



# GRAPE 4 Greening Agri-food Policy in the EU

## Deforestation-free agri-food supply chains: will the new EU regulation be up to the challenge?

### Abstract

Global forests are under threat from deforestation and degradation. This has negative impacts on biodiversity and counteracts climate change mitigation efforts. It is therefore indispensable to tackle agricultural expansion which lies at the heart of almost 90% of global deforestation. The EU, whose consumption is estimated to be responsible for at least 10% of tropical deforestation, has an important role to play in bringing change.

This paper provides an analysis of the proposed new EU regulation on deforestation-free supply chains which seeks to address the EU's significant contribution to global deforestation caused by its demand for certain agricultural and food products. We show that this legislation is an important part of the basket of measures under the Farm-to-Fork Strategy aiming to make the European agri-food system more sustainable. Due diligence can be an effective

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#### Notes

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tive tool for reducing the risk of deforestation and forest degradation embedded in EU agri-food supply chains. We argue that the targeted, commodity-based approach taken in this regulation is useful in establishing a solid and implementable regulatory framework which could withstand legal challenges from trading partners. Considering the risk of loopholes and leakage effects, it will however be necessary to adopt adequate complementary meas-

ures, which include effective engagement with producer countries, other consumer countries and stakeholders, in order to foster effectiveness and success of this legislation and address root causes of deforestation. Creating a harmonised and consistent policy framework for all agri-food system actors furthermore requires ensuring consistency between this regulation and other relevant legislations, incl. for the financial sector.



## 01.

### Introduction

Studies show that food production is linked to significant environmental damage and ecosystem degradation<sup>1</sup>. Forests cover 31% of the global land area<sup>2</sup> and are crucial for the preservation of our climate and biodiversity. Global forests are however under pressure from deforestation and degradation caused by human activities, with

farming and food production playing a significant role. Agricultural expansion lies at the heart of almost 90% of global deforestation. Growing demand, consumer preferences for certain products, and food loss and waste all play a role in agriculture-induced deforestation. EU consumption alone is estimated to be responsible for at least 10% of tropical deforestation<sup>3</sup>.

<sup>1</sup> Greenpeace (2022) *Greenpeace's views on the Commission proposal for an EU regulation on deforestation-free products*, <https://www.greenpeace.de/publikationen/greenpeace-briefing-eu-commission-deforestation-law.pdf>, p. 8–9.

<sup>2</sup> FAO (2022) *FRA 2020 Remote Sensing Survey*, FAO Forestry Paper No. 186, <https://www.fao.org/3/cb9970en/cb9970en.pdf>, p. 15.

<sup>3</sup> European Commission (2021) *Commission Staff Working Document. Impact Assessment minimising the risk of deforestation and forest degradation associated with products placed on the EU market [...]*, SWD(2021) 326 final, p. 17; WWF estimates it even as high as 16% (<https://www.wwf.eu/?2831941/EU-consumption-responsible-for-16-of-tropical-deforestation-linked-to-international-trade>).



For all these reasons, the EU needs to take responsibility for the damages to forests which are caused by its demand for certain agricultural and food products. There are different ways to address this issue at the different stages of the supply chain. They include:

### 1. Changing diets and raising consumer awareness

Making EU food consumption more sustainable is closely linked to taking up healthier dietary habits. Soya, for example, is one of the most important drivers of deforestation. Though China is by far the biggest importer of soya worldwide<sup>4</sup>, the EU's contribution of imported soya consumption to risk of deforestation is still significant in global comparison<sup>5</sup>. A large share of this imported soya is used for animal feed. WWF estimates that 90% of the soya the average European consumes per year is "hidden" in animal products. A shift to a more plant protein-based and a more sustainable and healthy diet would help reduce the EU's environmental footprint<sup>6</sup>.

Raising awareness of the environmental impact of dietary choices is not only relevant in the EU, but worldwide as the example of palm oil shows. Palm oil is a common ingredient of processed food. The shift in consumer preferences to more processed food in India and China correlates with a rising global demand for palm oil which is known to be responsible for significant deforestation activities, in particular in Indonesia and Malaysia<sup>7</sup>. In addition to food products, palm

oil is a common ingredient in cosmetics and other chemical products and is used for biofuel production. Awareness-raising thus needs to go further than food consumption.

### 2. Fighting food waste along the whole value chain from farm to fork

Another aspect of reducing the pressure on ecosystems arising from agricultural expansion is to ensure that the food that is produced is actually consumed. Around one third of all food produced globally is lost or wasted<sup>8</sup>. Post-harvest food loss still on the farm or during transport and processing occurs mainly in developing countries due to a lack of infrastructure. Technical support for these countries for building up relevant infrastructure which facilitates transport and trading could help reduce the amount of food that is lost. In the EU, where a fifth of all food produced is lost or wasted, the bigger problem is food waste at the retail and consumption stages. To address this, steps should be taken to raise awareness for the matter, to inform and educate consumers better, and to reduce waste at retail. This includes rethinking expiration date labelling, for example<sup>9</sup>.

### 3. Ensuring deforestation-free supply chains (through corporate responsibility)

While the previous two options target primarily EU consumers, EU food chain actors should also be held responsible for the impact of the commodities and products they market and trade. This can be achieved through due diligence obligations which oblige them to ensure that their supply chains are deforestation-free. Such due diligence obligations imposed on EU operators and traders are a way not

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[fern.org/fileadmin/uploads/fern/Documents/2022/Palm\\_oil\\_production\\_consumption\\_and\\_trade\\_pattern.pdf](https://www.fern.org/fileadmin/uploads/fern/Documents/2022/Palm_oil_production_consumption_and_trade_pattern.pdf), p. 8; while the food industry is by far the biggest demander of palm oil, biofuel production is the fastest growing area of demand for palm oil (p. 4).  
<sup>8</sup> FAO (2022) *Nutrition. Food loss and waste*, <https://www.fao.org/nutrition/capacity-development/food-loss-and-waste/en/>.

<sup>9</sup> Sustainability labelling for food products is one of the legislative initiatives under the Farm-to-Fork Strategy, expected to be published by the Commission end of 2023 as part of the sustainable EU food system regulation.

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<sup>4</sup> De Maria, M. et al. (2022) *Moving Towards a Sustainable Soybean Supply Chain. A Sustainable Policy Toolbox for Brazilian Stakeholders and Other Global Actors*, <https://doi.org/10.34892/ha52-ma53>, p. 4; China imports 58% of traded soya.

<sup>5</sup> European Commission (2021) see supra footnote 3, p. 17.

<sup>6</sup> Aubert, P.-M. et al. (2019) *Agroecology and carbon neutrality in Europe by 2050: what are the issues? Findings from the TYFA modelling exercise*, [https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20iddri/Etude/201904-ST0219-TYFA%20GHG\\_2.pdf](https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20iddri/Etude/201904-ST0219-TYFA%20GHG_2.pdf), p. 5.

<sup>7</sup> Fern (2022) *Palm Oil Production, Consumption and Trade Patterns: The Outlook from an EU Perspective*, <https://www.fern.org>.

only to regulate agricultural production within the EU, but also to address it indirectly in third countries. International law sets limits to the extent the EU can address farming practices in third countries<sup>10</sup>, but well-designed due diligence obligations can be a WTO-compatible instrument to tackle deforestation linked to EU food imports.

A recent survey shows the outstanding support of EU citizens for policies prohibiting the marketing and selling of products related to deforestation. Almost half of the respondents consider large companies to be the actors most responsible for forest protection<sup>11</sup>. An assessment of the 500 most influential companies and financial institutions in agri-food production revealed, however, that many of them have no or only insufficient policies in place to tackle deforestation in their supply chains<sup>12</sup>.

The new EU regulation on deforestation-free agri-food and wood products which the European Commission proposed in November 2021<sup>13</sup> is a response to the EU's significant contribution to global deforestation. Initiated by the European Parliament in 2020, the EU's legislative proposal, which would replace and expand the existing Timber

Regulation, aims for minimising the risk of deforestation and forest degradation in EU agri-food supply chains through due diligence obligations for operators and traders. Though it has been welcomed by most stakeholders, there are some aspects that have triggered important discussions. The Council and the European Parliament have agreed on their respective negotiating positions in June and September; inter-institutional negotiations have started recently.

