



**Greenpeace's views
on the Commission
proposal for an
EU regulation on
deforestation-free
products**

GREENPEACE

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Introduction

This is Greenpeace's analysis and recommendations for the European Commission's proposal for an EU Regulation "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" (referred to throughout as the proposal).

The Commission's draft is based on a sound approach and includes a number of positive elements which give hopeful signs that the EU could curb its impact on the world's forests.

However, the proposal only partially addresses the harmful environmental and social impact of the EU's consumption and production of commodities and products. In this regard, we have identified a number of significant omissions that the European Parliament and the Council of the European Union will need to address during the legislative process in order to make this legislation truly effective.

The EU cannot longer afford to postpone strong, decisive and effective action:

Forests are essential for life on earth. Despite this, forests have been cleared and degraded at an accelerating rate in recent decades mainly due to agricultural expansion, illegal or unsustainable logging, and other activities like mining. Between 1990 and 2020, some 420 million hectares of forest have disappeared, an area larger than the European Union. This deforestation has caused a massive loss of biodiversity due to the destruction of habitats, an exacerbation of climate change caused by the release of vast amounts of carbon into the atmosphere, and an increased risk of outbreaks of new viral diseases. In terms of the social and human cost, this destruction has also exacted a heavy toll on environmental defenders, with 227 fatal attacks recorded in the year 2020 alone

(70% of those killed were working to protect forests from destruction). Indigenous Peoples also regularly experience violence, land-grabs, threats and harassment for defending natural areas from exploitation.

Despite international commitments from governments and pledges from industry, forest destruction is far from ceasing but rather continues on a large scale. Between 2015 and 2020, deforestation averaged 10 million hectares per year. That is the equivalent of an area of forest the size of a football pitch disappearing every two seconds. In the Brazilian Amazon, recent satellite data shows deforestation has surged to a 15-year high.

The EU is directly fueling this destruction, through its consumption of products that come from cleared and degraded land, and it provides to companies who profit from this devastation through the funding of its financial sector. Estimates show that, in 2017, the EU was responsible for 16% of tropical deforestation linked to internationally traded commodities like meat, palm oil or soy. The EU's own forests are also suffering as they are losing diversity of habitats and species, largely due to forest management practices.

The proposal, which is part of the European Green Deal, has the potential to trigger a paradigm shift that will minimise the EU's contribution to forest and ecosystem destruction within and outside its borders, as well as the human rights abuses often associated with it. Over one million people responded to the European Commission's consultation in support of this initiative, and on 22 October 2020 the European Parliament adopted a resolution, asking the European Commission to act. It is now the task of the European Parliament and of the Council to deliver the legislation the EU needs to end its complicity in forest and ecosystem destruction.

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What must be kept

A. Environmental sustainability requirements

The Commission has set a clear “deforestation-free” standard to ensure that forest and ecosystem risk commodities and derived products made available on, or exported from, the EU market are not linked to any deforestation and forest degradation, whether illegal or not. This standard is essential to ensure that European consumers are not unwittingly complicit in the destruction of forests.

The Commission’s justifications for its choice are sound, and in particular it is true that “*focusing only on legality could potentially encourage a race to the bottom in countries highly dependent on agricultural exports that may be tempted to lower their environmental protection with a view to facilitating the access of their products to the EU market*” (see Commission’s impact assessment study [staff working document Part I](#), page 26). This approach is appropriate and justified, as recent developments in producing countries show. In Brazil, [a draft law](#) that is currently discussed in the parliament could, if approved, [lead to the deforestation of up to 1.6 million hectares of Amazon forest land by 2027](#). This would release 1.43 billion tonnes of CO₂ into the atmosphere in about a decade – almost five years’ worth of emissions from a country like France. In Southeast Asia, the Indonesian government introduced the 2020 Omnibus Law on job creation, which [incentivises deforestation and allows corporations to operate with impunity](#). The Omnibus law infringes on the rights of workers by removing critical wage and benefit protections, and threatens the rights of Indigenous Peoples as it risks triggering further land grabs through the weakening of environmental regulations.

The approach proposed by the Commission is indispensable for the EU to meet its international commitments on forests and land use. These include the [Convention on Biological Diversity Aichi 2020 Targets](#), in particular

target 5 under Strategic Goal B, the [New York Declaration on Forests](#) endorsed at the United Nations Climate Summit in September 2014, the [UN Sustainable Development Agenda](#) adopted in 2015, in particular SDG15, or more recently the [Glasgow Declaration on Forests and Land Use](#).

Furthermore, by applying the rules without discrimination to commodities and products produced both within the EU and to those imported from third countries, this approach is consistent with the EU’s obligations under WTO rules.

