end of 2020, and a fortiori that of the end of 2021, represents more than a compromise, it is the "top" of a time bracket mentioned by the EC ("between 2015 and 2020") a few months ago. The European Parliament had passed a resolution in 2020 that advised that the 2015 date be retained. In its September 2022 vote on the draft Regulation, the Parliament proposed the end of 2019. The dates proposed by the Commission and then by the "Environment" Council are clearly a gesture to the importing industries (and the producing countries) that requested the adoption of the earliest date. And this "amnesties" a lot of recent deforestation in large producer countries, such as Brazil or Ivory Coast, while countries with low deforestation such as Gabon, who wish to develop their agriculture now, will point out that they are more penalized.

### **The thorny issue of legal deforestation**

The other important point is the adoption of the FAO definition of forest, i.e. 10% tree cover (excluding oil palm or fruit trees) on a minimum area of 0.5 hectares. However, many countries have adopted a minimum threshold of 30% tree cover to define forests, i.e., a narrower definition of forest. By setting a threshold of 10% to define zero deforestation products, productions considered legal in the country

of origin (whose conversion may have involved an ecosystem with, for example, 20% cover) will be unacceptable to the EU, and, in principle, will not be allowed to be imported. This will create strong trade tensions and possible retaliatory measures. In this respect, a leaked memo from the EC's DG Trade considers that this project constitutes "*a direct challenge to notions of sovereignty over land use decisions*" because it does not distinguish between legal and illegal production (unlike the British law<sup>4</sup> or the US bill<sup>5</sup>).

The idea of having only one definition of forest for all countries (i.e., the same for Gabon, a country of dense forests, and Burkina, a country of dry and open forests) and all biomes reveals a lack of realism. It would be necessary to examine things on a case-by-case basis, and even biome by biome, as some countries have several forest biomes. If the EU is to move in this direction, shouldn't it rely on independent certification systems such as the Rainforest Alliance for cocoa, or the Roundtable for Sustainable Palm Oil (RSPO) for oil palm, which have recently adopted "zero deforestation" criteria?

#### **End of Voluntary Partnership Agreements for legal timber trade announced?**

The Commission is not questioning the European Union Timber Regulation (EUTR) of 2013, which aims to sanction importers who place illegally logged timber on the European market. However, the Commission is plainly preparing to abandon its "Voluntary Partnership Agreements" (VPA-FLEGT) initiative launched in the 2000s to help producer countries export only legal timber. The cornerstone of these VPAs are "FLEGT Licenses" on exported timber, all of which will have been verified (regardless of destination) through a "national legality verification system" audited by national authorities and the EC. These FLEGT Licenses, issued when shipped by the producing country for timber destined for the EU, exempt importers from the tedious paperwork linked to due diligence, thereby facilitating trade flows. However, of the 15 countries involved in this process, only Indonesia has managed to issue FLEGT Licenses since 2016. This situation is considered a failure in light of the large sums committed by Europe to this process.

In the new context, EC officials have indicated the need to "move from legality to sustainability" (hence the issue of degradation). The EUTR / VPA-FLEGT coupling is therefore destined to be dissolved into the new European multi-commodity regulation, which will make due diligence for all shipments, including consideration of "degradation" for timber, unavoidable. FLEGT Licenses are therefore no longer really on the agenda, even if they will still be used for some time (for the very few countries that have them) to meet the "legality" criterion in the due diligence procedures that importers will have to perform.

#### **Towards a collective penalty?**

A benchmarking of countries will be carried out to proportion the level of due diligence according to the country risk. Three levels of country risk (low, standard, high) will be established. The criteria for comparison would be deforestation rates, production trends for commodities at risk of deforestation, national policies, quality of governance, etc. While this approach follows a certain logic, it may put off importers from sourcing from countries such as Cameroon, Cambodia or the Democratic Republic of Congo, given the effort they will have to make to provide sufficient guarantees. The original EC text states that "certification or other third-party verified systems could be used in the risk assessment process", but that "however, these systems should not substitute the operator's responsibility for due diligence". Who will decide whether the importer's due diligence effort in addition to certification is sufficient? Interpretations are likely to vary greatly depending on the authorities of the European country concerned, creating uncertainty for economic operators. The European Parliament's ENVI

<sup>4</sup> U.K. Environment Act 2021

<sup>5</sup> U.S. Fostering Overseas Rule of law and Environmentally Sound Trade Act (2021)

Committee even voted on July 12, 2022 to reject the possibility of reviewing in future the potential role of private certification schemes as a means of mitigating risk

By not trusting private certification schemes that integrate zero deforestation criteria to declare the product “negligible risk”, the European Union will also sanction “clean” producers in contexts of difficult governance and rampant corruption. This will result in a collective penalty that is likely to further accentuate the shift of trade flows from the EU to Asia and emerging countries and will discourage responsible producers from operating in these countries. Thus, the EU is depriving itself of the lever of trade to influence sustainable practices through an incentive to develop zero deforestation production, even in risky areas, so as to access a more lucrative European market.

