

# Ending imported destruction

## How EU due diligence regulations could protect forests and people

Photo: Kate Evans, CIFOR

### Summary report from a webinar on 26 June 2020

Fern and the [Responsible Business Conduct \(RBC\) Working Group of the European Parliament](#), a cross-party group of MEPs, co-organised the event to discuss practical solutions for regulating company behaviour and supply chains of forest risk commodities. Panellists explored options for regulating agricultural supply chains and how an overarching horizontal EU human rights regulation could complement and interact with a product centered forest-specific regulation.

This discussion happened against the backdrop of:

- Growing recognition by policymakers, companies and civil society that regulatory action is urgently needed to ensure businesses respect human and environmental rights and halt deforestation and forest degradation.
- An [announcement](#) in April 2020 by European Commissioner for Justice, Didier Reynders, that following a recent Directorate General (DG) Justice Study, the Commission will introduce rules for mandatory corporate environmental and human rights due diligence.
- The publication of the [“Communication on stepping up EU action to protect and restore forests”](#) and [Roadmap](#), exploring ways EU legislation can address deforestation in supply chains.

- An upcoming DG Environment (ENV) impact assessment which will look at regulatory measures to avoid or minimise the placing of products associated with deforestation or forest degradation on the EU market.
- A recent [European Parliament draft report](#) proposing the adoption of new due diligence legislation to be implemented by all operators.

The event was facilitated by Vice President of the European Parliament and Chair of the RBC Working Group Heidi Hautala and Bernd Lange, Chair of the Committee on Trade. It was attended by more than 180 people.

Speakers included, Zsolia Kerecsen, DG Justice, EU Corporate Governance, Bojan Grlaš, DG Environment, Team Leader international deforestation; Delara Burkhardt, MEP and Rapporteur on the Legislative Own Initiative (INL) Report regarding an EU legal framework to halt and reverse EU-driven global deforestation, Felipe Carazo of the Tropical Forest Alliance (TFA) and Duncan Brack, Independent analyst and Shivani Kannabhiran, Sector Lead at the RBC Centre of the Organisation for Economic Cooperation and Development (OECD).

### Part 1: What should a European regulatory framework to halt deforestation look like?

Speakers from DG Justice (DG JUST) and DG Environment (DG ENV) outlined the situation including views on legislative initiatives and plans.

**Zsolia Kerecsen** from DG Justice (EU Corporate Governance) explained that the European Commission (EC) aims to

**develop a horizontal or overarching corporate governance instrument to address how corporate directors take the interest of stakeholders into account in their duty of care towards the company and to also address detrimental effects on human rights and the environment (due diligence).** It should be to develop a horizontal or

**overarching corporate governance instrument to address how corporate directors take the interest of stakeholders into account in their duty of care towards the company and to also address detrimental effects on human rights and the environment (due diligence).** Due diligence should also be accompanied by a strong enforcement system which includes civil liability and cooperation between Member State supervising authorities. This is in line with the current trend of converging human rights and environmental performance requirements in private sector initiatives and the EU's ambitions and targets.

The new instrument is expected to have three elements: directors' duties; duties to integrate sustainability into corporate strategy and to set science-based targets; and a corporate due diligence obligation.

As regards directors' duty, it should be clarified that directors must strike the right balance between shareholders' and stakeholders' interest (such as the environment). Directors would be legally accountable for neglecting their responsibilities. In the past decades we have seen companies focusing on short-term financial performance and paying an increasingly higher percentage of their income in dividends to shareholders. Shareholders received 20 per cent 30 years ago which has increased to 60 per cent at the cost of investment and sustainability.

Another problem concerns harmful unregulated supply chains. Companies have paid lip-service but not delivered on promises. Legislation is therefore necessary and should require companies to identify, prevent and mitigate environmental and human rights impacts of their operations (due diligence).

A cross sectoral corporate due diligence regulation should be aligned with a forest-specific, product-based regulation to address deforestation and forest degradation as will be proposed by DG ENV. The two regulations will be complementary.

**Bojan Grlaš** from DG Environment said that the Commission's next steps are clear and that **a legislative proposal focusing on avoiding or minimising the placing of products associated with deforestation or forest degradation on the EU market will be presented in the first quarter of 2021.** DG ENV is currently undertaking an Impact Assessment and looking at a broad range of different options, including not only due diligence, but also options including mandatory labelling, and learning from the Illegal, unreported and unregulated (IUU) fishing experience, and Green Finance, among others. They are also considering possible combinations of different elements. All options are open,

and decisions will be taken in a later process following the Commission Better Regulation rules.

