



Update on EU, US and UK regulatory initiatives to tackle commodity-driven deforestation

Rick Jacobsen

Manager, Commodities Policy

Environmental Investigation Agency

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EU deforestation regulation

- ▶ European Commission published proposal for regulation in November 2021
- ▶ Requires companies to carry out due diligence to ensure deforestation-risk commodities placed on the EU market do not cause deforestation or forest degradation and are produced in compliance with relevant laws
- ▶ The EU Council released a position in June 2022
- ▶ The European Parliament passed an amended version on September 13, 2022 that strengthened the ambition in a number of areas
- ▶ “Trilogue” negotiations underway to reach agreement between Council and Parliament on areas where positions differ
- ▶ Aiming to finalize regulation by the end of the year

U.S. FOREST Act

- ▶ FOREST Act introduced in House and Senate in October 2021; bipartisan support in the House, ongoing discussions with Senate Republicans
- ▶ Bill would prohibit imports of designated commodities produced on illegally deforested land
- ▶ Additional measures would provide support to producer countries, tackle financial crime associated with deforestation, and promote deforestation-free federal procurement
- ▶ Passage not expected this Congress; continuing to consult, refine and build support leading up to expected introduction early next session
- ▶ Large multi-national companies have stayed on the fence, while a number of progressive companies have endorsed

Other U.S. developments

- ▶ Biden issued Executive Order in April 2022
 - ▶ Committed to Lacey Act enforcement and tackling commodity-driven deforestation
 - ▶ Agencies tasked with developing recommendations, including on regulatory approaches, within a year
 - ▶ On October 18, the State Department put out a request for public comment on options including regulations to tackle commodity-driven deforestation
- ▶ NY and CA deforestation-free procurement bills were introduced in NY and CA this year but did not advance; reintroduction anticipated in 2023

UK Environment Act 2021

- ▶ UK passed the Environment Act in November 2021
- ▶ Schedule 17 of the law outlines measures requiring due diligence on certain deforestation-risk commodities in UK supply chains
- ▶ Require production in compliance with “local laws related to the ownership and/or use of land”
- ▶ Key details (eg commodities and businesses within scope, due diligence requirements, reporting, enforcement, penalties) will be determined in secondary legislation still under development by regulators led by DEFRA
- ▶ DEFRA carried out a public consultation on regulatory options in early 2022 and published a summary of responses in June
- ▶ Timeline for secondary regulations still unclear

Comparison of key elements (modified from TRASE/EIA, June 2022)

	European Commission proposal	US FOREST Act	UK Environment Act - Schedule 17
Overview of prohibition/standard	<p>Commodities or products in scope cannot be placed on EU markets unless they are deforestation- and forest degradation-free (after 31 December 2020), have been produced in accordance with local legislation, and are covered by a due diligence statement.</p> <p>EP included human rights protected under international law, particularly customary land tenure rights rights and FPIC; Council position also adds human rights under intl law</p>	<p>It will be unlawful to import any product made wholly or in part from a commodity in scope that is produced from land that undergoes illegal deforestation after the date of enactment</p> <p>Definition of illegal deforestation includes anti-corruption laws and laws protecting land rights of IPLCs and FPIC</p>	<p>Prohibition on using deforestation-linked commodities and their derivatives that have not been produced in accordance with local laws relating to the ownership and/or use of land. No specific cutoff dates currently defined.</p>
Commodities in scope	<p>Cattle, cocoa, coffee, oil palm, soya and wood products covered under the EU Timber Regulation.</p> <p>EP added palm oil derivatives, additional cattle products, rubber, maize, swine, chicken, goats and sheep fed with risk commodities</p>	<p>Products "made wholly or in part from" palm oil, soybeans, cocoa, cattle, rubber, and wood pulp</p> <p>Wood pulp expected to be removed and left under scope of Lacey Act, which would continue to govern imports of wood products</p>	<p>Cattle (beef & leather), cocoa, coffee, maize, palm oil, rubber and soy could all be within scope, but secondary legislation is necessary to determine this. Introduction could be staged over time.</p>

Comparison of key elements (cont.)

Forest definition	<p>Using FAO Forest Resource Assessment definition of "forest" to define deforestation. "An area of land greater than 0.5 hectare on which there are trees higher than five metres with a canopy cover of more than 10%".</p> <p>EP added "other wooded land" based on FAO definition; would expand coverage in biomes like the Cerrado and Gran Chaco</p>	<p>A "natural forest" is defined as "a natural arboreal ecosystem that (A) has a species composition a significant percentage of which is native species; and (B) includes (in alignment with FAO definitions) – (i) a native tree canopy cover of more than 10 percent over an area of not less than 0.5 hectares; or (ii) other wooded land with a combined cover of shrubs, bushes, and trees of more than 10 percent over an area of not less than 0.5 hectares.</p>	<p>"Forest" defined in alignment with FAO definition as "areas of land of more than 0.5 hectares with a tree canopy cover of at least 10%".</p>
Deforestation definition	<p>The conversion of forest to agricultural use, whether human-induced or not (see definition of "forests" above). Forest degradation is also in scope for wood products. The scope of legislation also includes relevant legislation in producer countries (although the scope of this is not yet clear).</p> <p>EP includes conversion to "plantation forest"; cutoff date December 31, 2019</p>	<p>Loss of natural forest resulting from the whole or partial conversion of natural forest to (A) agricultural use or another non-forest land use; or (B) a tree plantation. Only if commodities are grown on deforested land according to the definitions in the bill would importers need to consider legality.</p>	<p>Scope of legislation is defined by compliance with local land use laws, which are not necessarily only relevant for forest ecosystems.</p>

Comparison of key elements (cont.)