In this paper, we provide an analysis of the proposed regulation in the context of food system transformation. We outline the initial proposal by the Commission and discuss the European Parliament's and the Council's proposed amendments to specific aspects of it. We won't address all technical details but use some examples of the discussion to highlight important points which are not only relevant for this legislation, but for any similar legislation which seeks to address agricultural production standards within the EU as well as beyond its borders. We argue that the proposed regulation has the potential to deliver impact if emphasis is put on implementing a robust and enforceable legislative framework that is compatible with WTO law and also perceived as acceptable by the EU's trade partner countries. An overburdening of the legislation should be avoided at this stage. Negative externalities and loopholes need however to be addressed in future revisions. The sector-specific and commodity-driven approach taken in this regulation, while cleaning EU supply chains, will not necessarily bring the transformative systemic changes needed. Therefore, complementary actions and measures, including diplomacy and cooperation with producer and other consumer countries, are indispensable. Furthermore, consistency with other EU initiatives and legislations, incl. for the financial sector, needs to be ensured.

<sup>10</sup> Lamy, P., Pons, G., Garzon, I., Hub, S. (2022) *GRAPE 2: A narrow path for EU agri-food mirror measures*, <https://www.europejacquesdelors.eu/publications/grape-2-a-narrow-path-for-eu-agri-food-mirror-measures>.

<sup>11</sup> Agence Europe (2022) Newsletter of 5 September 2022, 15. ENVIRONNEMENT: soutien de plus de 80% des Européens au règlement de l'UE contre la déforestation importée, selon un sondage Bruxelles (survey carried out by Globescan in 9 different EU Member States in July).

<sup>12</sup> Forest500 (2022) *A climate wake-up: but business failing to heat the alarm on deforestation*, Executive Summary, <https://forest500.globalcanopy.org>.

<sup>13</sup> European Commission (2021) *Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) no. 995/2010*, COM(2021) 706 final, 17 November 2021.

02.

## Why does deforestation matter for EU agri-food sustainability?

Tackling global deforestation is indispensable for reducing GHG emissions, fighting climate change, and protecting biodiversity. According to the latest IPCC report on climate change mitigation, the agriculture, forestry and other land uses (AFOLU) sector accounted for 13-21% of total global anthropogenic GHG emissions in 2010-2019. 45% of total AFOLU emissions are caused by deforestation alone<sup>14</sup>, while forests harbour most of the world's terrestrial biodiversity<sup>15</sup>.

In the context of EU agri-food sustainability, there are two reasons to look at deforestation and forest degradation. The first, mentioned in the introduction, is the fact that unsustainable farming practices are the main driver of global deforestation and can lead to degradation of forests. The second is that farming depends on the functioning of forest ecosystems as these are critical for sustaining regional climate and water cycles<sup>16</sup>. The loss of trees leads to other environmental problems such as floodings, soil erosion, and desertification which are threats to agriculture.

The specific structure of its agri-food system puts the EU in a position where it is not only responsible for the environmental impact of domestic agricultural and food pro-

<sup>14</sup> The rest are direct emissions from agricultural production, e.g. from livestock and fertiliser use.

<sup>15</sup> Namely: 80% of amphibian species, 75% of bird species and 68% of mammal species. FAO and UNEP (2020) *The State of the World's Forests 2020. Forest, biodiversity and people*, <https://doi.org/10.4060/ca8642en>, p. 2.

<sup>16</sup> Lathuilière, M. et al. (2022) *Beyond deforestation: water use in global agricultural commodity supply chains*, Discussion brief, Stockholm Environment Institute, <http://doi.org/10.51414/sei2022.005>.

duction, but also for how the products and commodities are produced elsewhere if they are then imported and consumed within the EU. EU food production and consumption are inextricably linked to international markets, with the EU having become the world's largest food exporter and third biggest importer in terms of value<sup>17</sup>. Zooming into the different product categories, the picture becomes clearer: The EU exports more processed (value-added) food than it imports – making economic gains – but is dependent on imports of primary agricultural commodities from third countries. Put in terms of calories and proteins instead of value, the EU is a net importer overall – sourcing from other countries more than it contributes to feeding the world<sup>18</sup>.

The EU is thus contributing to global deforestation mainly through imports of commodities and products from countries where forests are cleared for crop and livestock production. It is amongst the biggest importer of the agricultural commodities found to be the largest drivers of global deforestation such as cattle, palm oil, soya, cocoa, plantation rubber, plantation wood fiber and coffee<sup>19</sup>.

Agriculture-induced deforestation plays a minor role in the EU itself, but forest degradation caused by fragmentation and illegal logging is a relevant issue<sup>20</sup>. Not even 5% of EU forests can be considered undisturbed or natural and less than 1% are primary or virgin forests<sup>21</sup>.

<sup>17</sup> Matthews, A. (2021) *The EU's position in global agri-food trade*, <http://capreform.eu/the-eus-position-in-global-agri-food-trade/> [2019 data].

<sup>18</sup> WWF (2022) *Europe Eats the World. How the EU's Food Production and Consumption Impact the Planet*, [https://wwf.eu.awsassets.panda.org/downloads/europe\\_eats\\_the\\_world\\_report\\_ws.pdf](https://wwf.eu.awsassets.panda.org/downloads/europe_eats_the_world_report_ws.pdf), p. 8.

<sup>19</sup> European Commission (2021) see supra footnote 5, p. 14–16.

<sup>20</sup> EEA (2019) *The European environment – state and outlook. Knowledge for transition to a sustainable Europe*, <https://www.eea.europa.eu/soer/publications/soer-2020>, p. 122.

<sup>21</sup> *Ibid.*, p. 305.



## GLOBAL DEFORESTATION

### Where does deforestation occur?

Nowadays, tropical zones record the biggest share of global deforestation (91%), and in particular tropical rainforests which made up around 40% of total forest loss over the period 2000-2018<sup>22</sup>. With around 39% South America is the world's region with the biggest share of total global deforestation taking place in 2000-2018, followed by Africa (28.3%) and Asia (21.2%) and further behind North and Central America (8.9%). In Europe<sup>23</sup> and Oceania, only a small fraction of total global deforestation occurred (1.9% and 0.6% respectively).

### What are the drivers of deforestation?

To successfully tackle deforestation, we need to look at the main drivers of deforestation – in the EU and worldwide. The numbers speak a clear language: almost 90% of global deforestation is caused by agricultural expansion, with conversion of forests into cropland accounting for 50% and livestock grazing for almost 40% of total forest loss<sup>24</sup>. Throughout human history, more than 25% of tropical forests and even almost 50% of temperate forests were converted for food production<sup>25</sup>. Even though global deforestation has been slowing down over the past two decades, the pressure from the expansion of farmland on tropical rainforests in particular remains high. Deforestation rates in tropical rainforests in South America and Asia continue to be the highest of all biomes<sup>26</sup>.

<sup>22</sup> FAO (2022) see supra footnote 2, p. 32.

<sup>23</sup> Europe means here the geographical area which is larger than the EU.

<sup>24</sup> FAO (2022) see supra footnote 2, p. 47

<sup>25</sup> Weisse, M. and Goldman, E. (2021) *Just 7 Commodities Replaced an Area of Forest Twice the Size of Germany Between 2001 and 2015*, World Resource Institute, <https://www.wri.org/insights/just-7-commodities-replaced-area-forest-twice-size-germany-between-2001-and-2015>.

<sup>26</sup> FAO (2021) *FAO Remote Sensing Survey reveals. Tropical rainforests under pressure as agricultural expansion drives global deforestation*, <https://www.fao.org/3/cb7449en/cb7449en.pdf>.

FAO data shows important regional differences in deforestation drivers. Agriculture is by far the most important driver in all regions of the world, except in Europe where it only accounts for around 35% of deforestation. Cropland expansion is the most important driver in Africa and Asia, accounting for almost 80% of deforestation in those regions. Livestock grazing is the biggest driver in South America (70%), Oceania (52%) and North and Central America (44%)<sup>27</sup>. Almost half (44%) of all agriculture-related deforestation occurs in only two countries, namely Brazil and Indonesia<sup>28</sup>.

Commercial agriculture is more than two times more relevant than local/subsistence farming as driver of deforestation in Latin America, while subsistence farming and commercial farming are equally important drivers in Africa and the subtropical and tropical regions of Asia<sup>29</sup>.

Deforestation can be linked to certain agricultural commodities that are the most important drivers. The World Resources Institute identified seven commodities that together accounted for a quarter of global tree cover loss between 2001 and 2015 and more than half of agriculture-driven forest cover loss: with 16%, cattle (pastureland) is by far the strongest driver, followed by oil palm, soya, cocoa, plantation rubber, plantation wood fiber and coffee<sup>30</sup>. The importance of the different commodities varies between world regions and countries. Oil palm is a significant driver of deforestation in Asia (29%) and Oceania (11%), while cattle ranching is predominant driver in South America (in particular in the Amazon Basin, the Gran Chaco region and the Cerrado)<sup>31</sup>.

