

## BRIEFING ON PROPOSAL FOR A REGULATION ON DEFORESTATION- FREE PRODUCTS – INTERNATIONAL CONTEXT

On 17 November 2021, the European Commission proposed a regulation on deforestation-free products. This proposal falls within the ambit of the European Green Deal which aims to make the EU climate-neutral by 2050 and to curb biodiversity loss. The proposal's objective is to promote products and value chains that exclude deforestation and forest degradation. It has therefore potentially significant impacts on some exporters to the EU and is likely to attract scrutiny from the EU's trading partners, including with respect to compliance with World Trade Organization (WTO) obligations. Overall, the proposal is in-line with similar US and UK regulations which were also introduced in 2021. Here we answer 5 key questions about the international context of the EU Proposal, covering its WTO implications as well as the regulations of the US and UK.

In a separate briefing we address the core provisions of the EU proposal, such as the scope and the main compliance requirements. The separate briefing is available [here](#).

### 1. What are the international trade law implications of the proposed regulation?

The proposed regulation is unprecedented in the extent to which it regulates the import and sale of products associated with deforestation and will attract significant scrutiny from the EU's trading partners regarding compliance with World Trade Organization (WTO) obligations. Indeed, elements of the proposed regulation have the potential to engage several WTO obligations, including the cornerstone National Treatment and Most-Favoured Nation provisions of the GATT 1994; as well as obligations under the Agreement on Technical Barriers to Trade (the "**TBT Agreement**") and the Agreement on Agriculture.

In general, WTO obligations require that restrictions on the import and placing on the market of goods must not have the effect of according less favourable

### Key issues

This briefing looks at 5 key questions about the international context of the EU Proposal, covering its WTO implications as well as the regulations of the US and UK:

- 1. What are the international trade law implications of the proposed regulation?
- 2. How does the proposed regulation take into account human rights-related impacts?
- 3. What are the impacts of the proposed regulation from a US perspective?
- 4. How do similar regulations in the UK work?
- 5. How and to what extent does the proposal overlap with other EU regulations?

treatment to imported products than "like" domestic products (national treatment); or discriminate between "like" products originating from different countries (most favoured nation). The TBT Agreement also includes obligations requiring that technical regulations not be more trade-restrictive than necessary to fulfil a legitimate objective (though the extent to which the TBT Agreement applies to so called 'non-product related processes and production methods' such as those covered by the proposed regulation remains a hotly debated topic in WTO jurisprudence).

Importantly, while the proposed regulation applies to both EU and foreign producers, WTO rules also prohibit certain measures that in fact favour domestic over imported products; or favour imported products from certain third countries over others. Accordingly, if producers from certain countries are disproportionately impacted by the proposed regulation relative to EU producers (for example if the criteria for establishing that a product is deforestation free favour EU producers), this may be challenged on the basis of alleged inconsistency with WTO national treatment obligations. Similarly, by imposing more onerous due diligence requirements with respect to some countries than others (through the Commission's risk assessment criteria), the proposals have the potential to engage the most-favoured nation obligation of the GATT 1994.

The public policy exceptions contained in Article XX of the GATT 1994 provide some flexibility for the EU to implement the proposed regulation in a manner consistent with WTO obligations. However, reliance on Article XX is subject to several conditions—including that the measure must not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail. Accordingly, whether the EU's proposed criteria for distinguishing between countries based on risk assessment criteria meet these conditions, and whether any discriminatory impacts of the proposed regulation are necessary for the achievement of legitimate EU objectives, are likely to be the subject of significant debate (and potential challenge).

## **2. How does the proposed regulation take into account human rights-related impacts?**

The regulation requires products to have been produced in compliance with 'relevant legislation of the country of production'. This is supported by information gathering and due diligence requirements. The explanatory memorandum to the proposed regulation clarifies that 'relevant legislation' entails labour, environmental and human rights applicable in the country of production at both a national and an international level. Such rights should be taken into account by companies when assessing compliance with the regulation. In this regard, the explanatory memorandum highlights that the rights of indigenous people and the EU Charter of Fundamental Rights (including the right to life, protection of personal data, freedom to conduct a business, right to property, and environmental protection) are relevant in the context of deforestation. However, the regulation does not consider any broader adverse human rights impacts that may result from reigning back the development of agriculture or industries (for example, impacts on the labour market) nor does it propose any steps that companies should take to mitigate such impacts. The interaction of the proposed legislation with EU legislation providing for human rights and environmental due diligence in the value chain is envisaged in the preamble to the proposed regulation. The preamble

indicates that where this proposed regulation contains more specific provisions, the interpretation of those provisions should not undermine the goals or effective application of other EU legislation dealing with the same topic. Accordingly, the proposed regulation pays regard to the efforts ongoing in parallel to push for mandatory environmental and human rights due diligence as a cornerstone of sustainability. For example, it appears as part of the EU Green Taxonomy which promotes sustainable finance, and the EU Sustainable Corporate Governance ("SCG") initiative (see further, our [BHR Insights Blog](#)).