Due diligence expectations	<p>Establishment of a system to identify and obtain information about commodities, assess risk and mitigate. Information supplied must demonstrate no or negligible risk of deforestation, forest degradation and illegality</p> <p>EP added obligation to engage with smallholder producers in supply chains to support compliance.</p>	<p>Importers must take "reasonable care" (an existing principle in US customs law) to assess and mitigate risks that commodities were produced on illegally deforested land.</p> <p>Customs and Border Protection is instructed to publish within 90 days of enactment guidance on what constitutes reasonable care, which may be commodity-specific if warranted.</p>	<p>Requires the establishment of a system to identify and obtain information about commodities, assess risk of non-compliance with local laws and mitigate risk. Exact details to be outlined in secondary legislation.</p>
Risk benchmarking	<p>Yes; low-, standard- or high-risk sourcing locations to be defined at time of enactment and reviewed periodically. Simplified due diligence processes for low-risk areas, enhanced checks for high risk regions. Benchmarking at national and subnational levels (but granularity unknown at subnational)</p> <p>EP and Council positions include more detail on risk criteria and engagement with producer countries.</p>	<p>Yes; default and high risk, with simplified import declaration requirements for default-risk countries.</p>	<p>No indication that benchmarking will be used.</p>

Comparison of key elements (cont.)

Supply chain information requirements	Geolocation of plot-level points of production required for sourcing across all risk levels. Additional information must demonstrate that the absence of deforestation and forest degradation and legality requirements are fulfilled. A due diligence statement is required EP required EP and Council positions include more detail on nature of required geolocation information (eg polygons vs GPS points; full life cycle traceability for livestock rearing).	Import declaration with point of production (or all possible points) for designated commodities from high-risk countries only (with risk level defined on a commodity-by-commodity basis), identified by the smallest administrative unit of land possible (concession, farm, ranch etc). Additional information is required documenting steps taken to mitigate risks.	Traceability requirements currently unclear; requirements expected to be defined during the development of secondary legislation. Companies must establish and implement a due diligence system to identify and obtain information about that commodity; assess risk that relevant local laws were not complied with; and mitigate risk.
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Comparison of key elements (cont.)

Public reporting requirements	Operators (excluding SMEs) are expected to publicly report on an annual basis on their due diligence processes (including risk assessment and mitigation).	No public reporting required of companies. Import declaration information will later be made public (subject to protections for confidentiality) by Customs and Border Protection.	Companies must provide the regulating authority with an annual report on actions taken by the company to establish and implement due diligence. Expectation that at least parts will be made publicly available.
Penalties	Penalties to be established by Member States, but should include as a minimum fines (of up to 4% of annual turnover), confiscation of materials, temporary exclusion from public procurement.	Penalties could include seizure and fines, following existing civil and criminal penalties under US Customs Law.	Potential sanctions, including fines with current suggested maximum of £250,000 (but to be defined in secondary legislation).
Audits	"Competent authorities" at Member State level must carry out annual checks covering at least 5% of operators and 5% of quantity of relevant commodities. This moves to 15% for high-risk regions. Council and Parliament have proposed different levels of mandatory checks.	Random audits of importer filings carried out by US Department of Agriculture; Customs and Border Protection has broad discretion for auditing and must report annually to Congress on audits and investigations carried out.	Auditing process to be set out within secondary legislation.
Evidence from third parties	"Substantiated concerns" may be submitted to competent authorities by any "natural or legal persons".	Formal mechanism to receive information from outside sources to be established by Customs and Border Protection within six months.	Not specified to date.

Key areas of discussion - traceability

- ▶ Necessity of traceability to point of production for effective due diligence recognized by lawmakers, strongly supported by CSOs
- ▶ Five major chocolate companies (Mars, Ferrero, Nestle, Mondelez, Hershey) have endorsed the farm-level traceability requirement of EU regulation
 - ▶ Calling for polygon mapping, noting 600,000 farms already mapped at polygon level
- ▶ Wilmar seems to agree: "The ability to trace smallholder FFB supply is critical to Wilmar in ensuring compliance by its third-party mill suppliers, and their independent smallholder suppliers, with its No Deforestation, No Peat and No Exploitation policy." (2016 press release)
- ▶ RSPO and some EU industry associations issued statement calling for delay in plantation-level traceability until at least 2030, citing challenges in mapping smallholders
- ▶ Some smallholder groups in palm oil and cocoa sector have issued statements supporting EU regulation as an opportunity, calling for support
- ▶ Rubber industry (GPSNR) recently issued statement supporting farm-level traceability where supply chain risk is identified

Other key areas of discussion

- ▶ Smallholder engagement and support – livelihoods, compliance with regulations
- ▶ Engagement with producer countries – balancing carrots and sticks
- ▶ Incentivizing jurisdiction-level changes
- ▶ Harmonization across legislative initiatives – commodity coverage, due diligence/traceability requirements, definitions, cutoff dates etc



Thank you!

