



**Veblen Institute** *for Economic Reforms*

## How to stop imported deforestation?

### Policy brief on the EU Commission's proposal for a regulation addressing imported deforestation

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#### EXECUTIVE SUMMARY

The Commission adopted on 17 November 2021 **a proposal for a regulation for deforestation-free products and supply chains based on due diligence**. The Veblen Institute welcomes the Commission's proposal which echoes calls from both the civil society and economic stakeholders in favor of a bold initiative to curb "imported deforestation".

**The draft regulation contained in the proposal addresses some of the main shortcomings of the existing EU Timber Regulation. However, the proposal still let aside some measures necessary to effectively curb imported deforestation. In this regard, the Veblen Institute recommends to:**

- **Widen the proposal's scope** to cover:
  - **all forest-risk commodities and derived products**
  - **all ecosystems threatened by conversion to agriculture use**
  - **financial actors** intervening within the supply chain of forest-risk goods deforestation from 2015 at least

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- **Strengthen the due diligence framework by:**
  - **Adding an item regarding traceability** to be checked during the risk assessment
  - Enacting an **obligation to have an independent party audit** the due diligence system set by **large operators**
  
- **Amend the criteria underpinning the country benchmarking system to:**
  - remove criteria which are not relevant to assess actual risk of deforestation
  - **add criteria related to the country or region's traceability standards** so that countries or regions deprived of traceability should be automatically ranked as high risk
  - **ensure that it is based on each category of goods** within a country rather than on countries as a whole to prevent specific issues from being overlooked
  
- **Complete the enforcement system by:**
  - **an obligation on the Competent Authorities to effectively and consistently implement the penalties** provided by the regulation
  - **a carding system** similar to the Regulation on illegal, unreported and unregulated fishing **leading to a ban on goods from countries that do not provide sufficient guarantees**, notably in terms of traceability
  - **a better access of civil society** to information and to each step of the enforcement process, including action before courts

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#### HOW TO STOP IMPORTED DEFORESTATION?

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JANUARY 2022

The Veblen Institute for Economic Reforms is a non-profit think tank promoting policies and civil society initiatives for the ecological transition. We believe the current economic model is profoundly unsustainable and should be transformed in the spirit of social justice and respect of planetary boundaries.

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## INTRODUCTION

**Deforestation and forest degradation are important drivers of climate change<sup>1</sup> and biodiversity loss.** At the global level, tropical areas are losing forests at a rate of 10 million hectares per year according to the FAO's latest report on forest resources.<sup>2</sup> Agricultural expansion is responsible for just under two-thirds (the remaining third is due to other factors such as forest fires, logging etc.). In total, about one third of the forest area lost is related to international trade.

**Of the portion of crops and livestock products associated with deforestation is traded internationally, the EU 27 imported and consumed 36% between 1990 and 2008.** At the heart of the problem is the consumption of oil crops - such as soy and palm oil - and their derived processed products, as well as meat consumption.<sup>3</sup>

**The Commission adopted on 17 November 2021 a proposal for a regulation for deforestation-free products and supply chains based on due diligence (the "Draft Regulation").<sup>4</sup>** It *"aims to minimize consumption of products coming from supply chains associated with deforestation or forest degradation – and increase EU demand for and trade in legal and 'deforestation free' commodities and products"*.

**This proposal follows on from a public consultation carried out in 2020 and from calls from both NGOs<sup>5</sup> and economic stakeholders<sup>6</sup> in favor of a bold initiative to curb 'imported deforestation'<sup>7</sup>.** It also echoes an international momentum on the matter: the EU notably

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<sup>1</sup> The Intergovernmental Panel on Climate Change estimates that 23% of total anthropogenic greenhouse gas emissions (2007-2016) come from agriculture, forestry and other land uses. See : IPCC, 2019: Summary for Policymakers. In: Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems [P.R. Shukla, J. Skea, E. Calvo Buendia, V. Masson-Delmotte, H.- O. Pörtner, D. C. Roberts, P. Zhai, R. Slade, S. Connors, R. van Diemen, M. Ferrat, E. Haughey, S. Luz, S. Neogi, M. Pathak, J. Petzold, J. Portugal Pereira, P. Vyas, E. Huntley, K. Kissick, M. Belkacemi, J. Malley, (eds.)]. In press.