B. Result-based due diligence obligation, including the tracing and geolocation obligation as well as the due diligence statement

The Commission’s proposal includes a due diligence obligation on operators and large traders (see [point d](#), below). This is designed to guarantee the effectiveness of the law and enable its enforcement, while providing clarity and legal certainty for both companies and competent authorities on the measures that must be taken and on the result that must be achieved. It is important that the Parliament and the Council maintain the due diligence approach laid out in the proposal, in particular as regards the obligation to:

- Trace commodities and products to the point of production, correctly defined as the plot of land where such commodities and products are grown, harvested, raised, fed from, or obtained. This traceability requirement, entailing access to the geographic coordinates (or geo-location via latitude and longitude), is essential to ascertain that products placed on the EU market are not linked to deforestation and forest degradation and provide European consumers with

Mass balance systems

Mass balance systems, by design, allow the mixing of goods that do not meet the sustainability criteria established by the law (e.g. soy or palm oil sourced from areas of recent deforestation) with those that may meet the sustainability criteria. The use of such systems simply requires that operators acquire certificates for a volume of commodities or products equivalent to that which they place on the market, turning due diligence into a paper-collecting exercise, and makes traceability to point of production impossible. Furthermore, as it emerges from the European Commission's own impact assessment study (see point c, below), certification lacks the effectiveness and reliability to assure that the commodities and products they cover are effectively and reliably sustainable and legal. This means that a mass balance system could effectively become the vehicle for large quantities of unsustainable and illegal goods to find the way to the internal market, absolving operators from the duty of knowing and, where appropriate, cleaning their supply chains.

assurances about the sustainability of the products in their shopping baskets. The use of a 'mass balance system', on the other hand, would have been an inadequate solution and Greenpeace firmly opposes its introduction in the law as an alternative to traceability – [see box](#) for more details.

- Ascertain and provide evidence that the risk that the commodities and products may contravene the regulation's sustainability and legality requirements is at most "negligible", prior to their placement on, or export from, the EU market.
- Submit a due diligence statement, under the operator's responsibility, attesting that commodities and products conform with the regulation. This will increase transparency of operators' compliance with the regulation and help the competent authorities to detect potential infringements.

- Refrain from placing on the market (or exporting) where (1) relevant commodities or products do not fulfil the "deforestation-free" or "legality" requirements, (2) where due diligence has revealed that the risk of relevant commodities and products being non-compliant is non-negligible or (3) where the due diligence procedure has not been completed.

The proposal builds on the experience acquired by the Commission and by competent authorities with the application and enforcement of the EU Timber Regulation (the EUTR), and preserves the structure of the required due diligence process. However, it also provides essential clarifications on the results that such a process must achieve, on the point in time when operators must reach these results and on the action that they must take if these results are not achieved.

Cerrado Biome in Brazil – © Fernanda Ligabue / Greenpeace



C. No 'green lane' for certification or third-party verification schemes

The regulation should not grant any preferential treatment (or so-called "green lane") to commodities and products that are covered by certification or other third-parties verification schemes, in particular by exempting them from one or more steps of the due diligence process. We support the approach proposed by the Commission, namely that certification or other third-party verification schemes could at most be used as a source of complementary information for risk assessment purposes, without absolving operators or traders of their due diligence obligations and of the related responsibility. The Commission's decision is sound and

based on an assessment of the weaknesses of "voluntary private certification" that led to its rejection as a suitable policy option (see Commission's impact assessment study [staff working document Part I](#), page 48). The Commission's impact assessment is not alone in doubting the effectiveness of certification schemes. In March 2021, Greenpeace published [a report](#) which assessed the effectiveness of major certification schemes (mainly voluntary) used for products like palm oil, wood, cocoa and soy for animal feed. The results led Greenpeace to conclude that certification is a weak tool for addressing global forest and ecosystem destruction and that after three decades of trying, attempts to correct the various design and implementation flaws, have largely failed. ([see Box](#) for more details).

Destruction: Certified

The Greenpeace report assessed the effectiveness of (mainly voluntary) certification for land-based commodities as an instrument to address global deforestation, forest degradation and other ecosystem conversion and associated human rights abuses (including violations of Indigenous rights and labour rights), as well as to determine what role certification can play as a tool for cleaning up supply chains.

The report's analysis was based on an extensive literature review of research on certification, and the views of certification experts. At its core is an assessment of nine major certification schemes spread over five land-use sectors (soy, wood, palm oil, cocoa/coffee and biofuels) based on a review of publicly available information together with feedback from the schemes themselves.

Report Findings:

- **Inherent limitations of certification:** due to certification's focus on increased access to (and expansion of) the market, large variations between schemes, and the responsibility for choosing products is put back on the consumer.
- **Governance and decision making:** in most schemes the business sector tends to be disproportionately represented in the scheme's governing bodies, giving them greater influence over the schemes than civil society and indigenous peoples.
- **Standards:** are extremely variable across schemes, with many not prohibiting deforestation or natural ecosystem degradation or conversion, or only prohibiting products from very recent ecosystem destruction. No scheme can guarantee that products from deforestation and natural ecosystem destruction are prohibited from entering their scheme due to a reliance on "mass balance" systems (see box at page 5, above) and weak implementation of standards (see below).
- **Traceability and transparency:** no scheme has 100% traceability of products to the land where they are grown or extracted, nor does it require transparency of production point or company group. Of particularly high risk are "mass balance" product systems that contain both certified and uncertified materials.
- **Auditing:** weaknesses in auditing procedures are common, including conflict of interest where the certification bodies are paid directly by the client they are auditing.
- **Implementation:** certification schemes often fall short in how their standards are interpreted, implemented and enforced.

