

Insights

THE EUROPEAN UNION AGAINST DEFORESTATION: THE COMPANIES CONCERNED STILL HAVE 8 MONTHS TO TAKE ACTION

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SUMMARY

On December 30, 2024, the European ^[1] regulation of May 31, 2023 on deforestation will come into force in all EU countries. The aim of these new rules, which are designed to combat the phenomenon of imported deforestation, is to require operators to implement a strict traceability system for the products they make available on the European market or export from this market

While European imports are responsible for around 16% of global deforestation, placing Europe in second place behind China according to the WWF, the EU adopted a new regulation on imported deforestation on May 31, 2023. After being adopted by a large majority (552 votes in for, 44 against and 43 abstentions) in April 2023 by the European Parliament, it came into force on June 29, 2023. The obligations arising from the regulation will start applying from December 30, 2024 and from June 30, 2025 for SMEs^[2]. This regulation is part of the Green Pact, which aims to make Europe the first climate-neutral continent by 2050.

The aim of the regulation is to enable European consumers to stop being unwittingly responsible for forest degradation and deforestation, and thus combat the phenomenon known as "imported deforestation". Imported deforestation refers to the supply of commodities or processed products whose production contributes, directly or indirectly, to deforestation, forest degradation or the conversion of natural ecosystems in producer countries.

IT'S A FAR-REACHING REGULATION.

The regulation applies to seven commodities potentially involved in deforestation activities (cattle, cocoa, coffee, oil palm, rubber, soya and wood) and to manufactured products containing them, known as "relevant products", whether or not they are produced in the EU. The precise list of these products and their related variants is set out in Annex I of the regulation and includes, exhaustively,

products such as leather, food preparations containing cocoa, beef, leather, palm oil derivatives, natural rubber products, paper products, etc.

Due to the wide range of products likely to be affected by this new regulation, many sectors and industries, well beyond the food sector alone, will be impacted, especially as there is no threshold in terms of volume or value.

The new obligations concern operators, i.e. any natural or legal person who, in the course of a commercial activity, place the relevant products on the EU market for the first time and/or export them. They also apply to traders, i.e. any trader in the supply chain other than the operator who, in the course of a commercial activity, makes relevant products available on the market, meaning any supply of a relevant product for distribution, consumption or use on the EU market in the course of a commercial activity, whether in return for payment or free of charge.

New conditions to be met before a product can be made available on the European market or exported.

Specifically, three conditions must be met before the products in question can be placed on the EU market, made available on the EU market or exported from the EU market.

- The products must be "zero deforestation", i.e. they must not contain commodities from land that has been subject to deforestation after December 31, 2020, or have been fed with or have been made using such commodities. For products that contain or have been made using wood, the wood must have been harvested without inducing forest degradation after December 31, 2020^[3].
- Products must be produced in compliance with the relevant legislation of the country of production. This includes not only environmental, fiscal and social legislation, but also rules for the protection of human rights and indigenous peoples.
- Finally, and this is the most restrictive condition for companies, each time a batch of products is placed on the market, operators and traders must submit a due diligence statement, guaranteeing that the products they are placing on the market are not the result of deforestation and that they comply with the relevant local legislation. The information to be included in the due diligence statement is specified in Annex II of the regulation.

THE OBLIGATION TO SET UP A DUE DILIGENCE SYSTEM.

Each year, operators (this does not apply to SMEs^[4]) will have to publish their due diligence system and the measures taken to comply with the regulation, otherwise they will be unable to place their products on the market. Due diligence involves gathering information and data, particularly on products^[5] and on the relevant legislation in the country of production, followed by an assessment of the risk that the products to be placed are not compliant, based on several criteria (presence of

forests in the production area, presence of indigenous populations, etc.), in order to attest that they are "zero deforestation". Only products with a zero or negligible risk of non-compliance will be allowed to be placed on the market or exported. This information must be kept for five years. This assessment will have to be re-examined at least once a year, and made available to the competent authorities in the Member States via an Information System.