<sup>2</sup> Alain Karsenty and Nicolas Picard, Imported deforestation: how Europe contributes to tree loss worldwide, and what we can do about it, The Conversation, 28 October 2021 <https://theconversation.com/imported-deforestation-how-europe-contributes-to-tree-loss-worldwide-and-what-we-can-do-about-it-169708>

<sup>3</sup> European Commission, 2013. The impact of EU consumption on deforestation: Comprehensive analysis of the impact of EU consumption on deforestation. Study funded by the European Commission, DG ENV, and undertaken by VITO, IIASA, HIVA and IUCN NL. V.

<sup>4</sup> [Proposal for a Regulation](#) of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (COM (2021) 706 final). This proposal contains an explanatory memorandum (the "Explanatory Memorandum") and the Draft Regulation.

<sup>5</sup> Together4Forests, "[NGO recommendations on deforestation regulation](#)", 11 Nov. 2021.

<sup>6</sup> "[Statement of support from businesses for an effective EU law to halt the trade in commodities and products linked to deforestation and conversion](#)".

<sup>7</sup> That is, the import of goods that directly or indirectly contributed to deforestation or forest degradation

**signed a zero-deforestation pledge along with 140 countries at the COP26 in Glasgow<sup>8</sup> and other countries such as UK and US envisage similar instruments<sup>9</sup>.**

The Draft Regulation will be examined successively by the Council of the European Union and the European Parliament (“EP”)<sup>10</sup>. It will benefit from the French presidency of the Council, as French President declared that it was one of its priority to “*advance negotiations on the establishment of a European instrument to combat imported deforestation*”<sup>11</sup>. The draft agenda of the EU Council meetings in the first half of 2022 specifies that the Draft Regulation will be debated in February by Ministers of Agriculture and in March by Ministers of the Environment before a general approach is adopted by the latter in June<sup>12</sup>.

The Veblen Institute welcomes this initiative and the efforts made in the Draft Regulation to address some of the shortcomings of the EU Timber Regulation (“EUTR”)<sup>13</sup>. In this regard, the Draft Regulation has made a significant improvement by extending its scope both in terms of goods (Art. 1 and Annex 1) and of economic actors covered (Art. 6), and by consolidating the due diligence obligation’s regime (Art. 6-12).

However, despite such improvements, **the Draft Regulation still shows some shortcomings that risk hampering its efficiency as regards its scope (1) the due diligence mechanism (2) and the enforcement system (3).**

## **I. THE DRAFT REGULATION’S SCOPE**

**The Draft Regulation’s scope appears too restrictive to tackle imported deforestation comprehensively as regards the commodities and ecosystems covered (1.1), the persons subject to its obligations (1.2) and its temporal reach (1.3).**

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<sup>8</sup> See [Glasgow leaders’ declaration on forests and land use](#), 2 Nov. 2021.

<sup>9</sup> See UK Department for Environment, Food and Rural affairs, “[Implementing due diligence on forest risk commodities Consultation document](#)”, December 2021 and Friends of the Earth, « [US Congress to introduce bill to curb global deforestation](#) », 6 Oct. 2021

<sup>10</sup> The steps of the procedure are reported at: <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX%3A52021PC0706>

<sup>11</sup> Press conference of 9 December 2021, available at: <https://www.youtube.com/watch?v=jKiTZh-XXBY>

<sup>12</sup> The draft is available in French at: <https://data.consilium.europa.eu/doc/document/ST-14736-2021-INIT/fr/pdf>

<sup>13</sup> [Regulation \(EU\) No 995/2010](#) of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

## 1.1. The Draft Regulation's material scope

### Commodities and products covered by the Draft Regulation

The Draft Regulation includes in its scope the following commodities: coffee, cocoa, cattle, oil palm, soy and wood as well as derived products (e.g. leather and chocolate<sup>14</sup>), based on their documented risk of being linked with deforestation. Whereas this extension of scope compared with the EUTR is welcome, we regret the omission of other goods often associated with land-use changes for agricultural purposes such as maize, rubber, rapeseed, cotton or sugarcane.

