

PROPOSAL FROM THE EUROPEAN PARLIAMENT ON DEFORESTATION DUE DILIGENCE

We recently gave our views on a proposal from the UK Government to establish a due diligence obligation in respect of commodities that are the product of illegal deforestation and degraded ecosystems, which would represent the first piece of UK supply chain due diligence legislation (See our September 2020 [client briefing](#)).

Now the European Parliament has published its own [recommendations](#) (EUP Recommendations) to the European Commission for importers and traders of forest and ecosystem-risk commodities (FERC) to be subject to an EU-wide due diligence legal framework to halt and reverse EU-driven global deforestation.

The EUP Recommendations are generally broader and more stringent than the UK's proposals. We have analysed the key differences and discuss some of the implications below.

SCOPE

The commodities to be covered by the EUP Recommendations are similar to those in the UK proposals, i.e. at least palm oil, soy, meat, leather, cocoa, coffee, rubber, and maize. Timber would also be brought in by merging protection under the Timber Regulation into the new regime.

The European Parliament wants all operators on the EU internal market to be covered by the obligations, irrespective of their legal form, size or complexity of their value chains, when they place relevant commodities on the EU market for the first time. In a distinct shift from the position in the existing EU Timber Regulation, the proposal would also impose some obligations on traders of commodities or derived products *within the EU market*.

Although the UK proposal would also cover import into, and trade within, the UK, the UK's proposals only aim to target larger businesses which are likely to have sufficient purchasing power to influence producers. Correspondingly, the UK proposals only apply to businesses exceeding certain employee and turnover thresholds.

Key issues

- The European Parliament has made a far-reaching proposal for due diligence of supply chains for Forest and Ecosystem-Risk Commodities incorporating annual reporting, a grievance mechanism, public challenge rights and stringent civil sanctions
- Unlike the recent UK proposal:
 - It would apply to all operators and traders, not only larger businesses
 - It is not simply based on breach of local laws, but on broader harm to natural forests and ecosystems, and human rights violations
- If the Commission supports the European Parliament's proposals, the UK Government is likely to come under pressure to strengthen the UK proposals

GENERAL OBLIGATIONS

Under the EUP Recommendations, operators will be prohibited from selling products into the EU internal market unless operators can demonstrate that within their operations or their value chain, there is, at the very most, only a negligible risk that the goods:

- originate from the conversion of land that had a status of natural forest or natural ecosystems as at a set date (proposed as 2015); or
- originate from land that had a status of natural forest or natural ecosystems (again as at 2015) which have undergone degradation since that time; or
- are produced in, or are linked to, violation of human rights (as embedded in national laws, the EU Charter on Fundamental Rights or various international standards, treaties and other internationally recognised human rights including the right to a healthy environment), child labour, or obtained from land of indigenous peoples or local communities without their free prior and informed consent.

The above list of criteria triggering obligations is far broader than under the UK proposals which would only bite for goods which have been grown in breach of local laws where they were produced. Furthermore, the UK proposals only focus on deforestation and ecosystem damage through an 'environmental' lens and, unlike the EUP's recommendations do not incorporate human rights related provisions or any reference to the UN Guiding Principles on Business and Human Rights.

DUE DILIGENCE AND OTHER ASPECTS

The EUP Recommendations propose that operators be obligated to take a risk-based approach to due diligence, including all types of business relationships along the operator's entire value chain. They would need to identify and assess real and potential forest and ecosystem risks in that value chain. Risks would then need to be prevented and mitigated to a negligible level. If, after having carried out due diligence and mitigation steps, the operator considers that its operations (or part thereof) still contribute to or potentially cause or contribute to adverse impacts on human rights, natural forests, or natural ecosystems that cannot be prevented or mitigated, then the relevant operations should be ceased.

Annual reporting of due diligence and consultation efforts is required, carrying with it a penalty for non-compliance and the possible prohibition from selling products into the EU market. The EUP Recommendations are far-reaching, and for example, include the requirement for a grievance mechanism for workers and interested parties to report on risks to human rights, natural forests and natural ecosystems in an operator's value chain. The EUP Recommendations also envisage a standalone documentation requirement to facilitate review of operators' due diligence actions by authorities.

Public reporting and due diligence obligations are also foreshadowed in the UK proposals but a lack of detail in the proposals does not yet allow us to see how the level of due diligence obligations might otherwise compare.

The EUP Recommendations call for members of the public to be able to challenge non-compliance. Operators would be subject to stringent civil liability for harm in certain cases. In particular, the EUP recommends that

operators should be liable for harm arising out of human rights abuses or damage to natural forests and natural ecosystems directly linked to their products, services or operations through a business relationship. However, operators may be able to discharge their liability if they can prove that they took all due care to identify and avoid the damage.

While the UK proposals provide for 'civil sanctions', it is not clear whether these would go as far as the EUP Recommendations.

IMPLICATIONS

Significantly, if the EUP Recommendations are adopted by the EU, they would place obligations on non-EU operators and finance parties relating to commodities and derived products going into the EU. It is quite possible, therefore, that UK-based traders, would in any event have to comply with more expansive and stringent EU provisions in any event, irrespective of the UK system. This could mean effectively UK traders having to go further in their due diligence obligations for products (and their related supply chains) destined for the EU than for those products staying in the UK (in the same way that UK companies providing goods into the EU market will in future have to meet EU product standards following its departure from the EU legal framework, unless a future agreement for the UK's relationship with the EU deals with mutual recognition of product standards). The UK Government may well come under pressure to strengthen its due diligence requirements accordingly and trail the EU's position more closely.

The EUP Recommendations have been adopted against the backdrop of a review of the EU Timber Regulation and associated legislation by the Commission, as well as the launch this week of a [consultation](#) in relation to its "Sustainable Corporate Governance Initiative", under which the Commission is expected to propose a broader mandatory human rights and environmental due diligence regime. There will be a need to integrate these mechanisms to avoid significant duplication, and possible confusion, and it will be interesting to see how the Commission proposes to achieve that.

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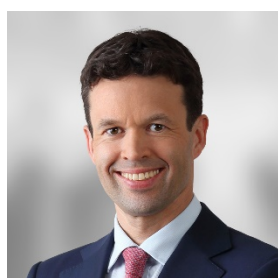
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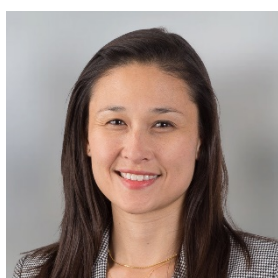
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