Although there will be some overlap between the overall objectives of the proposed regulation and the SCG proposal, the proposed regulation will focus more specifically on products and product supply chains while the SCG aims to address adverse human rights and environmental impacts within business operations and value chains more generally. In addition, the deforestation proposal appears to be limited to due diligence targeting illegal deforestation – i.e. where the focus of the due diligence is whether practices occurred consistently with local law – as opposed to deforestation generally or deforestation that is inconsistent with any internationally applicable standards in relation to either human rights or the environment.

### **3. What are the impacts of the proposed regulation from a US perspective?**

The proposed regulation is in-line with ongoing US legislation efforts. Bill S.2950, otherwise known as the "Fostering Overseas Rule of Law and Environmentally Sound Trade Act of 2021" or the "FOREST Act of 2021," was introduced in the US Senate on October 26, 2021. The purpose of the act is "[t]o combat illegal deforestation by prohibiting the importation of products made wholly or in part of certain commodities produced on land undergoing illegal deforestation, and for other purposes." The Bill highlights that the United States is a significant market for products made wholly or in part of commodities such as palm oil, cattle, cocoa, and rubber – all of which are at risk of being produced on illegal deforested land – and builds on the Lacey Act, which prohibits the trade of wildlife and timber from illegal sources, to protect biodiversity and increase overall ecosystem resilience. To ensure compliance and coordination of identified countries without adequate and effective protection against commodity-driven illegal deforestation, U.S. Customs and Border Protection ("CBP") will not only share declarations and other information with relevant agencies to ensure effective enforcement, but it will also establish a process for other sources to submit evidence of potential violations 180 days after enactment. In addition, CBP will submit a report to Congress, two years after enactment, detailing its enforcement efforts and continue to do so annually thereafter. The lists of covered commodities and products produced on illegally deforested land will also be updated at least annually to ensure their scope adjusts for shifts in the market to deter illegal deforestation. If/when the FOREST Act of 2021 becomes law, companies will need to understand their specific obligations and reconcile where necessary any differences with the EU's proposal.

### **4. How do similar regulations in the UK work?**

On 3 December, the UK Government consulted on its own version of a deforestation due diligence framework (see our [briefing](#) discussing the

proposals). Although the UK framework powers are already implemented in legislation, the Commission's proposal is further advanced in terms of the detail proposed. However, already significant differences can be detected between the approaches of the EU and the UK, see the box below.

**Some (non-exhaustive) key differences between EU and UK proposals**

Aspects of proposal	EU proposals	UK proposals
<b>Commodities covered</b>	Beef (including derivative product leather), cocoa, coffee, palm oil, soy, <b>wood</b>	Beef (and derivative product leather), cocoa, coffee, <b>maize</b> , palm oil, <b>rubber</b> , soy
<b>Regulated Businesses</b>	<b>All businesses</b> placing commodities and relevant products on the EU market for the first time, and exporting from the EU. <b>SME businesses</b> supplying commodities / products in the EU are subject to light regime	<b>Turnover and commodity volume test</b> for all relevant businesses in respect of <b>each relevant commodity</b> .
<b>Risk covered</b>	Commodities produced in breach of relevant local laws, <b>or through deforestation (even if lawful) or leading to forest degradation occurring after 31 December 2020</b>	Commodities produced in breach of relevant local laws
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<b>Risk mitigation requirement</b>	Reduce risk so as to be <b>negligible</b>	Reduce to <b>'as low as reasonably practicable'</b> level
<b>Sanctions</b>	Fines proportionate to the damage and commodity/product value, confiscation of revenues, confiscation, exclusion from public procurement processes	Civil penalties and criminal penalties – monetary penalties up to £250,000

**5. How and to what extent does the proposal overlap with other EU regulations?**

Generally, the proposed regulation falls under the umbrella of the European Green Deal which aims to make the EU climate-neutral by 2050 and to curb biodiversity loss. The proposal for a regulation on deforestation-free products is an integral part of and coherent with the overall objectives of the European Green Deal and all the initiatives developed thereunder. Therefore, the proposed regulation is expected to be applied together with the Renewable Energy Directive (RED II), another regulation under the European Green Deal. Both regulations apply when commodities falling within the scope of the proposed regulation are also used as biofuels or to produce biofuels (which triggers the applicability of RED II), such as wood pellets or derivatives of soy

and palm oil. RED II sets, among others, sustainability criteria rules for biofuels, bioliquids and biomass to be considered sustainable and specifies targets for the EU to achieve a renewable energy target of at least 32% by 2030.

Further, the proposal also links its own due diligence requirements with other EU legislative instruments that lay down requirements regarding supply chain due diligence into adverse human rights or environmental impacts. The linkage is established in such a way that reporting obligations (such as publicly reporting on due diligence systems) under the proposed regulation may be fulfilled by including the required information when reporting under other EU legislative instruments.

The proposed regulation is intended to co-exist among other EU legislative instruments that lay down requirements regarding value chain due diligence into adverse human rights or environmental impacts – where more specific or stringent requirements in other instruments exist, those should be applied in conjunction with those of the proposal.

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