<sup>27</sup> FAO (2022) see supra footnote 2, p. 48.

<sup>28</sup> Pendrill, F. et al. (2019) *Deforestation displaced: trade in forest-risk commodities and the prospects for a global forest transition*, *Environ. Re. Lett.* 14 (2019) 055003, <https://doi.org/10.1088/1748-9326/ab0d41>, p. 7.

<sup>29</sup> FAO and UNEP (2020) see supra footnote 15, p. 83.

<sup>30</sup> Weisse, M. and Goldman, E. (2021) see supra footnote 25.

<sup>31</sup> FAO (2022) see supra footnote 2, p. 48.

03.

## An EU regulation on deforestation-free agri-food supply chains

The EU legislative proposal for a regulation on deforestation-free supply chains comes at a time where global leaders, at the COP26 in Glasgow, have committed to stopping deforestation and reversing forest degradation by 2030<sup>32</sup>, and where other countries such as the US<sup>33</sup> and the UK<sup>34</sup> are looking into similar deforestation-free supply chain legislations. A Handbook on Deforestation, Forest Degradation and Due Diligence in Agricultural Supply Chains is currently in preparation at OECD and FAO for publication early 2023<sup>35</sup>. It will lay out international guidelines for companies for the integration of deforestation and forest degradation considerations in corporate due diligence procedures. There also already exist a variety of global and regional platforms<sup>36</sup>, initiatives companies vol-

untarily commit to<sup>37</sup>, voluntary eco-labels<sup>38</sup>, and regional and commodity-specific programmes<sup>39</sup> to address deforestation in general or in a specific context.

The EU is thus not the only actor moving forward on the issue, but its proposed regulation is of particular relevance given its binding nature, the importance of the EU market and the fact that it addresses deforestation in other countries, going beyond illegal logging. The initiative is part of the legislative package under the Biodiversity Strategy and linked to the Farm-to-Fork Strategy, the new Forest Strategy, and the EU's new trade strategy promoting greater sustainability in line with the UN Sustainability Development Goals<sup>40</sup>. It is complementary to other initiatives such as the Code of Conduct on Responsible Food Business and Marketing Practices<sup>41</sup>, which entered into force in July 2021 as a voluntary instrument<sup>42</sup>, and the proposed directive on corporate sustainability due dili-

<sup>32</sup> Glasgow Leaders' Declaration on Forests and Land Use of 2 November 2021: <https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>.

<sup>33</sup> "FOREST Act of 2021" introduced in US Senate in October 2021, see: <https://www.congress.gov/bill/117th-congress/senate-bill/2950/text>.

<sup>34</sup> The Environment Act 2021 was adopted in November 2021 and addresses in Part 6 the use of forest risk commodities in commercial activity, see: <https://www.legislation.gov.uk/ukpga/2021/30/contents/enacted>; for a summary of the related "Consultation on implementing due diligence on forest risk commodities" of June 2022, see: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1080235/due-diligence-uk-supply-chains-summary-of-responses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1080235/due-diligence-uk-supply-chains-summary-of-responses.pdf).

<sup>35</sup> See draft OECD-FAO Handbook, which was published for public consultation in June/July 2022: <http://mneguidelines.oecd.org/draft-oecd-fao-handbook-on-deforestation-forest-degradation-and-due-diligence-in-agricultural-supply-chains.pdf>.

<sup>36</sup> E.g. the High Carbon Stock Approach, the High Conservation Value (HCV) Research Network.

<sup>37</sup> E.g. the Accountability Framework Initiative, the Palm Oil Transparency Coalition.

<sup>38</sup> E.g. Roundtable on Sustainable Palm Oil Certification, Forest Stewardship Council Certification (mainly for wood products).

<sup>39</sup> E.g. Africa Palm Oil Initiative, Brazil's Amazon Soy Moratorium.

<sup>40</sup> Commission proposal, Preamble, para. 18.

<sup>41</sup> European Commission (2021) *EU Code of Conduct on Responsible Food Business and Marketing Practices. A common aspirational path towards sustainable food systems*, [https://food.ec.europa.eu/system/files/2021-06/f2f\\_sfpd\\_coc\\_final\\_en.pdf](https://food.ec.europa.eu/system/files/2021-06/f2f_sfpd_coc_final_en.pdf).

<sup>42</sup> Sets out actions that actors 'between the farm and the fork', such as food processors, food service operators and retailers, can voluntarily commit to undertake to tangibly improve and communicate their sustainability performance. These actions can be directly relevant and implementable within their own operations or may encourage collaboration with industry peers and other food system stakeholders (such as farmers and consumers) to make similar changes. The Code defines 7 aspirational objectives (incl. healthier and sustainable food consumption, reduction of food loss and waste, climate neutrality by 2050, and sustainable sourcing in food supply chains) and seeks to improve sustainability on 3 levels (in relation to food consumption patterns; internal processes and organisation; throughout the supply chain)

gence<sup>43</sup>, which, if adopted, will set out mandatory due diligence obligations for large companies, incl. agricultural businesses, in relation to their environmental impact and human rights matters.

### The objective of the Regulation

The Commission's proposal states two objectives the regulation seeks to achieve: (1) minimising the EU's contribution to deforestation and forest degradation worldwide and (2) reducing the EU's contribution to greenhouse gas emissions and global biodiversity loss. While the Council retains these objectives in its agreed position, the European Parliament added the goal of minimising the EU's contribution to forest conversion<sup>44</sup> worldwide and of contributing to a reduction in global deforestation – going, thus, beyond the EU's share in global deforestation.

Despite these differences, the core of the regulation remains the same, i.e. a targeted sector-specific approach which focuses on forest ecosystems – as opposed to broader environmental concerns and due diligence obligations addressed in the sustainable corporate due diligence directive for example. Important to note is that the new regulation would go beyond addressing what is considered

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<sup>43</sup> See EJD's analysis of the proposed directive: Lamy, P., Pons, G., Garzon, I. (2022) GT 10 – EU Corporate due diligence proposal: game changer or paper tiger?, <https://www.europejacquesdelors.eu/publications/gt10>.

<sup>44</sup> With ecosystem conversion being defined as: "the change of a natural ecosystem to another land use or change in a natural ecosystem's species composition, structure or function; this includes severe degradation or the introduction of management practices that result in a substantial and sustained change in the ecosystem's species composition, structure or function" [European Parliament (2022) *Report on the proposal for a regulation of the European Parliament and the Council on making available on the Union market as well as export from the Union certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) no. 995/2010*, 25 July 2022].

illegal deforestation in the producing countries. It would also include legal deforestation activities if these fall within the regulation's definitions. This is a significant step forward compared to the existing EU Timber Regulation and the approach taken by the UK and US legislative initiatives on deforestation-free supply chains which only address illegal deforestation. With view to countries like Brazil where the national government facilitates the legalisation of certain deforestation activities, the EU approach may have a more significant impact than the other initiatives.

### The legal basis

The proposal is based on Article 192 TFEU on environment<sup>45</sup> which does not prescribe any specific form of legislation. Therefore, the Commission could choose the form of a regulation which is directly applicable to all legal entities within the EU (Member States, economic operators, etc.) and can be more prescriptive on the means to achieve the objectives than a directive would be. It also ensures greater harmonisation across EU Member States which is important for matters concerning international trade and has been raised by stakeholders as relevant prerequisite for the success of this legislation.

### Due diligence: a key tool for delivering the regulation

The purpose of the proposed regulation is conditioning the marketing and exporting of commodities and products covered by the regulation, which may ultimately lead to a prohibition. Relevant commodities and products may only be placed or made available on the EU market or exported from it if they fulfil the following three requirements: they must be (1) deforestation-free; (2) legally produced (i.e.

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<sup>45</sup> Refers to Article 191 (1) TFEU which defines objectives for EU policy on environment: "preserving, protecting, and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures to deal with regional or worldwide environmental problems, and in particular combatting climate change".

in accordance with the laws applicable in the country of production); and (3) covered by a due diligence statement. Due diligence is not the purpose of the regulation itself, but a tool to ultimately ban high-risk products from the EU market.

