

# Europe's regulation of imported deforestation: the limits of an undifferentiated approach

**Unless amended, draft rules to ban deforestation-tainted commodities could unfairly penalize less-developed countries**

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**Fit for Europe?** Artisanal sawnwood with traceability tags in Madagascar. Photo: A. Karsenty

The European Commission unveiled its plan to address deforestation and forest degradation associated with certain imported agricultural and forestry products in November 2021.<sup>1</sup> Around 20–25% of global deforestation is linked to international trade,<sup>2</sup> and the consumption of goods and services in the European Union is responsible for the “embedded deforestation” of an estimated 730 000 hectares of land per year, or about 10% of the global total (2004 figures).<sup>3</sup>

The proposed regulation states that, before placing a product on the European market, a company must guarantee that it is not linked to an area that has been deforested after 31 December 2020. It must also geolocate the plots of lands from which the product originates and set up a tracing system. The Commission proposed that the regulation initially apply to palm oil, soy, cocoa, coffee, beef, and wood. However, the European Parliament has proposed, through amendments adopted in September 2022,<sup>4</sup> to include swine, sheep and goats, poultry, corn, natural rubber, charcoal and printed paper products, and to tighten the cutoff date by one year to 31 December 2019.

The cornerstone of the draft regulation is the obligation on importers to perform “due diligence”—a set of checks to establish the product’s origin, legality, and “deforestation-free” status. The European Parliament requested that due diligence also take into account “human rights abuses associated with deforestation, forest degradation and

conversion, including violations of the rights of indigenous peoples, local communities and land rights holders”. As of November 2022, the regulation still needs to be finalized in “trilogue” negotiations between the Commission, the European Council (where governments of Member States are represented) and the Parliament.

## Thorny issues

A key element of the draft regulation is the cutoff date. Any commodities produced on land that was converted from forest to agriculture or pasture before this date are not considered linked to deforestation. While they differ by a year, the dates proposed by the Commission and Parliament represent a gesture to the importing industries and producing countries by granting an effective “amnesty” to a lot of recent deforestation in countries such as Brazil and Côte d’Ivoire. Countries with relatively low deforestation, such as Gabon, who wish to now develop their agriculture, may feel penalized by this arrangement.

The other important point is the adoption in the regulation of the definition of forest used by the Food and Agriculture Organization of the United Nations: a minimum of 10% tree cover (excluding oil palm or fruit trees) on a minimum area of 0.5 hectare. However, many countries have adopted a minimum threshold of 30% tree cover to define forests. With the threshold at 10%, production considered legal in the country of origin (where land with, for example, 20% tree cover has been recently cleared for agriculture) will be unacceptable in the European Union. This discrepancy risks creating trade disputes and triggering possible retaliatory measures. Indeed, a leaked memo from the Commission’s Directorate-General for Trade considers that the regulation as drafted constitutes “a direct challenge to notions of sovereignty over land use decisions” because it does not

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

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

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

<sup>4</sup> <https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1716198&t=e&l=en>



**Forest or farm?** A landscape in Acre, Brazil, where some forest land has been converted to pasture. *Photo: Kate Evans/CIFOR*

distinguish between legal and illegal production, unlike similar regulations in the United Kingdom<sup>5</sup> and the United States<sup>6</sup> and even existing European regulations (Box 1). In the memo, the trade officials also argued that the law should be limited to deforestation rather than include forest degradation. The absence of international definitions of forest degradation would make the law hard to enforce, they said, while including degradation “poses serious policy and legal concerns and [it is] a risky avenue to try to justify this on the basis of public morals.”<sup>7</sup>

Moreover, the idea of having only one definition of forest for all countries and all biomes reveals a lack of realism. It would be better to examine land units on a case-by-case basis, and even biome by biome, as some countries have several forest biomes.

## A collective penalty?

Under the proposed regulation, a benchmarking of countries will be carried out to establish different levels of due diligence according to country risk. Three levels of risk (low, standard and high) will be established. The criteria include deforestation and forest degradation rates, production trends for commodities associated with deforestation, national policies and quality of governance.

While this approach follows a certain logic, it may deter importers from sourcing timber from countries such as Cambodia, Cameroon and the Democratic Republic of the Congo, given the effort they will have to make to provide sufficient guarantees. The Commission’s draft states that “certification or other third-party verified systems could be used in the risk assessment process” but adds that “these systems should not substitute the operator’s responsibility for due diligence”. Who will decide whether the importer’s due diligence effort in addition to certification is sufficient? Interpretations are likely to vary greatly depending on the authorities of the European country concerned, creating uncertainty for economic actors.

By not trusting private certification schemes that integrate zero-deforestation criteria to declare a product “negligible risk”, the European Union will also sanction “clean” producers

## Box 1: End of the voluntary partnership agreements for legal timber trade?

The Commission is not questioning the European Union Timber Regulation (EUTR) of 2013, which aims to sanction importers who place illegally logged timber on the European market. However, the Commission appears to be considering abandoning the voluntary partnership agreements (VPAs) established under its 2003 Forest Law Enforcement Governance and Trade (FLEGT) initiative to help producer countries export only legal timber. The cornerstone of the VPAs are “FLEGT licences” for exported timber. Licences must be verified through a “national legality verification system” that has in turn been audited by national authorities and the Commission. Licences exempt importers in the European Union from tedious paperwork linked to due diligence, facilitating trade flows. However, of the 15 exporting countries involved in this process, only Indonesia has managed to issue FLEGT licences since 2016. This situation is considered a failure in light of the large sums committed by Europe to the initiative.