The ongoing Forest Law Enforcement Governance and Trade (FLEGT) Regulation and EU Timber Regulation (EUTR) fitness check will, together with other relevant experiences, for example on IUU fishing, feed in the Impact Assessment process to avoid repeating the same mistakes. It will also allow us to learn from the experience of implementation, in particular with regards to challenges in national legal systems and among operators when it comes to the concept of due diligence. The objective is to have real results and impacts and avoid having a nice regulation that will not be implementable. It should be noted that this initiative is more complex compared with FLEGT as it will tackle a range of different commodities, not only timber, and look beyond legality as it focuses on sustainability. There is good cooperation between DG JUST, DG DEVCO, DG AGRI and DG TRADE.

**Delara Burkhardt MEP**, rapporteur of the [Legislative Own Initiative report](#) on an EU legal framework to halt and reverse EU-driven global deforestation stressed that voluntary options are not working, that the responsibility should not be shifted to the consumer, and that regulation is required. **Consumers should not need to choose deforestation-free products, companies must stop deforestation products from entering the EU.**

A product based mandatory due diligence regulation applicable to all forest risk commodities including soy, beef, cocoa, palm oil and rubber is the main feature of the report. It recommends imposing four duties on companies:

1. To conduct a due diligence analysis of their entire value chain to identify risks affecting forests, other ecosystems and forest communities (especially land rights). They would also need to prevent and mitigate risks and negative impacts. The report proposes forest risk commodities placed on the Union market should not be harvested, extracted or produced from land that had on 1 January 2008 the status of natural forest or natural ecosystem; To conduct a consultation with stakeholders and to establish an early warning mechanism - that gives an opportunity to workers and parties with substantiated concerns to inform about any risk of harm;
2. To conduct a consultation with stakeholders and to establish an early warning mechanism - that gives the opportunity to workers and parties with substantiated concerns to inform about any risk of harm;
3. To be transparent and conduct regular reporting and;

4. To keep records and make these publicly available.

**The rapporteur stressed that a horizontal corporate due diligence legislation and a forest specific product based**

**due diligence regulation are both needed and should be complementary.** It would also be necessary to better define "Deforestation" and the scope of forest risk commodities.

## Part 2: Private sector views

**Felipe Carazo**, Head of Public Sector engagement at Tropical Forest Alliance (TFA) **and Duncan Brack**, Independent environmental policy analyst (see [presentation](#)).

Efeca and TFA hosted ten roundtables with **150** organisations to collect private sector views on measures to halt deforestation. Nearly **100** organisations were from industry – from **global traders to manufacturers and pan-European retailers**; and **national palm oil and soy initiatives**, representing a range of European industry actors (including Small and Medium Enterprises (SMEs)). Commodities represented included **palm oil, soy, cocoa, coffee, rubber and pulp/paper**.

**Alongside the roundtables, ten associations have publicly supported a new due diligence regulation:** Cocoa coalition (Barry Callebaut, Mars, Mondelez, Nestle, Tony's Chocolonely, Unilever), CAOBISSCO, European Cocoa Association, European Palm Oil Alliance, FoodDrinkEurope, French Alliance for the Preservation of Forests, and a joint statement by COCERAL, FEDIOL and FEFAC.

The companies and associations that participated in the roundtable agreed that **mandatory EU-wide due diligence legislation should be introduced, aiming to transform global commodity supply chains** (not just clean up EU supply chains); address the root causes of deforestation; **enhance traceability**; and encourage a better understanding of supply chains and their exposure to risk (of illegality, unsustainability, deforestation and human rights abuses.)

To this end the EU should propose:

- a **broad 'horizontal' corporate due diligence** obligation applying to all companies throughout their operations and supply chains.
- **detailed legislation for specified commodities** or supply chains, focusing first on forest risk commodities (i.e. not non-legally-binding 'guidelines').

The due diligence obligations should extend throughout the supply chain. There should be no threshold by company size or turnover, although the obligation should be proportionate to a company's influence.

As described in the United Nations Guiding Principles on Business and Human Rights (UNGP), due diligence should be a process of continual improvement. Such an approach implies that not all challenges can be overcome immediately but through a gradual process in which the company is given time to mitigate the risks and address them. Without this, companies may simply drop high-risk suppliers. An immediate import prohibition or trade ban is not consistent with this; there may be an argument for it, but it is not part of a due diligence approach.