The due diligence obligation is an obligation of conduct which holds companies responsible for ensuring that certain standards are respected throughout their supply chains. They are obliged to “identify, assess, mitigate, prevent and account for how they address the actual and potential adverse impacts of their activities as an integral part of business decision-making and risk management systems”<sup>46</sup>. The rationale of **risk management** is at the core of due diligence which translates into a duty of care to minimise the risk of an undesirable event occurring – here: deforestation and degradation of forest ecosystems.

The due diligence procedure required by the proposed regulation includes three elements (information requirements, risk assessment and risk mitigation measures) which need to be carried out before a product/commodity can be placed on the EU market or exported from it (Article 8). Where operators cannot demonstrate that the risk of non-compliance with the regulation is nonexistent or negligible, they would have to take adequate risk mitigation measures such as collecting additional information, data or documents or carry out independent surveys and audits in order to reach the level of no or only negligible risk of non-compliance. Otherwise, they would not be allowed to market or export the commodity. Operators (except for SMEs) would have to publicly report, e.g. on their websites, about their due diligence systems in place on an annual basis.

**Simplified due diligence**, omitting the risk assessment and risk mitigation steps, would apply in cases where the

<sup>46</sup> OECD/FAO (2016) *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, <http://dx.doi.org/10.1787/9789264251052-en>, p. 21.

relevant commodities/products have been produced in so-called “low-risk” countries or areas. To this end, a **country benchmarking system** would be established identifying countries or parts thereof as representing a low, standard or high risk of deforestation and forest degradation occurring there. This assessment would be done by the Commission through implementing acts. The criteria include, among others, the rate of deforestation and forest degradation in the country in question and the rate of expansion of agricultural land for the commodities covered by the Regulation (Article 27 (2) (b)). While the proposed country benchmarking system has been criticised by some interest groups, the European Parliament and Council agree with it in principle – the Parliament does however not support the possibility of simplified due diligence.

The proposed requirements for due diligence in this regulation do not prescribe many specifics of the internal organisation of companies; they set out what needs to be achieved by a company (obligation of result) rather than prescribing how these obligations need to be fulfilled in form of formal requirements for internal processes<sup>47</sup> (contrary to the proposed directive on corporate sustainability due diligence<sup>48</sup>). This gives operators and traders flexibility in implementing the obligations and in tailoring their due diligence systems to the specificities of their sector and supply chains<sup>49</sup>.

<sup>47</sup> Which shall include: model risk management practices, reporting, record-keeping, internal control and compliance management, incl. for operators that are not SMEs, the appointment of a compliance officer at management level; and an independent audit function... for all operators that are not SMEs (Article 10 (6)).

<sup>48</sup> See: Lamy, P., Pons, G., Garzon, I. (2022) see supra footnote 45.

<sup>49</sup> ClientEarth (2022) *Getting to “deforestation-free”: clarifying the traceability requirements in the proposed EU deforestation regulation*, [https://www.clientearth.org/media/mdzplo2q/getting-to-deforestation-free\\_clarifying-the-traceability-requirements-in-the-eu-deforestation-regulation\\_clientearth.pdf](https://www.clientearth.org/media/mdzplo2q/getting-to-deforestation-free_clarifying-the-traceability-requirements-in-the-eu-deforestation-regulation_clientearth.pdf), p. 7–8.

### Deforestation: agricultural expansion at the heart of the definition

The proposed legislation's approach to deforestation is clearly defined. It only covers conversion of forests to *agricultural* land use, but not to any other use (e.g. mining, urban areas, water reservoirs<sup>50</sup>).

The European Parliament proposes to define deforestation as the conversion of forests and *other wooded* land to agricultural use or to plantation forests. The inclusion of other wooded land would broaden the scope of the regulation, without modifying the approach taken, i.e. to focus on deforestation caused by *agricultural* activities.

The EU legislation would thus take a narrower path to address deforestation than what international definitions of deforestation suggest. These also include other land uses as causes of deforestation. The EU definition would nevertheless still be aligned with international standards insofar as the definition of "forest" reflects the FAO definition<sup>51</sup>. This alignment with international concepts is important in terms of compatibility of the EU measure with international trade law<sup>52</sup>.

<sup>50</sup> See broader definition of deforestation by FAO: FAO (2018) *Global Forest Resources Assessment 2020. Terms and Definitions. FRA 2020*, <https://www.fao.org/3/I8661EN/i8661en.pdf>, p. 6.

<sup>51</sup> *Ibid.*, p. 4; this is however criticised by e.g. Euro Commerce who promote the UNFCCC range definition (Position paper of 30 March 2022, [https://www.politico.eu/wp-content/uploads/2022/05/25/EuroCommerce-Position-Deforestation-Regulation\\_30-March-2022.pdf?utm\\_source=POLITICO.EU&utm\\_campaign=f72bb39f44-EMAIL\\_CAMPAIGN\\_2022\\_05\\_26\\_04\\_59&utm\\_medium=email&utm\\_term=0\\_10959edeb5-f72bb39f44-190440401](https://www.politico.eu/wp-content/uploads/2022/05/25/EuroCommerce-Position-Deforestation-Regulation_30-March-2022.pdf?utm_source=POLITICO.EU&utm_campaign=f72bb39f44-EMAIL_CAMPAIGN_2022_05_26_04_59&utm_medium=email&utm_term=0_10959edeb5-f72bb39f44-190440401)).

<sup>52</sup> For more details, see: Lamy, P., Pons, G., Garzon, I., Hub, S. (2022) see supra footnote 10.

### Forest degradation: a question of structural change or of ecosystem functioning

The definition of forest degradation has been subject to much discussion and is likely to continue to do so throughout the trilogue negotiations. Since no commonly agreed definition of forest degradation, e.g. by FAO<sup>53</sup>, exists, the EU's definition will likely face enhanced scrutiny from trading partners.

The Commission proposes a definition that is founded on two elements, namely (1) harvesting activities that cannot be qualified as sustainable<sup>54</sup> and (2) the loss of biological and economic productivity and complexity of the forest ecosystem which would in the long term result in a reduction of ecosystem services. The Council supports a definition that means only structural changes, namely the conversion of primary forests into plantation forest or other wooded land<sup>55</sup>. It argues that a definition focusing on the structure of the forest can easily be based on internationally recognised concepts (see FAO definitions). A definition limited to the conversion of primary forests is however too

<sup>53</sup> See: FAO (2018) see supra footnote 50, p. 20, saying that "degraded forest" should be defined by the countries themselves.

<sup>54</sup> With sustainable harvesting meaning: "harvesting that is carried out considering maintenance of soil quality and biodiversity with the aim of minimising negative impacts, in a way that avoids harvesting of stumps and roots, degradation of primary forests or their conversion into plantation forests, and harvesting on vulnerable soils; minimises large clear-cuts and ensures locally appropriate thresholds for deadwood extraction and requirements to use logging systems that minimise impacts on soil quality, including soil compaction, and on biodiversity features and habitats" (EC proposal, Article 2, Nr. 7).

<sup>55</sup> Council of the European Union (2022) *Draft Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 – General approach*, 10284/22, 24 June 2022, nr. 13.

narrow – in particular as far as EU forests are concerned, knowing that only a very small percentage of them can be qualified as primary forests.

The Commission's definition as well as the modified definition proposed by the European Parliament are both built on the functioning of the forest ecosystem which is more complex to assess. Since a reduction of forests' capability to deliver ecosystem services such as the storage of carbon or the preservation of biodiversity is however what this legislation wants to address, an approach based on the functioning of the forest ecosystem is convincing. It is in line with approaches taken by FAO in older publications<sup>56</sup>, by IUCN<sup>57</sup> or IPCC<sup>58</sup>.

<sup>56</sup> FAO (2002) *Proceedings. Expert Meeting on Harmonizing forest-related definitions for use by various stakeholders*, [http://foris.fao.org/meetings/download/\\_2002/expert\\_meeting\\_on\\_harmonizing\\_forest\\_related\\_defin/misc\\_documents/\\_15533\\_0cb816e82c09c14873ce9226dd13910b9.pdf](http://foris.fao.org/meetings/download/_2002/expert_meeting_on_harmonizing_forest_related_defin/misc_documents/_15533_0cb816e82c09c14873ce9226dd13910b9.pdf), p. 7–8; FAO (2011) *Assessing forest degradation. Towards the development of globally applicable guidelines*, <https://www.fao.org/3/i2479e/i2479e00.pdf>, p. 1–2, referring to 2002 publication which defines forest degradation as a reduction of the capacity of a forest to provide goods and/or services.