Against this background, Commission officials have indicated the need to “move from legality to sustainability” (hence the issue of degradation). The EUTR/VPA FLEGT coupling is therefore destined to be subsumed into the new European multi-commodity regulation, which will make due diligence for all shipments, including consideration of “degradation” for timber, unavoidable. FLEGT licenses are therefore diminishing in importance, even if they may still be used for some time to meet the “legality” criterion in future due diligence procedures.

in contexts of difficult governance and rampant corruption. This will result in a collective penalty (especially for less-developed countries) that is likely to further accentuate the shift of trade flows away from the European Union and towards Asia and emerging countries. It will also discourage responsible producers from operating in some developing countries. Thus, the European Union risks depriving itself of the lever of trade to promote sustainable practices through the incentive to develop zero-deforestation production, even in challenging contexts, in order to access lucrative European markets.

## An alternative approach

Distinguishing between illegal and legal deforestation is likely a more effective way to combat deforestation and forest degradation. This distinction is more politically acceptable than a boycott of agricultural imports associated with deforestation that are considered legal in the producing country but deemed environmentally problematic under the proposed European regulation.

It would be more realistic to adopt a “graduated response” model with the following elements:

- prohibit the import of agricultural products linked to illegal deforestation.

<sup>5</sup> U.K. Environment Act 2021

<sup>6</sup> U.S. Fostering Overseas Rule of Law and Environmentally Sound Trade Act (2021)

<sup>7</sup> [www.theguardian.com/world/2021/nov/12/trade-officials-taking-a-chainsaw-to-eu-forest-protection-plans](https://www.theguardian.com/world/2021/nov/12/trade-officials-taking-a-chainsaw-to-eu-forest-protection-plans)





**Commodity under scrutiny:** A worker in Muara Kaman District of East Kalimantan, Indonesia, loading oil palm fruit onto a truck to be taken for processing. *Photo: Ricky Martin/CIFOR*

- modulate tariffs on imported products according to their implication in forest degradation and loss;
- require information and guarantees from sector actors that products are deforestation-free; and
- certify product status by independent bodies accredited by public authorities, subject to continuous evaluation.

Switzerland has just paved the way for this kind of approach through an agreement with Indonesia that lowers tariffs by up to 40% for certified palm oil.

While the current lack of zero-deforestation certification for some commodities could be an obstacle for this alternative approach, the situation is evolving. In recent years, organizations like the Roundtable on Sustainable Palm Oil and Rainforest Alliance have included such criteria in their certification programmes for palm oil, cocoa and other commodities (timber certification schemes already have provisions about deforestation). More certification programmes would likely follow suit and demand from businesses would grow if the prospect of differentiated taxation at European Union borders became clear.

For public authorities, this would be a way to spur the evolution of third-party certification, insofar as they could endorse programmes that integrate a zero-deforestation approach and whose verification mechanisms are deemed credible. Certification can also address other topics, such as wildlife conservation, fair earnings for small producers, and gender issues, which are further driving interest in using these levers.

A weakness of certification systems is the risk that auditors from private-sector verification bodies are influenced by the companies that select and pay them. To some extent, the assessment of sustainability criteria is still subjective, and companies may seek out auditors with a reputation for complacency. However, public authorities can require certification systems to ensure auditor independence. This can be done, for instance, through continuous performance evaluation and conditional re-accreditation, or auditors can be randomly assigned instead of selected by the customer.

The proposed alternative can be summarized as follows. In all cases, importers should comply with a legal requirement to perform due diligence and ensure that the product is not associated with illegal land conversion. If this condition is fulfilled and importation takes place, to secure a favourable customs tariff, the importer must demonstrate that his product can be labelled “zero-deforestation” through an independent certification system accredited in the European Union. Otherwise, a higher tariff is applied.

The logical sequence would be as follows:

- If due diligence suggests a high risk of illegality, the importer should not proceed with the shipment.
- If due diligence establishes zero or negligible risk of illegality, but the product is not certified zero-deforestation, then a higher tariff is applied.
- If due diligence establishes zero or negligible risk of illegality, and the product is certified as zero-deforestation, a favourable tariff is applied (zero-deforestation certification may also incorporate the guarantee of legality, facilitating due diligence).

An issue with this approach is that many tariffs are currently set at zero, for example for soy, natural rubber, and cocoa. Introducing a tax differential between zero-deforestation products and others requires an increase in some tariffs, and thus a revision of existing bilateral trade agreements. Unilateral increases in some tariffs could be challenged at the World Trade Organization (WTO). However, there is room for manoeuvre in the provisions of GATT Article XX, which allows some exceptions for measures deemed necessary to pursue a legitimate objective (such as the conservation of non-renewable natural resources).

The additional revenue from tariffs could be used to fund programmes that help small producers adopt sustainable practices. As well as individual certification, such programmes could support certification and zero-deforestation labelling for groups and whole territories.

Allocating additional revenues to producing countries in line with the taxes levied on their imports would ward off accusations of protectionism and provide a “good faith” basis for defending this measure at the WTO. And, as with all ecological tax mechanisms, the objective would be for the yield from the duty to decrease, with the European Union only importing certified zero-deforestation products with the lowest tariffs.

## A call for common sense

With the loss of forests along with their biodiversity and carbon stocks so high on the political agenda, the proposed European regulation has drawn sharp scrutiny—and criticism—from many interested parties. Some environmental groups, for instance, consider its provisions too weak.

As the Commission, ministers and lawmakers seek to finalize the regulation, they should keep in mind that, to succeed in advancing global sustainability, it should provide positive incentives for exporters as well as importers, and support a fair trade in agricultural commodities that can help countries in the global South to realize their legitimate development goals alongside the conservation of their forests.