A patchwork of 27 countries' national legislations is not desirable. A directive would leave too much flexibility to Member States, so most businesses prefer a regulation. There is broad consensus that due diligence criteria should go beyond legality and include environmental and human rights. Definitions should be based where possible on existing frameworks such as the Accountability Framework Initiative (AFI). Company compliance should consist of three requirements: to exercise due diligence, to put in place an adequate due diligence system, and to issue reports.

Monitoring and evaluating due diligence systems is a complex task, **and better undertaken by the state rather than left to third-party action through the courts** – though this option would also be useful as a backstop. Enforcement must be properly resourced, with recourse to adequate penalties (this is the problem with EUTR implementation in some countries).

There are limits to what companies can achieve by themselves, so there needs to be a mix of complementary measures in addition to a due diligence regulation. These could include: Trade Partnership agreements (similar to voluntary partnership agreements (VPAs)) or clauses in Free Trade Agreements (FTAs) or investment agreements, development assistance to support the changes needed in producer countries, reforms to EU competition law so companies may collaborate more effectively on sustainability, public procurement policies to boost the market for deforestation free commodities, dialogues with other consumer countries (particularly China), and regulation of finance and investment, all underpinned by effective verification systems.



## Part 3: The intergovernmental view

**Shivani Kannabhiran**, Sector Lead at the RBC Centre of the OECD stated we need action at a scale, globally versus limited action from some progressive companies.

Shivani [shared lessons](#) from [implementing](#) the OECD-FAO Guidance for Responsible Agricultural Supply Chains, which provides a practical risk-based due diligence framework for companies across the entire value chain from investors, to input suppliers, producers, traders, food and beverage manufacturers and retailers.

It is important to integrate international standards into legislation to provide clarity and coherence to the market. This happened for example with the EU legislation on Responsible

minerals (conflict minerals legislation). There is technology available to help support due diligence implementation although this needs to go hand in hand with on-the-ground truthing.

It is a big step from discussion to real action. OECD guidance is relevant for both large companies and SMEs. It is important that all companies are involved.

Companies are encouraged to use existing tools such as Environmental Impact Assessments (EIAs). Lessons from OECD pilots show that the biggest challenge is the implementation of company policies and commitments to address risks. For more information about the pilot results please see [here](#).

### Question and answers from the audience:

**Question:** Boukje Teewes from [Solidaridad](#): *Concerns are expressed about producer countries disengaging. How do we incentivise actors in producing countries and avoid negative impacts on the ground?*

**Answer:** Duncan answered that Partnership Agreements can be one way to support action on the ground. If this is not possible then development assistance can be used to address root causes. If a regulation includes the prohibition of placing certain goods on the market, it may have an adverse short-term effect, but may be a long-term option. All actors need to collaborate in real partnerships (not imposed) to generate change on the ground.

**Question:** Charlotte Opal from Forest Conservation Fund: *What is the EU doing to decrease consumption as we have the biggest footprint?*

**Answer:** The Farm to Fork Strategy may offer some solutions as may health campaigns, but they will face huge resistance from the agriculture lobby.

**Question:** Rob Delaet - engaged in reforestation project in Brazil: *Are emergency measures possible to stop destruction of the Amazon in Brazil?*

**Answer:** Companies and the financial sector should exercise pressure on the Brazilian government.

Bernard Lange MEP concluded the meeting noting that there is a lot of work to be done, that due diligence legislation needs strong enforcement and to be complemented by partnerships with producing countries to support strong local regulatory frameworks and SMEs.

## Top five conclusions from the 'Ending imported destruction' webinar:

- There was consensus among speakers from the European Commission, the European Parliament and the private sector that a general corporate due diligence regulation should be complemented by a forest specific forest-related due diligence regulation.
- Including prohibition as part of any due diligence regulation has risks. A due diligence approach is an evolutionary process which does not require companies to fix all challenges immediately but to put strong tools in place to mitigate and address risks.
- Any due diligence regulation will require strong enforcement.
- Any due diligence regulation will need to be complemented by other measures including bilateral partnership agreements. In countries where such agreements are not feasible development assistance should be used to support SMEs and tackle the root causes of deforestation.
- OECD guidelines and OECD pilots can help develop mandatory legislation and can be a catalyst for scaling up concrete action.