<sup>57</sup> IUCN (2021) *Deforestation and forest degradation*, Issues Brief, <https://www.iucn.org/resources/issues-brief/deforestation-and-forest-degradation>: "Forest degradation occurs when forest ecosystems lose their capacity to provide important goods and services to people and nature".

<sup>58</sup> Olsson, L. and Barbosa, H. (2019) Land Degradation. In: *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, [https://www.ipcc.ch/site/assets/uploads/sites/4/2019/11/07\\_Chapter-4.pdf](https://www.ipcc.ch/site/assets/uploads/sites/4/2019/11/07_Chapter-4.pdf), p. 349–350: Forest degradation is land degradation occurring in forest land. Land degradation is defined as a negative trend in land condition, caused by direct or indirect human-induced processes including anthropogenic climate change, expressed as long-term reduction or loss of at least one of the following: biological productivity, ecological integrity, or value to humans.

Nevertheless, there are significant differences between the definition proposed by the Commission and the one proposed by the Parliament. The Commission's proposal addresses forest degradation only in the context of wood harvesting. It is included in the "deforestation-free" definition only in relation to wood, not to the other covered commodities and products. This reflects the fact that logging, incl. illegal logging, is the main driver of forest degradation, but it omits any other (agriculture-induced) cause for forest degradation, such as overgrazing and forest fires.

### Focus on forest ecosystems: is there a need to go beyond deforestation?

The narrow focus of the proposed regulation on forest ecosystems has been widely criticised. The Commission's proposal recognises that the protection of forests could have negative leakage effects and "lead to the conversion or degradation of other natural ecosystems"<sup>59</sup>. It therefore envisages to assess an extension of the regulation's scope to include other ecosystems when reviewing the regulation after two years.

Some stakeholders request the inclusion of other ecosystems right away in order to avoid any negative leakage effects from the start and to align the EU's regulation with the Accountability Framework Initiative which sets international sustainability standards that companies can voluntarily commit to<sup>60</sup>. These standards include a commitment to eliminating deforestation from the companies' supply chains as well as a more comprehensive "no-conversion approach", which includes the elimination of conversion of other natural ecosystems (such as natural savannahs, grasslands, peatlands and wetlands) from the supply chains<sup>61</sup>.

<sup>59</sup> Commission Proposal, Preamble, Nr. 54 and 58 (very similar).

<sup>60</sup> E.g. Greenpeace, see supra footnote 1; Coalition of businesses in a statement on the proposed regulation (<https://drive.google.com/file/d/1lxQLvYEuzlMGz5kZMxNhj02UOgdYBsrZ/view>).

<sup>61</sup> Accountability Framework (2022) *Core Principle 1. Protection of forests and other natural ecosystems*, <https://accountability->

While the interlinkages between protecting forests and shifts of agricultural land use expansion into other natural ecosystems are a critical issue, it should not be forgotten that an inclusion of more ecosystems in this regulation would make the legislation, in particular data collection and monitoring, much more complex. It is important to set up a functioning, implementable and robust system which withstands legal challenges from trade partners. It is therefore sensible to limit the coverage of the regulation to deforestation in the beginning, focusing on implementation and enforcement. The extension of the regulation to other natural ecosystems should however be assessed as soon as possible in order to prevent leakage effects.

#### **Commodity-driven approach: the risk of loopholes and displacement effects**

The Commission chose to include those commodities and derivatives<sup>62</sup> in the regulation for which “Union consumption is most relevant in terms of driving global deforestation and forest degradation and for which a Union policy intervention could bring highest benefits per unit value of trade”<sup>63</sup>. This selection is based on efficiency and effectiveness considerations. It is less comprehensive than the list of commodities the European Parliament and some value chain actors or other interest groups want to see included<sup>64</sup>.

The clearly defined, narrow approach taken by the Commission reflects the objective of the regulation as set out in the Commission’s proposal which is, first and

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[framework.org/core-principles/1-protection-of-forests-and-other-natural-ecosystems/](https://ec.europa.eu/efsd/framework.org/core-principles/1-protection-of-forests-and-other-natural-ecosystems/).

<sup>62</sup> I.e. products that contain, have been fed with or have been made using relevant commodities (Article 1).

<sup>63</sup> Commission Proposal, Preamble, Nr. 27.

<sup>64</sup> See: European Parliament report (see supra footnote 44) which also includes swine, sheep and goats, poultry, palm-oil based derivatives, maize, rubber and a more comprehensive list of products defined in Annex 1, including charcoal and printed paper.

foremost, to make relevant EU supply chains deforestation-free and thereby to reduce the EU’s contribution to global deforestation. If the EU wants to tackle deforestation and forest degradation as a global phenomenon (as proposed by the European Parliament<sup>65</sup>), which means greater efficiency in terms of climate change mitigation, then displacement effects and loopholes – which risk to occur with such a limited scope of commodities and products covered – need to be addressed.

There is the risk of reallocation of supply chains in the way that commodities and products from low-risk countries could be directed to the EU, while high-risk products are redirected to other countries. Unsustainable production could also be transferred to commodities not included in the scope of the regulation<sup>66</sup>. This would not lead to any improvement of the global situation, but simply to a “cleaning” of EU supply chains. While ripple effects of the EU legislation could certainly lead to a broader positive outcome, it is not evident they will happen to the extent desired. Any future review of the legislation’s commodities and products coverage should therefore include efficiency considerations that go beyond the ones on which the current Commission proposal is based. Leakage and displacement effects have to be taken into consideration.

#### **Key actors responsible for delivery: a commodity-driven supply chain approach vs. more transformative change**

The proposed regulation would put due diligence obligations on operators and traders<sup>67</sup>. Operators are those

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<sup>65</sup> See amendment 86 to Commission proposal in the first reading.

<sup>66</sup> The Commission addresses this risk of leakage in its Impact Assessment, see supra footnote 5, p. 65.

<sup>67</sup> With operators being any natural or legal person that places relevant commodities or products on the EU market or exports them from it as part of their commercial activity and traders being any natural or legal person, other than the operator, who makes relevant commodities or products available on the EU market.

who first place a commodity or product on the EU market, traders those who sell products already on the EU market (e.g. retailers). The Commission proposal prescribes the same due diligence obligations for both groups, with the exception of small and medium traders. Traders that are SMEs would be obliged to only collect and keep certain information (Article 6, para. 1-3) and to inform competent authorities should they become aware that any of their commodities or products might not be in conformity with the regulation. Further risk mitigation obligations would not be applicable.

It is being argued that putting the same due diligence obligations on traders as on operators leads to a duplication of obligations and administrative burden (for supply chain actors as well as member states' authorities). The European Parliament's amendments<sup>68</sup> as well as the Council position<sup>69</sup> therefore include provisions to prevent that due diligence exercises are carried out twice for the same product/commodity. The complexity of retailers' supply chain is also put forward as an argument for lowering the level of responsibility for actors further down the supply chain<sup>70</sup>. Having significant market power<sup>71</sup>, retailers should nevertheless be addressed by this legislation in a meaningful

way. Rather than simply reducing the due diligence obligations for traders, it could be discussed whether the focus of their due diligence obligations should be different. The obligations put on traders could be modified in a way to focus more on the establishment of adequate procurement policies, capacity-building and engagement along the value chain in order to support and enable upstream actors in their risk mitigation efforts.

Financial institutions are not addressed in the Commission's proposal despite their importance in food systems. Pointing to EU legislation on sustainable finance – already in place or in preparation such as the Sustainable Finance Disclosure Regulation, the Corporate Sustainability Reporting Directive and the EU Taxonomy Regulation – as being better suited for the purpose overlooks that the proposed regulation on deforestation-free supply chains is much more rigid in terms of due diligence and mitigation obligations than the other initiatives which mainly focus on reporting and disclosure<sup>72</sup>. If the European Parliament's request to include financial institutions in the deforestation legislation prevails, any involvement in any funding and investment activities potentially leading to deforestation and forest degradation would be prohibited<sup>73</sup>.

<sup>68</sup> Amendment 119, adding a new paragraph (2a) to Article 8.

<sup>69</sup> Setting out that traders which are not SMEs shall ensure "that operators have exercised due diligence in a way that fulfils the requirements" set out in the regulation and to make available to the competent authorities the reference numbers of existing due diligence statements (Article 6, para. 5 of Regulation as amended by the Council in its negotiation position).