Likewise, although the EUTR's narrow scope in terms of derived products has been recognized as a loophole<sup>15</sup>, Annex 1 of the Draft Regulation still fails to adopt a more comprehensive approach of products derived of wood in the scope of the Draft Regulation. The same goes for the other commodities: far from the EP's recommendation to cover "*all intermediate or final products that are derived from these commodities, and products that contain these commodities*"<sup>16</sup>, the Draft Regulation is based on an explicit list which narrows its potential impact. In the worst-case scenario, such approach could provoke a shift of demand from raw materials to derived products currently omitted from the list to bypass the regulation, thus distorting competition on the EU and global markets<sup>17</sup>.

### The ecosystems and practices covered by the Draft Regulation

The Draft Regulation is based on a set of crucial definitions that underpin its scope of application. Yet, the definitions of forest, deforestation, forest degradation and deforestation-free show that the Draft Regulation fails to grasp the full complexity of ecosystem conversion driven by foreign demand.

Deforestation<sup>18</sup> is defined irrespectively of its legality, thus preventing loopholes for countries where deforestation may be legal. However, it only relates to conversion to agricultural use, thus excluding other land-use changes like forest plantation for energy purposes for instance (i.e., "plantation forest" by opposition to "agricultural plantation" within the meaning of Art. 2(3) and (4) of the Draft Regulation).

The very notion of forest<sup>19</sup> (and, by extension, that of deforestation) is based on a unique set of thresholds that do not take into account the diversity of ecosystems that may be impacted

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<sup>14</sup> See the list in Annex 1 of the Draft Regulation.

<sup>15</sup> See European Commission, "[Impact Assessment Study for the Revision of the Product Scope of the EU Timber Regulation](#)", 2019, p. 31 et seq.

<sup>16</sup> [European Parliament resolution of 22 October 2020](#).

<sup>17</sup> See European Commission, "[Impact Assessment Study for the Revision of the Product Scope of the EU Timber Regulation](#)", 2019, p. 33.

<sup>18</sup> Defined as "the conversion of forest to agricultural use, whether human-induced or not" (Art. 2(1)).

<sup>19</sup> Defined as "land spanning more than 0,5 hectares with trees higher than 5 meters and a canopy cover of more than 10%, or trees able to reach those thresholds in situ, excluding agricultural plantations and land that is predominantly under agricultural or urban land use" (Art. 2(2)).

by land use changes. **This definition thus excludes from the Draft Regulation’s scope other biodiversity- and carbon-rich ecosystems like savannahs, wetlands (e.g., Bolivia’s Pantanal) and grasslands (e.g., Brazil’s Cerrado), whereas NGOs and the EP rightly supported the inclusion of any ecosystem subject to conversion<sup>20</sup>.**

On this point, the Explanatory Memorandum accompanying the Draft Regulation unconvincingly argues that *“such an expansion of the scope was considered premature as the lack of practical experience would be detrimental to the effectiveness and enforceability of the policy measures”*.<sup>21</sup> In addition to impairing the Draft Regulation’s efficiency, this approach could cause a shift of pressure from ‘forests’ within the meaning of the Draft Regulation to other ecosystems (i.e. ‘deforestation leaks’), as stressed by operators themselves<sup>22</sup>.

Lastly, the definition of forest degradation might prove difficult to use as it provides no indicators to measure unclear notions such as ‘biological productivity’ or ‘complexity of forest ecosystems’<sup>23</sup>. Since such imprecision paves the way for divergent interpretation, this provision should at least be completed by a guidance harmonizing States’ approach based on common indicators.

## 1.2. The Draft Regulation’s personal scope

The Veblen Institute welcomes the extension of the personal scope of the Draft Regulation compared with the EUTR. Indeed, the Draft Regulation, imposes due diligence obligations not only on ‘operators’, which place goods on the market for the first time (Art. 2(12)), but also on large ‘traders’ (excluding SMEs)<sup>24</sup> which make them available subsequently (Art. 2(13)). This limits the most obvious circumventing strategies through shell companies acting as trader<sup>25</sup>.

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<sup>20</sup> [European Parliament resolution of 22 October 2020](#), p, Preamble, §30 and Together4Forests, [“NGO recommendations on deforestation regulation”](#), 11 Nov. 2021.

<sup>21</sup> Explanatory Memorandum, p. 8.

<sup>22</sup> *“Limiting the scope of the law to natural forests, and leaving out conversion of other natural ecosystems, will exacerbate the already existing high pressures on other ecosystems.”*, [“Statement of support from businesses for an effective EU law to halt the trade in commodities and products linked to deforestation and conversion”](#).

