

What is the EU Regulation on deforestation-free products?

The European Union (EU) Regulation on deforestation-free products (EUDR) - to be adopted spring 2023 - prohibits companies from putting products on the EU market unless they are deforestation-free and legally produced. It will also be illegal to export such products from the EU.

The EUDR applies to wood, palm oil, soy, coffee, cocoa, rubber and beef as well as most of the products derived from these commodities like hides, leather, chocolate, charcoal, paper and printed paper.¹

The EUDR will enter into application twenty days after the publication in the Official Journal of the EU – which is expected around May 2023. After that large companies will have 18 months to prepare themselves before the prohibition becomes active (small companies will have 24 months).

The key elements of the EUDR

Any company that imports the named commodities or products² into the EU market (or exports them from it) must take reasonable care (known as due diligence) to ensure they comply with the EUDR. Before putting any product on the EU market, the company must produce a due diligence statement - including the company's details, the products it relates to, the quantity, and the geolocation of all plots of land where the commodities were produced - stating that there is no - or only a negligible - risk of non-compliance.³

A **due diligence process** consists of three steps:

1. Gathering information about the product, quantity, geolocation, legality and deforestation.
2. Conducting a risk assessment (including consideration of the presence of Indigenous Peoples⁴ in the country, region and area of production of the commodity; whether there has been consultation and cooperation with Indigenous Peoples; whether there are existing land claims; and how complex the supply chain is).
3. Mitigating risks (which may include supporting smallholders to comply with the EUDR through capacity building and investment).

Companies must appoint a compliance person and an independent audit function to manage the risk of non-compliance.

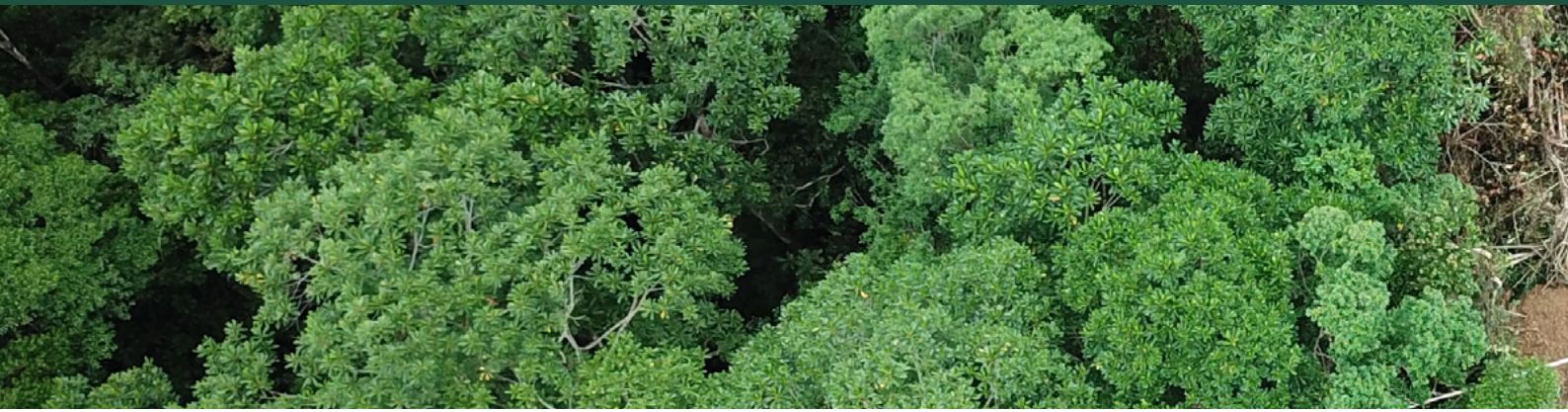
A **Competent Authority**, to be appointed in each Member State will use a risk-based approach to **check** companies' statements and due diligence processes. Each year they will check an agreed percentage of companies and products. They will also check companies where information is provided to them by third parties, including substantiated concerns. If a company is found to be non-compliant, products can be confiscated, the company can be denied temporarily market access, and/or fines can be issued. Countries, or regions thereof, will be **benchmarked** as standard, low or high-risk. Imports from the high-risk countries or regions will have a higher percentage of goods and companies checked by competent authorities. Only high-risk countries will have goods as well as companies checked. See below.

¹ - Annex 1 of the EUDR lists all commodities and products.

² - In this briefing we use commodities and products interchangeably to mean both commodities and products.