<sup>70</sup> Metro AG (2022) *Ever Heard of Spheres of Influence? Metro Position Paper on Corporate Sustainability Due Diligence Directive*, <https://politics.metroag.eu/future-viability/ever-heard-of-spheres-of-influence?dt=20220727>; argument here made in relation to the proposed EU directive on corporate sustainability due diligence.

<sup>71</sup> JRC (2022) *Concepts for a Sustainable EU Food System. Reflections from a participatory process*, <https://data.europa.eu/doi/10.2760/381319>, p. 23.

<sup>72</sup> For a critical analysis of the reporting obligations under the different legislations and the definition of environmental impact in that context, see EJD paper "GT10 – EU Corporate due diligence proposal: Game changer or paper tiger?" (supra footnote 43).

<sup>73</sup> Cf. article on financial institutions as proposed by the European Parliament (Article 3a): "Financial institutions shall provide financial services to customers only when the financial institutions conclude that there is no more than a negligible risk that the services in question potentially provide support directly or indirectly to activities leading to deforestation, forest degradation or forest conversion." Called for also by stakeholders and interest groups, such as Greenpeace (see supra footnote 1) and an alliance of companies incl. Aldi, Carrefour, Colruyt, Danone, Ferrero, Lidl (see supra footnote 60).

Extending the scope to financial institutions would strengthen the impact of this legislation in line with its overall objective. It would help avoid any situation where the EU financial sector could be involved in unsustainable activities linked to products that are banned from being marketed in the EU itself<sup>74</sup>. A coherent approach for all food system actors is desirable since we need to work towards a systemic change. No relevant actor in the agri-food system can be left out; the level of ambition needs to be the same for all and responsibilities be shared. The commodity-based supply-chain approach, addressing direct drivers of deforestation, which the proposed regulation takes, is a good and necessary step, but the more indirect systemic drivers have to be addressed to the same degree. This means, among others, finance and investment<sup>75</sup>.

Nevertheless, it is questionable whether the proposed regulation is the right legislative basis for regulating financial activities<sup>76</sup>. Financial institutions fall within a different regulatory system and their inclusion in this regulation would require setting up two different tracks/authorities for monitoring and enforcement<sup>77</sup>. The discussion on the inclusion of financial institutions highlights once more that ensuring coherence between different EU legislative initiatives as regards their level of ambition, the definition of environmental impact, the legal consequences and enforcement is indispensable. Europe Jacques Delors has pointed this out already in the context of the proposed corporate sustainability due diligence directive<sup>78</sup>.

<sup>74</sup> Greenpeace (2022) see supra footnote 1, p. 10.

<sup>75</sup> Mammadova et al. (2022) Deforestation As a Systemic Risk. The Case of Brazilian Bovine Leather, *Forests* 2022, 13, 233, <https://doi.org/10.3390/f13020233>, p. 18.

<sup>76</sup> Rapporteur Christophe Hansen at European Parliament's plenary debate on 12 September 2022.

<sup>77</sup> Commissioner Sinkevičius at European Parliament's plenary debate on 12 September 2022.

<sup>78</sup> Lamy, P., Pons, G., Garzon, I. (2022) see supra footnote 43.

### Traceability: possible challenges and the need for cooperation with partner countries

Traceability back to the origin of products and commodities is critical for the success of the proposed legislation. Studies and reports show however that this can be a major challenge. Depending on the product, the degree of processing, the number of suppliers and intermediary stages, supply chains can become very complex. Agricultural commodities "are often bulked and aggregated"<sup>79</sup>. Coffee, cocoa and palm oil, in particular, are sourced from many different smallholders which makes it more complicated for operators and traders to trace back to the origins through the whole supply chain. It makes a difference whether operators and traders are sourcing directly from producers or whether they source indirectly through aggregators and brokers<sup>80</sup>. Those operators and traders that source from a large supply basis and through intermediaries will face greater challenges and are likely to have to invest more resources in fulfilling their due diligence obligations.

Different proposals have been made on how to address these challenges<sup>81</sup>. One key element stands out: in the long run, the goal should not be to make EU supply chains of the relevant products and commodities deforestation-free, but to build up deforestation-free supply bases. This requires engagement with producer countries in order to enhance transparency, public monitoring, support for smallholders in the form of technical and financial capacity-building etc. Some requirements in this regard are set out in the proposed regulation (Article 28). The European Parliament seeks to strengthen them by, inter alia, including Member States in the engagement and requiring adequate financial

<sup>79</sup> Bellfield, H. et al. (2022) *Strengthening the EU regulation on deforestation-free products*, Trase, <https://cdn.sanity.io/files/n2jhhvipv/production/ba35f696e24f132a3e623f7fc70539579d1cf8b6.pdf>, p. 7.

<sup>80</sup> *Ibid.*, p. 8.

<sup>81</sup> *Ibid.*; Mammadova et al. (2022) see supra footnote 75, p. 18.

resources. The effectiveness of this legislation very much depends on the success of these partnerships and collaborations and therefore, special emphasis should be given to it in the implementation phase.

### Addressing root causes: the social and socio-economic aspects of deforestation

In many producing countries, deforestation not only has an environmental impact, but also a socio-economic one. There is evidence that trade in commodities associated with deforestation may increase the income of local households. It however also has negative impacts on livelihoods, such as on health or on socio-economic factors like education and land rights<sup>82</sup>. Smallholder farmers and local communities are often dependent on the functioning of the existing forest systems and their different resources for their livelihoods. They therefore have a strong interest in maintaining these ecosystems and suffer significantly from deforestation activities caused by large-scale producers<sup>83</sup>. This can trigger conflicts and violence and the outmigration of smallholders to urban areas or environmentally more marginal land (ecological marginalisation)<sup>84</sup>. The disrespect for customary land tenure rights held by indigenous peoples and local communities is often at the heart of the conflicts and a root cause for deforestation.

The Commission's proposal omits to address this. Following the demand from many civil society organisations and inter-

est groups, both the Council and the European Parliament included – to varying extents – the respect of international human rights, in particular the rights of indigenous peoples and (customary) land tenure rights, in their proposed amendments to the Commission's text. The inclusion of human rights requirements in the due diligence obligations strengthens the anti-deforestation legislation in two ways: (1) by addressing root causes of deforestation (land grabbing for agrobusiness expansion), and (2) by strengthening the position of those who have an inherent interest in protecting the forest ecosystems for their livelihoods, thereby having an important role in protecting biodiversity and mitigating climate change<sup>85</sup>.

## 04.

### Conclusion and outlook

The proposed regulation on deforestation-free agri-food supply chains is an important piece of legislation in the basket of European Green Deal initiatives addressing unsustainable practices in our agri-food system. It reflects the fact that EU agri-food production and consumption are embedded in international supply chains. What we consume has an impact elsewhere. For this reason, "greening" agri-food in the EU requires looking beyond our borders. The legislation also responds to the fact that deforestation, biodiversity loss and climate change are global problems which need to be addressed worldwide.

<sup>82</sup> Trade, Development & the Environment Hub (2021) *What do we need to make trade more socially sustainable within exporting countries?*, Discussion Paper 5, [https://tradedeb.org/wp-content/uploads/2021/11/TRADE\\_Discussion\\_Paper\\_5.pdf](https://tradedeb.org/wp-content/uploads/2021/11/TRADE_Discussion_Paper_5.pdf).

<sup>83</sup> Human Rights Watch (2019) *When We Lost the Forest, We Lost Everything*. *Oil Palm Plantations and Rights Violations in Indonesia*, <https://www.hrw.org/report/2019/09/23/when-we-lost-forest-we-lost-everything/oil-palm-plantations-and-rights-violations>.

<sup>84</sup> Levers, C. et al. (2021) Agricultural expansion and the ecological marginalization of forest-dependent people, *PNAS* 2021, Vol. 118, No. 44, <https://doi.org/10.1073/pnas.2100436118>.

<sup>85</sup> ClientEarth (2021) *Upholding human rights in the fight against deforestation and ecosystem conversion*, [https://www.clientearth.org/media/ekobwqpr/upholding-human-rights-in-the-fight-against-deforestation\\_clientearth-global-witness\\_sept-2021\\_hires.pdf](https://www.clientearth.org/media/ekobwqpr/upholding-human-rights-in-the-fight-against-deforestation_clientearth-global-witness_sept-2021_hires.pdf): Indigenous Peoples and other customary rights-holders are estimated to hold as much as 65% of the world's land area through customary, community-based tenure systems. Under national laws, however, only 10% are recognised as their property, and another 8% designated for their use (p. 4).