<sup>23</sup> Forest degradation *“means harvesting operations that are not sustainable and cause a reduction or loss of the biological or economic productivity and complexity of forest ecosystems, resulting in the long-term reduction of the overall supply of benefits from forest, which includes wood, biodiversity and other products or services”* (Art. 2(6)).

<sup>24</sup> Small traders, on the other hand, must only collect and keep information as to the identification of their own supplier and client traders (Art. 6(1) and (2)).

<sup>25</sup> Environmental Investigation Agency, [“State of Corruption”](#), 2021.

However, **contrary to a common recommendation of the EP<sup>26</sup> and stakeholders<sup>27</sup>, the Draft Regulation focuses exclusively on downstream actors and omits to consider upstream actors, especially the financial sector funding companies directly or indirectly responsible for deforestation or forest degradation.** It is therefore the responsibility of the EU to impose specific obligations on banks and other financial actors based in the EU where they invest in companies trading commodities presenting high deforestation risks.

Yet, according to the Commission, new instruments like the Taxonomy of sustainable activities and the Corporate Sustainability Reporting Directive should suffice to address the financial sector's role in imported deforestation.<sup>28</sup> However, so far, this kind of incentive approach has proven inefficient: while zero-deforestation pledges are multiplying in the financial sector, *"The companies razing forests to produce palm oil, beef, and rubber are currently able to secure financing for new projects at commercially attractive rates from banking hubs in the US, Europe and Asia"*<sup>29</sup>.

### 1.3. The Draft Regulation's temporal scope

It stems from the definition of the new 'deforestation-free' requirement<sup>30</sup> that the Draft Regulation is designed as essentially forward-looking. Indeed, **while the EP recommended that the regulation cover deforestation from "no later than 2015" (as permitted by satellite imagery)<sup>31</sup>, the Draft Regulation "sets a cut-off date of 31 December 2020"**. Therefore, goods associated with forest destruction that took place before this date could be exempted. This concerns a significant portion of deforestation, in Brazil for instance, where legal deforestation exceeded one million hectares annually in 2019 and 2020<sup>32</sup>. A cut-off date in 2020 would also

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<sup>26</sup> "The proposal should apply to all operators (...) that places commodities that are covered by the proposal and their derived products on the Union internal market for the first time, or that provides financing to the operators undertaking these activities", see [European Parliament resolution of 22 October 2020](#) with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation, p. 24.

<sup>27</sup> "[Statement of support from businesses for an effective EU law to halt the trade in commodities and products linked to deforestation and conversion](#)" and Together4Forests, "[NGO recommendations on deforestation regulation](#)", 11 Nov. 2021.

<sup>28</sup> Explanatory Memorandum, p. 3.

<sup>29</sup> Global Witness, "[Money to burn](#)", 2019. The report showed that "EU-based banks were the biggest provider of international finance to six of the most harmful agribusinesses involved in the destruction of climate-critical forests in the Amazon, Congo Basin and Papua New Guinea, funding them to the tune of €7 billion between 2013 and 2019." (see [here](#)). For an analysis of voluntary commitments by major companies, see for example [Forest 500 annual assessment](#).

<sup>30</sup> "(a) that the relevant commodities and products, (...) were produced on land that has not been subject to deforestation after December 31, 2020, and (b) that the wood has been harvested from the forest without inducing forest degradation after December 31, 2020" (Art. 2(8)).

<sup>31</sup> [European Parliament resolution of 22 October 2020](#), p. 32.

<sup>32</sup> According to Brazilian government's satellite monitoring program PRODES. Annual data are accessible at: <http://www.obt.inpe.br/OBT/assuntos/programas/amazonia/prodes>



directly undermine initiatives such as the Amazon Soy Moratorium, which aims to prevent the sale of soy from areas deforested in the Amazon region after 2008.

This cut-off date is justified by the aim of “*minimiz[ing] disruption of supply chains and potential negative impacts in partner countries*”<sup>33</sup>. Yet, Article 36 already provides that most of the regulation would not apply before a year after its entry into force, thus leaving time for supply chains to adapt to the new legal framework. Moreover, some groups involved in trade of risky goods have already put in place their own environmental risk management system, which show that supply chains are already adapting to higher standards<sup>34</sup>. Finally, according to the EP, studies show that such system “*will have no impact on volume and price of the commodities sold in the Union (...) and that extra costs incurred by operators to implement these legal obligations are minimal*”<sup>35</sup>.