Finally, the operators and traders concerned will have to put in place risk mitigation measures to achieve no or only a negligible risk. If there is no or only a negligible risk, the relevant product may be placed on the market. In the opposite case, the operator must put in place sufficient and proportionate strategies, procedures and controls to effectively mitigate and manage the identified risks of non-compliance. Operators will have to pay particular attention to three key points: the complexity of the supply chain concerned, the use of insufficiently conclusive and verifiable information, and the risk of circumventing this regulation or mixing it with relevant products of unknown origin or produced in areas where deforestation or forest degradation has occurred or is occurring. To assess the extent of the obligations facing the relevant companies, they can usefully refer to the FAQ published by the European Commission in December 2023.

The due diligence obligations will start applying from December 30, 2024 and, for SMEs established no later than December 31, 2020, from June 30, 2025. This means that, by this date, operators will have to have developed their entire due diligence system and, where necessary, complied with any shortcomings.

THE EFFECTIVENESS OF THE REGULATION IS ENSURED BY CONTROL AND SANCTION MECHANISMS.

Traceability and transparency are therefore at the core of the proposed measures to make the sustainability of supply chains a new standard. To ensure the effectiveness of this regulation, dissuasive controls and penalties have been introduced.

The competent authorities in the Member States will have to carry out controls in accordance with an annual control plan that they draw up, taking into account the level of risk per country, the compliance record of an operator or trader and any relevant information.

The regulation also requires the competent authorities in the Member States to check a certain percentage of operators and traders each year. This percentage will depend on the risk level of the countries of production of the products placed on the market (9% of operators and retailers marketing products from a country of production presenting a high risk; 3% for a standard risk; and 1% for a low risk).

Finally, the regulation provides for a range of penalties for breaches of the obligations laid down in the regulation. These penalties must be effective, proportionate and dissuasive, and will be set out in detail under the national law of each Member State.

Penalties should include fines proportionate to the damage caused to the environment and to the value of the relevant commodities or products concerned, and will increase in the event of repeated infringements, up to a maximum of at least 4% of EU turnover. The regulation also recommends confiscation of the relevant products or the revenues gained from them, or temporary exclusion (for a maximum of 12 months) from public procurement processes and public funding.

Finally, in the event of serious or repeated infringements, a temporary prohibition from placing or making available on the market or exporting relevant commodities and products may be ordered by the competent authorities.

The penalties laid down in the regulation are heavy, and it is therefore a real challenge for companies to implement an effective due diligence and risk mitigation system that complies with the obligations set out in this new regulation.

In France, to ensure compliance with these obligations, the Ministry for Ecological Transition and Territorial Cohesion and the Ministry for Agriculture and Food Sovereignty have been designated as the joint competent authority for the application of these new rules.

[1] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

[2] Within the meaning of Article 3 of Directive 2013/34/EU of the European Parliament and of the Council, a "micro, small and medium-sized enterprise" or "SME" is a company that does not exceed two of the following three thresholds: balance sheet total: EUR 25,000,000; net turnover: EUR 50,000,000; average number of employees during the financial year: 250.

[3] With regard to timber and timber products within the meaning of Regulation EU 995/2010 (Timber Regulation) produced before 29 June 2023 and placed on the market from 31 December 2027, the Regulation specifies that these are considered to comply with this regulation and may be placed on the market. Regulation EU 995/2010 (Timber Regulation) will be repealed with effect from 30 December 2024.

[4] SME operators will be subject to simplified obligations, and in particular will have to keep registers instead of setting up a *due diligence* system.

[5] The collection of information must be exhaustive and detailed in order to prove that there is no deforestation on the plots of land concerned and use data or documents relating to production, including the correct geolocation of all plots (i.e. using aerial photos, satellite images, photographs with linked geotags and time stamps or polygons with latitude and longitude to six decimal places for plots of land larger than four hectares used for the production of commodities other than

livestock) where all relevant commodities were produced and the date or time interval of production. These geolocation coordinates must be provided as part of the declaration of due diligence.

RELATED CAPABILITIES

- Regulation, Compliance & Advisory
- ESG Governance, Compliance and Reporting

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