Due diligence obligations seem to be a good instrument as they put responsibility on downstream supply chain actors, thereby holding them accountable for what they import, export and market, instead of addressing primary producers only. They are also a means that allows to address agriculture-induced deforestation abroad which cannot directly be regulated by the EU.

The discussions around the legislative proposal highlight the challenges every piece of legislation that addresses farming and production practices outside of the EU's borders will face: On the one hand, it is desirable to strive for environmental protection in as broad of a manner as possible, on the other hand, legislations need to be targeted and tailored to specific problems which can be justified under international trade law. This dilemma is reflected in the discussion on the scope of the regulation (commodities/products and ecosystems covered). The debate around the risk of loopholes, leakage and reallocation of supply chains highlights the fact that one piece of legislation cannot solve all arising challenges at once. The question of the inclusion of human rights requirements, in particular land tenure rights of indigenous peoples and local communities, shows the social dimension of the matter. Stopping deforestation requires us to look at and address the root causes of agricultural expansion. One step in this direction is that the EU regulation would not only prohibit the marketing of products and commodities stemming from deforestation considered illegal under the laws of the producing countries, but also from deforestation activities that are deemed legal in the country of production.

Nevertheless, it is evident that one single piece of legislation alone cannot bring the transformative change in global agri-food systems that would be necessary to halt deforestation worldwide. Deforestation is a systemic problem, while the EU due diligence legislation takes a commodity-driven supply-chain approach.

Based on these considerations, we recommend to:

### **1. Focus on ensuring a robust, implementable and enforceable regulatory framework as first step**

It is important to put a robust and implementable regulatory system in place and to ensure that the implementation of the due diligence obligations is controlled and enforced. This means that the focus should be on the implementation of functioning due diligence systems for risk assessment and mitigation through European operators and traders and the establishment of effective control systems for monitoring, verification and enforcement (incl. of the potential marketing and export ban) through customs and national authorities.

For this reason, while being ambitious, an overburdening of the proposed legislation in terms of its scope should be avoided at this stage. A too broad scope of commodities/products or ecosystems covered risks to make the regulation unwieldy and to complicate compliance with WTO rules. These rules require that any implication for trade can be justified and that there is scientific evidence to back it up<sup>86</sup>. This needs to be done for every commodity and product covered by the EU regulation as well as every ecosystem addressed. Any extension of the legislation's scope going beyond the Commission's initial efficiency analysis needs to demonstrate the link between the EU and the objective pursued through the concrete measure.

### **2. Provide for complementary measures**

The theory of change behind this legislation is the so-called "Brussels effect"<sup>87</sup> where the impact on the ground of the EU legislation is bigger than the market share of the EU's trade<sup>88</sup>. This effect has been observed in the case of the

<sup>86</sup> For more information on WTO rule compliance of autonomous regulatory measures, see: Lamy, P., Pons, G., Garzon, I., Hub, S. (2022) see supra footnote 10.

<sup>87</sup> Concept shaped by Anu Bradford.

<sup>88</sup> Pascal Canfin (2022) at the Stakeholders Workshop on Deforestation-free products of the Green Trade Network on 19 May 2022.

GDPR and the REACH regulations where big international companies announced to apply the strict EU standards to their entire global operations. In other cases, for example matters of consumer protection and health standards, trading partner countries take over EU standards.

A commodity-driven supply chain approach risks to have loopholes and to trigger leakages and displacement effects. Engagement with producer and other consumer countries is indispensable to minimise these risks and to facilitate the “Brussels effect”. This includes capacity-building and technical support for stakeholders in producing countries and to work together on ensuring supply chain traceability and transparency. Such engagement is also important to prevent any attempt of bypassing the risk controls by disguising the origin through triangular trade which could be triggered by the simplified due diligence option. Cooperation with producer countries should also support smallholder farmers and address the socio-economic root causes of agricultural expansion. Alternatives to slash-and-burn-agriculture need to be promoted<sup>89</sup>. By moving from one area to the next, this method contributes to global deforestation. To address this cause, smallholders must be supported in finding alternative livelihoods.

Cooperation with other consumer countries is necessary to push for the implementation of standards similar to the EU regulation which together might trigger a more significant ripple effect and make deforestation-free production a business case for producers. Engagement between stakeholders and capacity-building along the supply chain should be fostered to create an enabling environment for transformative horizontal change at the supply basis instead of incentivising simply a “switch” from one supplier to the other.

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<sup>89</sup> A traditional land management practice which includes the cutting and burning of forests or woodland and using the ash as natural fertile layer on the soil to grow crops.

Importantly, action within the EU to promote healthy and sustainable diets and to reduce food waste as mentioned in the introduction will also help to reduce the EU’s contribution to global deforestation. It is the interplay of these complementary initiatives foreseen under the Farm-to-Fork Strategy that will deliver bigger impact and effectiveness.

### **3. Ensure consistency with related legislative instruments**

Should the Parliament’s amendment, which would add the financial sector to the text proposed by the Commission, not go through, it will nevertheless be indispensable to oblige financial institutions to respect the same level of due diligence for investments and economic activities that are linked to the production, supply and marketing of the commodities and products covered by this legislation. Financing and investment activities as indirect systemic drivers of deforestation need to be addressed – not only through reporting and disclosure obligations, but with the same rigour as supply-chain activities to ensure a harmonised and consistent policy framework for the whole food system.

For the same reason, consistency should also be ensured with other due diligence legislations (such as the proposed corporate sustainability due diligence directive), other sustainability reporting obligations for companies and the financial sector, and the environmental crime directive. This will help send clear messages to food system actors in terms of ambition and implementation requirements.

## The proposed regulation on deforestation-free agri-food products

|   | Commission proposal  | European Parliament report   | Council negotiating position   |
|---|--|--|--|
| <p><b>Covered objectives:</b></p> <p>Environmental impacts addressed</p> <p>Compliance with relevant laws</p> | <ul style="list-style-type: none"> <li>Deforestation resulting from the production of six agricultural commodities (cattle, cocoa, coffee, oil palm, soya and wood) certain derivative products</li> <li>Forest degradation resulting from wood harvesting</li> <li>Possible extension of the scope to other ecosystems and further commodities at review of regulation no later than 2 years after entry into force</li> <li>Cut-off date: 31 December 2020</li> </ul> <ul style="list-style-type: none"> <li>Legislation of the country of production concerning legal status of area of production, such as land use rights, environmental protection, third parties' rights, relevant trade and customs regulations</li> </ul> | <ul style="list-style-type: none"> <li>Deforestation, forest degradation and forest conversion linked to all covered commodities and products</li> <li>Extended list of commodities (incl. also swine, sheep and goats, poultry, palm-oil based derivatives, maize, rubber) and products (incl. also charcoal and printed paper)</li> <li>Covers forests and other wooded land</li> <li>Possible extension to other natural ecosystems to be checked in impact assessment not later than 1 year after entry into force, and to other commodities and products not later than 2 years</li> <li>Cut-off date: 31 December 2019</li> </ul> <ul style="list-style-type: none"> <li>All relevant laws and standards, incl. the rules applicable in country of production as defined in EC proposal</li> <li>Human rights protected under international law (in particular concerning protection of customary tenure rights, the right to free, prior and informed consent, Indigenous rights etc.)</li> </ul> | <ul style="list-style-type: none"> <li>Deforestation and forest degradation resulting from production of certain commodities and products – like in Commission proposal</li> <li>forest degradation definition limited to conversion of primary forests (structural changes) à to be reviewed in first review of legislation</li> <li>Additional products included</li> <li>Cut-off date: 31 December 2021</li> </ul> <ul style="list-style-type: none"> <li>Rules applicable in country of production concerning legal status of area of production, such as land use rights, environmental protection, third parties' rights, labour rights, human rights protected under international law (UN Decl. on the Rights of Indigenous Peoples), tax, anti-corruption, trade and customs regulations</li> </ul> |
| Companies concerned   | <ul style="list-style-type: none"> <li>Any natural or legal person that are operators or traders à concerns importers and exporters</li> </ul>   | <ul style="list-style-type: none"> <li>Any natural or legal person that are operators or traders</li> <li>Financial institutions headquartered or operating in the EU</li> </ul>   | <ul style="list-style-type: none"> <li>Operators and traders (any natural person, legal person and any association of persons which is not a legal person but has the capacity to perform legal acts)</li> </ul>   |
| Definition of due diligence   | <ul style="list-style-type: none"> <li>Collecting of specific information to demonstrate that commodities/products are deforestation-free and produced in accordance with laws of country of production</li> <li>Taking risk assessment measures</li> <li>Taking risk mitigation measures</li> <li>Placing on the market/exporting only of goods with a valid due diligence statement</li> <li>Simplified due diligence for products/commodities from low risk countries (excl. risk assessment and mitigation)</li> <li>The same due diligence obligations for operators and traders, some lighter obligations for traders that are SMEs</li> </ul>   | <ul style="list-style-type: none"> <li>Obligations as in EC proposal (information requirements, risk assessment and risk mitigation, provision of due diligence statement) + simplified due diligence for products/commodities from low risk countries</li> <li>The same due diligence obligations for operators and traders, some lighter obligations for traders that are SMEs</li> <li>Avoiding duplication of efforts: product components that have already undergone due diligence analysis do not require additional due diligence procedure</li> </ul>  | <ul style="list-style-type: none"> <li>Due diligence as in EC proposal + simplified due diligence for products/commodities from low-risk countries</li> <li>Operators to carry out full due diligence exercise + to communicate to actors down the supply chain information to confirm that due diligence exercise was carried out + no or only negligible risk was found</li> <li>Lighter obligations for traders that are SMEs.</li> <li>Avoiding of duplication of efforts: operators/traders further down the supply chain do not have to carry out due diligence exercise again, but can submit reference number of existing due diligence statement of all relevant product components</li> </ul>  |