## II. THE DRAFT REGULATION’S DUE DILIGENCE MECHANISM

**The Draft Regulation provides an opportune clarification of due diligence obligations (2.1), whereas the new benchmarking system of third countries needs to be reviewed (2.2).**

### 2.1 The clarification of companies’ due diligence obligations

The Draft Regulation shows the Commission’s efforts to depart from its current approach based on third countries’ standards and to consolidate the due diligence mechanism by completing its framework.<sup>36</sup> Indeed, **due to its lack of exhaustiveness, the EUTR’s due diligence framework has proven to let too much margin of appreciation to companies, resulting in a poorly efficient implementation.**

The Draft Regulation elaborates on how operators and traders must exercise due diligence, thereby limiting the risks of discrepancies. In particular, **the following additions are particularly relevant:**

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<sup>33</sup> Explanatory Memorandum, p. 11.

<sup>34</sup> For example, in Brazil, the Carrefour group set up a monitoring platform to monitor the group’s beef suppliers and thereby identify any non-compliance with a set of five criteria including deforestation.

<sup>35</sup> [European Parliament resolution of 22 October 2020](#), p. 12. See for instance Bernardo B.N et al., “When enough should be enough: Improving the use of current agricultural lands could meet production demands and spare natural habitats in Brazil”, *Global Environmental Change*, Vol. 28, 2014, Pages 84-97, ISSN 0959-3780, <https://doi.org/10.1016/j.gloenvcha.2014.06.001>.

<sup>36</sup> “*The Due Diligence procedure set up under the EUTR will be adapted and improved in the present Regulation, through the introduction of new features such as the due diligence statement (Article 4), the geographic information requirement or geo-location, linking the commodities and products to the plot of land where they were produced (article 9), increased cooperation with customs (Articles 14 and 24), minimum inspection levels (article 14) as well as the country benchmarking (Articles 25-26).*”, Explanatory Memorandum, p. 7

- The obligation on operators and large traders to ensure that goods placed on the EU market or exported not only *“have been produced in accordance with the relevant legislation of the country of production”* but are also *“deforestation-free”* (Art. 3). This new condition is paramount to prevent imports from countries with no adequate forest protection (whether in the existing legal framework or in the effectiveness of its implementation and control).
- The addition in the list of information to be collected by operators of new items, in particular the *“geo-localisation coordinates, latitude and longitude of all plots of land where the relevant commodities and products were produced, as well as date or time range of production”* (Art. 9(d)).
- The inclusion in the risk assessment of criteria such as:

*“(d) the source, reliability, validity and links to other available documentation of the information referred to in Article 9(1);*

*(e) concerns in relation to the country of production and origin, such as level of corruption, prevalence of document and data falsification, lack of law enforcement, (...);*

*(f) The complexity of the relevant supply chain, in particular difficulties in connecting commodities and/or products to the plot of land where they were produced”.*

- The introduction of a prohibition on operators from placing products on the EU market, if they are *“unable to complete”* the due diligence process (Article 4(5)c)) or if the exercise of due diligence has revealed a *“non-negligeable risk”* of non-compliance (Article 4(5)(b)). However, although the Draft Regulation defines ‘negligible risk’<sup>37</sup>, this notion remains subjective so that it could still be hard to challenge by the competent authorities in the absence of a harmonized methodology.<sup>38</sup>

The due diligence framework is thus more comprehensive than in the EUTR. Still, there is room for circumvention strategies, so that the following improvements should be envisaged:

- Given the documented risks of certain supply chains (e.g. beef, see below, box n°1) and countries ranked as ‘high risks’ (see below), **a specific criterion regarding traceability could be envisaged within the list of Article 9(1);**

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<sup>37</sup> Article 2(16): *“‘negligible risk’ means a full assessment of both the product-specific and the general information on compliance with Articles 3(a) and 3(b) by relevant commodities or products showing no cause for concern”.*

<sup>38</sup> In this regard, the [Executive Summary of the Fitness Check](#) highlighted that *“Difficulty in challenging inadequate [due diligence] in court has led to [competent authorities] hesitating to file lawsuits”.*

- Additionally, **large operators could be required to carry out an independent third-party audit** of supply chain due diligence to verify their robustness<sup>39</sup>.