³ - A draft due diligence statement is included as Annex II of the EUDR.

⁴ - The EUDR refers to Indigenous Peoples, not communities in the wider sense.



FUTURE CHANGES TO THE SCOPE

Within one year of coming into force, the EU will assess whether the scope should be expanded from forests to “forests and other wooded land”.⁵ After two years, the EU will assess whether to extend the scope of commodities and products with a specific focus on maize and biofuel. This revision will also assess how to address the financial sector’s role in deforestation and whether other ecosystems such as grasslands should be added.

After five years, an evaluation will look at how effective the EUDR has been and the impact it has had on smallholders and local communities. The evaluation will consider the need for and the feasibility of additional trade facilitation tools and support to Least Developed Countries (LDCs).

DEFINITIONS: FORESTS, DEFORESTATION AND DEGRADATION

“**Deforestation-free**” means that the commodities and products only contain, or have been fed commodities that were produced on land that has not been deforested after 31 December 2020. With regards to wood it means “that the wood has been harvested from the forest without inducing forest degradation after 31 December 2020.”

Deforestation means the conversion of forest to agricultural use. Logging in concessions can therefore never qualify as deforestation – even if a large area has been clearcut. Logging in concessions could, however, qualify as degradation (see below).

Degradation means “structural changes to forest cover, taking the form of the conversion of **primary forest or naturally regenerating forest** into **plantation forest** or into other wooded land and the **conversion of primary forest into planted forests**.”⁶ This appears to mean that conversion from naturally regenerating forests to planted forest would not qualify as degradation. The implications, specifically for secondary tropical, temperate and boreal

forests needs to be assessed. The degradation definition will be re-assessed after five years.

BENCHMARKING, CHECKS AND PUNISHMENTS

Countries or subnational jurisdictions will be rated high, low or standard-risk in terms of deforestation. Risk ratings will be primarily based on three assessment criteria (rate of deforestation; rate of agricultural expansion; and production trends) but may also include a country or region’s climate commitments; level of transparency; and existence/ compliance with laws protecting human and customary tenure rights.

For high-risk countries, nine per cent of operators and nine per cent of the quantity of each relevant product must be checked annually. For standard-risk countries, three per cent of the operators must be checked, and for low-risk countries at least one per cent of operators must be checked. Competent Authorities should ensure each relevant commodity meets the required percentage of checks.

Companies in breach of the EUDR can be fined at least four per cent of their total annual EU-wide turnover in the financial year preceding the fining decision, and their products confiscated. They may also be asked to cover the Competent Authority’s costs.

MONITORING

Each year, companies must publicly report “as widely as possible” on their due diligence system describing the products, the quantity and the source country/region, as well as the conclusion of their risk assessment and possible mitigation measures taken. As part of their risk assessment they must describe “the process of consultation of Indigenous Peoples, local communities, and other customary tenure rights holders or the respective civil society organisations that are present in the area of production of the relevant commodities and products, where applicable.”

⁵ - Other wooded land means land not classified as forest, spanning more than 0.5 hectares, with trees higher than five metres and a canopy cover of five to 10 per cent, or trees able to reach these thresholds in situ, or with a combined cover of shrubs, bushes and trees above 10 per cent, excluding land that is predominantly under agricultural or urban use.

⁶ - A plantation forest means a planted forest that is intensively managed and satisfies all the following criteria once it is mature: one or two species, even age class, and regular spacing. A planted forest means forest predominantly composed of trees established through planting and/or deliberate seeding, provided that the planted or seeded trees are expected to constitute more than 50 per cent of the growing stock at maturity.



Photo: Tropical forests in Borneo, Malaysia, have been destroyed to make way for oil palm plantations.

Member States will be required to, by April 30 each year, make publicly available information about how they have applied the EUDR, including the number and results of checks carried out; the quantity of relevant products checked and the cases of non-compliance. The European Commission will be required to, by 30 October each year, publish a cross-EU overview based on the Member States' reports. The Commission will publish a list on its website of all infringements of the EUDR, naming the company involved, the date, the activity and the nature and (if relevant) the penalties imposed.

HUMAN RIGHTS

Relevant products/commodities imported to or exported from the EU must comply with relevant national laws rather than international laws and standards. Many NGOs had called for the EUDR to require countries to comply with international law as that may have provided better protection of communities' tenure rights. The definition of "relevant legislation of the country of production", however, explicitly states that it includes "human rights protected under international law" and "the principle of [Free Prior and Informed Consent] FPIC, including as set out in [the United Nations Declaration on the Rights of Indigenous Peoples] UNDRIP".