#### **A possible alternative: rely on zero deforestation certifications and modulate tariffs**

Adopted in 2018, France's national strategy to combat imported deforestation mentions the need to include the issue of deforestation in trade agreements and highlights the need to “assess the feasibility of implementing incentives for sustainable raw materials”. Bearing this in mind, we believe it is necessary to distinguish between illegal and legal deforestation, a distinction that is more politically acceptable than a boycott of agricultural imports associated with deforestation that is considered legal in the producing country but deemed environmentally problematic by the EC.

Ideally, producing and importing countries should agree on common definitions of forests (tailored to each biome) and on cut-off dates after which deforestation is no longer acceptable. However, this would be a long and very uncertain process. It would be more realistic to adopt a double principle, along the lines of the “graduated response” model:

- Prohibit the import of agricultural products from illegal deforestation (which is foreseen in the EC draft).
- Modulate tariffs according to the information and guarantees that the sector's actors provide to ensure that their production is zero deforestation (which is not foreseen by the EC). These differentiated tariffs should be introduced on the basis of independent certifications including zero deforestation criteria. These certifications would be accredited by public authorities and subject to a continuous evaluation process. Switzerland has just paved the way through an agreement with Indonesia that lowers tariffs by up to 40% for certified palm oil (three approved standards). The performance of the certifications will be monitored over time by the authorities.

#### **“Governing” private certifications through incentives**

The current lack of zero deforestation certification for some commodities could be an obstacle, but the situation is rapidly changing. Since 2018, certifications such as RSPO (palm oil) or Rainforest Alliance (cocoa and other commodities) have incorporated such criteria (and timber certifications such as FSC or PEFC already have provisions about deforestation). It can be assumed that certifications will follow suit and that business demand will be much more pressing if a prospect of differentiated taxation at EU borders becomes clear.

For public authorities, this would be a way to make private certifications evolve, insofar as they could label those that integrate a zero-deforestation approach corresponding to European expectations and whose verification mechanisms are deemed credible. Beyond zero deforestation criteria, certifications also address other important issues related to wildlife conservation, social dimensions, fair earnings for small producers, gender, etc. Hence the interest in using these levers.

Nevertheless, the Achilles heel of many certification systems remains the risk that auditors (private certification bodies) come under the grip of the companies that select and pay them. To some extent, the assessment of sustainability criteria is still subjective, and companies tend to choose auditors who are known to be complacent and avoid the strictest ones. However, public authorities can require certification systems to find ways to ensure greater auditor independence. This can be done through continuous performance evaluation and conditional re-accreditation. For example, an accredited auditor can be randomly assigned instead of being selected by the company.

### **Designing a fair measure for small-scale producers in the South**

The proposed alternative can be summarized as follows: in all cases, importers should comply with the legal requirement of due diligence and ensure that the product is not associated with illegal land conversion. If this condition is fulfilled and the importation takes place, in order to benefit from a more favorable customs tariff, the importer will have to demonstrate that his product that is deemed legal under the legislation of the producing country, can also be labeled “zero deforestation” by an independent certification system approved by the EU. Without this label, it will not benefit from a favorable customs tariff.

The logical sequence would be as follows:

- If due diligence suggests a high risk of illegality, the responsible importer will not market the production concerned.
- If the due diligence is conclusive (no or negligible risk of illegality), but the product is not certified zero deforestation, then a higher tariff is applied.
- If the due diligence is successful and the product is certified as zero deforestation, then a favorable tariff is applied. A zero-deforestation certification also incorporates the guarantee of legality, thus facilitating due diligence.

The problem is that many tariffs are at a 0% rate (such as soy, natural rubber or cocoa). Introducing a tax differential between zero deforestation products and others will require an increase in some tariffs, and thus a revision of existing and future bilateral trade agreements. Although a unilateral increase in some tariffs may be challenged at the WTO level, there is room for maneuver if one relies on the provisions of GATT Article XX - relative to general exceptions allowing for measures necessary to pursue a legitimate objective (such as the protection of human or animal life or health, or the conservation of exhaustible natural resources) as long as the measure does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The additional tax revenue could also be used to fund programs that help small producers in exporting countries to adopt sustainable practices and obtain certification. In addition, individual certification may not be the only instrument. Group certification and zero deforestation labelled territories may be among the instruments used.

Such an allocation of additional tax revenues to producing countries, corresponding to the taxes levied on their imports, would ward off accusations of protectionism and provide a “good faith” basis for defending this measure in front of WTO bodies. And, as with all ecological tax mechanisms, the objective would be for the yield of this import duty to decrease, i.e., for the EU to eventually import only certified zero deforestation products with the most favorable tariffs.