## 2.2 A necessary recast of the third countries' benchmarking system

The Draft Regulation establishes a *“a three-tier system for the assessment of countries or parts thereof”*, allowing the Commission to classify countries or regions as presenting low, standard or high risks.<sup>40</sup> Operators and large traders will be required to take into account this benchmark when conducting their risk assessment (Art. 10(2)(a)). Likewise, Member States will have to carry out ‘enhanced scrutiny’, that is ensure that their annual compliance checks cover 15% of the companies and goods linked with high-risk countries (Art. 20).

It is therefore crucial that this benchmark accurately reflects deforestation risks. In this regard, **some criteria on which it will be based shall be reviewed:**

- The inclusion of deforestation and forest degradation emissions in countries' nationally determined contribution (NDC) under the Paris Agreement (Art. 27(2)(d)) does not allow to assess the countries' actual measures to fight deforestation.
- Likewise, agreements concluded between third countries and the EU that address deforestation provide little guarantee (Art. 27(2)(e)). In this regard, the Commission acknowledged that partnership agreements concluded under the FLEGT regulation<sup>41</sup> have failed to reduce illegal logging.<sup>42</sup> Also, the inclusion of forest conservation provisions in the “Trade and Sustainable Development” chapter of free trade agreements might lead to

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<sup>39</sup> Similarly to what provides the Conflict Mineral Regulation, to which the Draft Regulation's preamble refers to: “32. [...] *future legal framework regarding forest-risk commodities should build upon lessons learned from [...] Regulation (EU) 2017/821 of the European Parliament and of the Council*1 (*‘the Conflict Mineral Regulation’*)”.

<sup>40</sup> The criteria laid out in paragraph (2) include: “(a) *rate of deforestation and forest degradation*”, “(b) *rate of expansion of agriculture land for relevant commodities (...)*”, “(e) *agreements and other instruments concluded between the country concerned and the Union that address deforestation (...)*” and “(f) *whether the country concerned has national or subnational laws in place, including in accordance with Article 5 of the Paris Agreement, and takes effective enforcement measures to avoid and sanction activities leading to deforestation and forest degradation, and in particular whether sanctions of sufficient severity (...) are applied.*”

<sup>41</sup> The FLEGT (Forest Law Enforcement, Governance and Trade) action plan consisted of two pillars: the EU Timber Regulation and the Voluntary Partnership Agreements (trade agreements with timber exporting countries to prevent illegal timber from entering the EU market).

<sup>42</sup> “*While VPAs have led to enhanced stakeholders' participation and positive results in terms of improvement of forest governance in some countries, negotiations proved lengthy, progress in their implementation has been very slow and there is no clear evidence of their impact in terms of stopping illegal timber from being placed on the EU market, and/or reducing illegal logging globally*”, [Executive Summary of the Fitness Check](#), p. 2.

some positive diplomatic commitments but remain insufficient to offset the incentive created by the surge of foreign demand for forest-risk goods<sup>43</sup>.

Conversely, the Draft Regulation **does not include any criteria related to the country or region's traceability standards, whereas the existence of such traceability is the cornerstone of the due diligence system**. Indeed, if a country or region lack of traceability systems, it is virtually impossible to ensure where goods have been produced. This, in turn, paves the way for fraudulent practices<sup>44</sup>.

### Box 1. Cattle laundering in Brazil

While full individual traceability from birth of the animal to slaughter is mandatory in the EU Regulation 2017/625<sup>45</sup>, this is not a requirement for animal products imported from third countries.

In Brazil, for example, traceability is not mandatory, except in the state of Santa Catarina. A national cattle identification system does exist, but producer membership is voluntary and only required for exports to Chile, Switzerland and the EU at present. Even on farms that have joined this system, animals are not traced from birth but only from fattening, and via a non-exhaustive and non-computerised system that leaves room for errors and fraud ('cattle laundering').

Hence, some major European retail companies have announced their decision to stop supplying beef from Brazil due to the impossibility to mitigate deforestation-related risks<sup>46</sup>.

Therefore, to ensure that no forest-risk good access the EU market according to the European consumers' demand and in compliance with the precautionary principle, **the existence of a reliable traceability system should at least be explicitly included** in the criteria underpinning the three-tier system **so that countries or regions deprived of such traceability system should be automatically ranked as high/extreme risk**.