Furthermore, when companies do their risk assessment they must take account of: "the presence of Indigenous Peoples in the country, region and area of production of the relevant commodity"; "the consultation and cooperation in good faith with Indigenous People in the country, region and area of production of the relevant commodity" and "the existence of duly motivated claims by Indigenous Peoples based on objective and verifiable information regarding the use or ownership of the area used for the purpose of producing the relevant commodity."

The country benchmarking also suggests that the assessment may take into account "whether the country concerned makes relevant data available transparently; and if applicable, the existence, compliance with or effective enforcement of laws protecting human rights, the rights of Indigenous Peoples, local communities and other customary tenure rights holders."

ACCESS TO JUSTICE

The EUDR provides that any person or company with a sufficient interest (as determined by the national Member State law) shall have access to administrative or judicial procedures to review the legality of the decisions, acts or failure to act of the Competent Authorities under the EUDR. The EUDR does not, however, foresee access to legal remedies to achieve redress or compensation of people or communities who have been harmed. Substantive concerns can be submitted, anonymously if so required, to the Competent Authority who will need to respond to the concerns raised within 30 days.

SMALLHOLDERS

The EUDR starts by stating its intention that "when sourcing products, reasonable efforts should be undertaken to ensure that a fair price is paid to producers, in particular smallholders, so as to enable a living income and effectively address poverty as a root cause of deforestation." But the only provision on smallholders in the text itself is under risk mitigation - as part of the due diligence process - where it is suggested that companies include efforts to support their suppliers to comply with the EUDR, in particular smallholders, through capacity building and investment—but this remains optional, rather than mandatory. The first full review of the EUDR, after five years, will assess its impact on smallholders.

FOREST LAW ENFORCEMENT, GOVERNANCE AND TRADE (FLEGT)

FLEGT licenses will be accepted as proof of legality, but not as proof that the item is deforestation-free. Although FLEGT-licensed timber from Indonesia will therefore automatically qualify as legal, it will not be given green lane access, meaning that operators would still have to do due diligence to ensure the timber is deforestation-free.

CERTIFICATION

The EUDR points out that certification or other third party verified schemes can only be used as a source of information in the risk assessment procedure; they cannot be used as a substitute for the operator's responsibility to conduct due diligence.

ADDITIONAL MEASURES TO TACKLE THE ROOT CAUSES OF DEFORESTATION

Although the EUDR may help clean up EU supply chains, it will not provide incentives to producer countries to tackle the root causes of deforestation, including poor forest governance and unclear land tenure. To solve this, the Commission has been asked to "develop a comprehensive EU strategic framework for [partnerships with producer countries] and shall consider mobilizing relevant EU instruments."

The EUDR also requires the Commission to engage in a coordinated approach with producer countries, and parts thereof, via the use of existing and future partnerships to address the root causes of deforestation. "Partnerships and cooperation mechanisms may include, but are not limited to, structured dialogues, administrative arrangements, and existing agreements or provisions thereof, as well as joint roadmaps that enable the transition to an agricultural production that facilitates the compliance with the requirements of this Regulation, paying particular attention to the needs of Indigenous Peoples, local communities and smallholders and ensuring the participation of all interested actors."

Last, the article on benchmarking requires the Commission to engage in a specific dialogue with all countries that are high-risk or in danger of being classified as such, with the objective of reducing their level of risk.

CONCLUSION

The EUDR has the potential to drastically reduce the role EU consumption plays in driving deforestation and in violating community tenure rights. It all depends, however, on implementation and enforcement. It will be critical to strengthen the position of smallholders so that they are not undermined by the geo-location and traceability requirements. The risk assessment and benchmarking processes must adequately assess whether Indigenous Peoples and local communities' tenure rights are being respected. Equally important is that Competent Authorities are given sufficient resources, support and guidance to do their work properly.

To really help halt deforestation, the EU must develop meaningful partnership agreements with producer countries that are inclusive of all stakeholders and rightsholders. Such agreements must include jointly developed roadmaps that create an enabling environment, improve governance, tackle deforestation and respect rights. As identified by the EU in 2019,⁷ working closely with consumer markets like the United States, China and India will also be essential.

⁷ - 2019 EU Communication "Stepping up action to address deforestation" - <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1565272554103&uri=CELEX:52019DC0352>