|                                | Commission proposal  | European Parliament report   | Council negotiating position  |
|--------------------------------|--|--|---|
| Reporting                      | <ul style="list-style-type: none"> <li>• Non-SME operators to report publicly on their due diligence systems</li> <li>• Member States to report annually to the Commission and the public about application of regulation (plans for checks, number and result of controls...)</li> <li>• Commission to publish annually an EU-wide overview on application based on data from Member States</li> </ul>  | <ul style="list-style-type: none"> <li>• All operators to report annually publicly on due diligence system, implementation and outcomes, and measures taken to support compliance of smallholders (incl. investment and capacity-building)</li> <li>• Member States and Commission reporting similar to EC proposal</li> </ul>   | <ul style="list-style-type: none"> <li>• Operators (excl. SMEs, microenterprises and natural persons) to report publicly on their due diligence systems</li> <li>• Member States to report annually to the Commission (in detail) and the public (in aggregated form)</li> <li>• Commission to publish annually an EU-wide overview</li> </ul>  |
| Controls and access to justice | <ul style="list-style-type: none"> <li>• Member States to designate <i>surveillance authorities</i> with sufficient powers and resources: Detailed prescriptions on national checks to be performed (risk-based approach; covering at least 5% of the operators marketing/exporting each of the relevant commodities and at least 5% of the quantity of each commodity); enhanced scrutiny for commodities/products from high-risk origins (15%)</li> <li>• <i>Customs</i> authorities to control correct declaration of commodities/products</li> <li>• Right of any natural or legal person to submit <i>substantiated concerns</i> to competent authorities (based on objective circumstances, need to be well-founded). National authorities to assess concerns + take necessary steps.</li> <li>• Right of <i>access to justice</i> open to any natural or legal person with substantiated concern (but only for complaints against competent national authorities, not companies)</li> </ul> | <ul style="list-style-type: none"> <li>• Obligation for companies to set up <i>complaints system</i> for receiving substantiated concerns from interested parties + investigation</li> <li>• Higher rate of checks to be carried by Member State authorities (10%), except for commodities/products from low-risk countries (5%); enhanced scrutiny for high-risk products/commodities (20%)</li> <li>• <i>Customs</i> to control due diligence declarations</li> <li>• For submissions of <i>substantiated concerns</i> from producer countries (esp. local communities), Commission shall establish centralised communication procedures. Identities of persons submitting substantiated concern to be protected.</li> <li>• Access to court or other public bodies shall be fair, equitable timely and not prohibitively expensive + provide for adequate and effective remedies</li> </ul> | <ul style="list-style-type: none"> <li>• Member States' checks shall take risk-based approach, taking into account, inter alia, specificities of the supply chains (length and complexity).</li> <li>• Checks on 5% of operators, and traders that are not SMEs for each commodity; no reference to checks in relation to quantity of the products</li> <li>• No enhanced scrutiny</li> <li>• <i>Customs</i> to control due diligence declarations</li> <li>• Right of any natural or legal person to submit <i>substantiated concerns</i> to competent authorities (need to be well-founded). National authorities to assess concerns + take necessary steps.</li> <li>• No access to justice</li> </ul> |



#Deforestation  
#Agri-food  
#forests  
#Biodiversity  
#Climate change  
#trade  
#EUGreenDeal

|                                | Commission proposal  | European Parliament report  | Council negotiating position  |
|--------------------------------|--|---|---|
| Consequences of non-compliance | <ul style="list-style-type: none"> <li>• <i>Market surveillance measures:</i> Appropriate and proportionate corrective measures to be taken by operators/traders upon request of competent authorities (rectification of formal non-compliance; preventing marketing/exporting; withdrawal; destruction) à Member States' authorities to ensure withdrawal/marketing prohibition in case of persisting non-compliance</li> <li>• <i>Interim measures</i> may be taken through competent authorities where checks reveal possible serious shortcomings (seizure or suspension of free circulation/exporting)</li> <li>• <i>Border measures:</i> Suspension of free circulation/exporting through customs where additional checks on commodities/products are necessary</li> <li>• <i>Penalties</i> to be defined by Member States, include as minimum fines proportionate to the environmental damage or the value of the commodities (max. amount at least 4% of operator's/trader's annual turnover), confiscation of commodities or revenues, temporary exclusion from public procurement processes</li> </ul> | <ul style="list-style-type: none"> <li>• <i>Corrective measures</i> include destruction only as last resort. Non-compliant commodities/products shall be donated to charitable or public interest purposes or recycled. Operator/trader to address short comings in due diligence system.</li> <li>• <i>Interim measures</i> may be taken</li> <li>• <i>Customs measures</i> similar to EC proposal</li> <li>• <i>Penalties:</i> shall be uniform across Member States, fines shall also be proportionated to economic damage for local communities, fines shall be at least 8% of annual turnover; also include obligation to restore the environment and to <i>compensate</i> for damage done to any natural or legal person that could have been avoided by proper due diligence</li> <li>• Public "shaming list"</li> </ul> | <ul style="list-style-type: none"> <li>• <i>Corrective action:</i> as in EC proposal. Donating shall be given priority over disposing of a commodity/product.</li> <li>• <i>Interim measures</i> may be taken</li> <li>• <i>Border measures</i> similar to EC proposal</li> <li>• <i>Penalties:</i> similar to EC proposal</li> </ul> |



|   | Commission proposal  | European Parliament report   | Council negotiating position   |
|---|--|--|--|
| Engagement with other countries and stakeholders. | <ul style="list-style-type: none"> <li>• Commission to engage with producer countries concerned to jointly address deforestation and forest degradation. Focus on conservation, restoration and sustainable use of forests, deforestation, forest degradation and transition to sustainable commodity production, consumption, processing and trade methods. Promote development of integrated land use planning processes, rel. legislations and fiscal incentives etc., and strengthen rights of forest-dependent communities.</li> <li>• Partnerships and cooperation to allow for participation of all stakeholders (civil society, Indigenous peoples, local communities, private sector...)</li> </ul> | <ul style="list-style-type: none"> <li>• Engagement by Commission and Member States in coordinated approach.</li> <li>• Engagement with partner countries, local governments and interested parties.</li> <li>• Purpose of engagement is addressing root causes of deforestation, forest degradation and forest conversion. Focus also includes good governance and protection of rights, livelihoods and subsistence of forest-dependent communities.</li> <li>• Commission to actively engage with indigenous peoples, local communities and civil society for development of joint roadmaps.</li> <li>• Ensuring adequate financial resources.</li> <li>• Commission to supply specific administrative and capacity-building support to governments and other stakeholders.</li> <li>• Special emphasis given to rights of ownership, tenure and access to land and the right to give or withhold free, prior and informed consent.</li> <li>• Obligations put on operators to engage “meaningfully” with vulnerable stakeholders in their supply chains (smallholders, indigenous peoples, local communities)</li> </ul> | <ul style="list-style-type: none"> <li>• Engagement by Commission and interested Member States. Commission to develop strategic framework. Focus, objectives and inclusion of stakeholders similar to EC proposal.</li> <li>• Addressing deforestation and forest degradation and their root causes.</li> <li>• Commission and interested Member States to engage with other major consuming countries.</li> </ul> |

Managing Editor

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