Overall, **this benchmark should differentiate between each category of goods within a country**. This level of granularity is crucial. Otherwise, this could lead to overlook specific risks associated with certain regions, goods or supply chains. This would be problematic in conjunction with the 'simplified due diligence' exemption (Art. 12), according to which that companies do not need to proceed to risk assessment and mitigation when the goods at stake originate from countries

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<sup>43</sup> Barreto et al. (2020). [Is the EU-MERCOSUR trade agreement deforestation-proof](#).

<sup>44</sup> Brazil provides a good example through documented practices of "cattle laundering", whereby ranchers often raise and fatten cattle on non-compliant farms and then move the animals to a compliant property before selling them to slaughterhouses. See Gibbs et al. (2015). Did Ranchers and Slaughterhouses Respond to Zero-Deforestation Agreements in the Brazilian Amazon? Conservation Letters. 9. 10.1111/conl.12175.

<sup>45</sup> [Regulation \(EU\) 2017/625](#) of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products.

<sup>46</sup> The Guardian, "[Supermarkets drop Brazilian beef products linked to deforestation](#)", 16 Dec. 2021.

classified as 'low-risk'. Such exemption could thus be a potential loophole in the due diligence mechanism.

### III. THE DRAFT REGULATION'S ENFORCEMENT

**The Draft Regulation intends to remedy national discrepancies that undermine the enforcement system (3.1) but fails to fully acknowledge the role of the civil society (3.2).**

#### 3.1 An incomplete attempt to close enforcement gaps

**The failure of the EUTR is widely due to the lack of proper enforcement by EU Member States.**

In particular, the lack of uniform, effective and dissuasive sanctions is a major flaw of the EUTR's implementation<sup>47</sup>. In Germany for instance, according to WWF *"Only about 1% of all timber companies in Germany are inspected annually and violations, if punished at all, would only result in fines of a few hundred to a thousand euros. This is usually not proportional in any way to the value of the traded timber. High profit margins stand in contrast to negligible risk"*.<sup>48</sup> Likewise, in France, *"the number of actual court cases and penalties remain insignificant to trigger any dissuasive effects on operators, with 2 penalties reported on the period between March 2015 and February 2017 for imported timber, and no court cases."*<sup>49</sup>

**Uncompliant operators have capitalized on discrepancies between national laws.** Indeed, *"there are differences in the level to which the national legislation allows an effective enforcement. Operators see variations in the stringency of enforcement (e.g. number of checks, level of penalties) and attempt to import and place on the market risk products via specific EU [Member States]"*.<sup>50</sup>

While the Draft Regulation intends to address this issue, this will remain a major challenge.

Article 23 provides that Member States have to enact *"effective, proportionate and dissuasive"* penalties in case of breach and specifies a wider panel of minimum penalties than the EUTR's.<sup>51</sup>

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<sup>47</sup> See ClientEarth, « [National EUTR penalties: are they sufficiently effective, proportionate and dissuasive?](#) », March 2018; WWF ["Enforcement Review of the EU Timber Regulation"](#), 2019.

<sup>48</sup> In this regard, WWF has already lodged a complaint against Germany and Austria: WWF, ["Illegal timber trade in Germany and Austria: WWF files complaint with European Commission"](#), 30 June 2019.

<sup>49</sup> WWF, ["WWF: EUTR enforcement review country assessment sheet: France"](#), 2019.

<sup>50</sup> [Executive Summary of the Fitness Check](#), p. 1.

<sup>51</sup> Article 23(2) states that *"Penalties shall include as a minimum: (a) fines proportionate to the environmental damage and the value of the relevant commodities or products concerned, calculating the level of such fines in such way as to make sure that they effectively deprive those responsible of the economic benefits derived from their infringements, and gradually increasing the level of such fines for repeated infringements; the maximum amount of such fines shall be at least 4 % of the operators or trader's annual turnover in the Member State or Member States concerned; (b) confiscation of the relevant commodities and products concerned from the operator and/or trader; (c) confiscation of revenues gained by the operator and/or trader from a transaction with the relevant commodities and products concerned; (d) temporary exclusion from public procurement processes"*.

Nevertheless, the EUTR experience shows that such provision does not solve **the enforcement issue** which is **mostly caused by a lack of means allocated to Competent Authorities or willingness to impose sanctions**. In this regard, the Draft Regulation requests States to ensure that competent authorities have “*adequate powers and resources*” (Art. 13(4)). Nevertheless, this provision is not precise enough so that **the allocation of means will still depend on States’ political will to deal with imported deforestation**.

In addition, to avoid a lack of application of penalties by Competent Authorities, **it is paramount to impose that the finding of a breach must be followed by penalties provided by the law and applied in a consistent (proportionally to the gravity of the breach or the value of the goods) and deterrent way (so as to modify the risk/profit balance of other companies) under the guidance of the Commission**.

**The enforcement framework should go further.**

When the Commission has reasonable doubt regarding a country’s capacity to supply compliant goods, following repeated concern submission or breaches, it should be able to **conduct audits on site** to assess if the country provides sufficient guarantees or not. Where the audit reveals that such guarantees are not ensured, the future regulation should provide for a **mechanism similar to the EU carding system under the Regulation on illegal, unreported and unregulated (IUU) fishing**<sup>52</sup> to which the Draft Regulation’s preamble refers.<sup>53</sup> Therefore, where third countries are unable to certify the compliance of their products, the Commission would engage to cooperate and assist them to improve their legal framework and practices.

If third countries fail to undertake necessary reforms, the Commission would attribute them a ‘yellow card’ as a warning. If this situation persists nevertheless, **a ‘red card’ would be issued, leading to a trade ban on the country’s products**. In this regard, Article 19(2)(c) of the EUTR already provides for “*immediate suspension of authorisation to trade*” as one of the minimum penalties. In this regard, the Commission’s impact assessment stresses that “*no obstacle that cannot be overcome has been detected*” to replicate this system. Moreover, “*The current IUU Regulation system for fisheries is seen positively by the Commission and NGO (IUU Watch) as it does not overload European companies and operators with excessive administrative burdens and legal uncertainties generally linked to [due diligence] obligations*”, so that “*In the Open Public Consultation, nearly 50% of respondents judged the measure to be “completely suitable” to address the issue of deforestation and forest degradation and another 23% considered it “somewhat suitable”*”<sup>54</sup>.

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<sup>52</sup> [Regulation \(EC\) No 1005/2008](#) of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

<sup>53</sup> See (32): “*Believes that future legal framework regarding forest-risk commodities should build upon lessons learned from [...] legislation on illegal, unreported and unregulated (IUU) fishing and other Union initiatives to regulate supply chains*”.

<sup>54</sup> See European Commission, “[Impact Assessment Study for the Revision of the Product Scope of the EU Timber Regulation](#)”, 2019, p. 115-116.

Overall, the enforcement's efficiency would likely benefit from the obligation of Member States and the Commission **to elaborate and publish reports on the enforcement** (Art. 19). This should be done by ensuring that such reporting is based on standardized data and an efficient treatment allowing for the detection of gaps and inconsistencies.

### 3.2 Civil society's involvement to be enhanced

**Finally, there are still insufficient guarantees regarding the civil society's involvement in the enforcement system despite its relevance where competent authorities lack of sufficient means or willingness to act.**

In this regard, the Commission completed the mechanism allowing any person to submit a 'substantiated concern' to Competent Authorities, inherited from the EUTR (now Art. 29). New Article 30 gives a new resort to third parties as it provides that: *"Any natural or legal person having sufficient interest, including those having submitted substantiated concern [...], shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Regulation."*

Still, to ensure a full effectiveness of this provision, civil society or at least accredited NGOs fighting deforestation should be granted:

- **Access to the data base (Art. 19), the information system (Art. 31) and to the Commission's audit reports** to be able to detect non-compliance and act upon it;
- **Additional guarantees as to the submission of substantiated concerns** to Competent Authorities (Art. 29). The Draft Regulation improved this reporting system by specifying that Competent Authorities must *"diligently and impartially"* assess concerns and inform *"as soon as possible"* the third party of the outcome. Yet, this framework is **still insufficiently precise**: specific deadlines should be set for greater predictability and efficiency of the process followed, where needed, by a quick response based on interim measures (Art. 21).
- **Access to courts** through the acknowledgement of standing to initiate legal action against uncompliant companies and to claim specific damages linked to deforestation or forest degradation. Indeed, without such improvements, the length and complexity of a judicial procedure as well as the difficulty to prove causality and harm may be insurmountable barriers to initiate legal action.