These findings confirm that certification is a weak tool to address global forest and ecosystem destruction. At best, it can play a limited role as a supplement to more comprehensive, binding measures in producer and consumer countries, combined with efforts to reduce the consumption of certain commodities. In the context of the new EU regulation, this means an obligation to carry out result-based due diligence, under the responsibility of operators and large traders.



PT Megakarya Jaya Raya (PT MJR) Oil Palm Concession in Papua – © Ulet Ifansasti / Greenpeace

D. The application of the due diligence obligation to all operators as well as to large traders

The proposal requires all operators – regardless of their size, turnover or volume of trade – to comply with the regulation's requirements and to apply due diligence to their commodities and products. This choice is sound and should be maintained, as granting exemptions would create loopholes that would fatally undermine the effectiveness of the law and jeopardise its objectives.

In addition, the Commission has proposed to extend the requirement to perform due diligence to large traders (ie. those companies, that are not SMEs, that deal in commodities and products already placed on the EU market by operators). The traders' due diligence will work as an additional tool to ensure the achievement of the

proposal's objectives, allowing the widespread scrutiny of operators' due diligence and facilitating the detection of commodities and products at risk in EU supply chains. We support this approach, which could substantially improve the effectiveness of the legislation.

The uniform application of the proposal's sustainability requirements and of the due diligence obligation will create a level playing field for all companies on the internal market, rewarding those who comply and penalising the laggards, while providing clarity and greater certainty to European citizens. In response to growing consumer concerns, many companies have voluntarily committed over the last decade to implement deforestation-free supply chains. However, in the absence of a strong regulatory framework, most have failed to deliver on their pledges while many others have not implemented any policies at all.

2

What is missing

A. Protection for other ecosystems, not only forests

The Council and Parliament should immediately expand the scope of the proposal's protection beyond forests to include other natural ecosystems. This would align the EU's rules with the international commitments the EU and its member states have signed up to, including under the [UN Sustainable Development Agenda](#) (in particular [SDG15](#)), the [UN Convention on Biological Diversity](#) and the [Ramsar Convention](#).

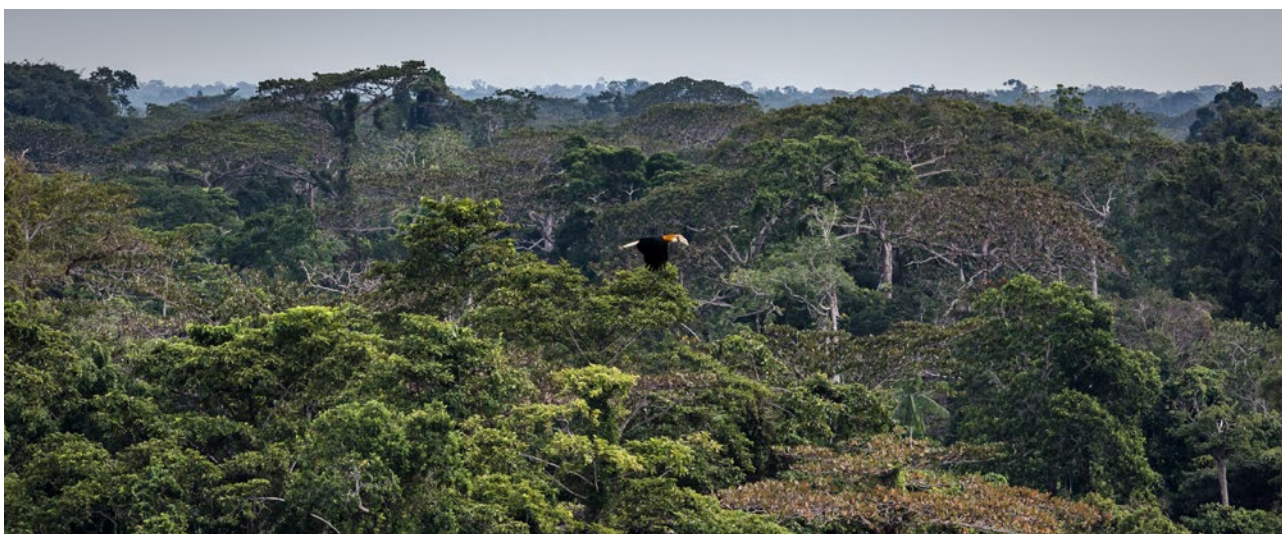
The Commission has recognised that limiting protection to forests would leave other natural ecosystems exposed to pressure from commodities producers, or even increase the risk of their conversion and degradation such as through 'leakage'¹. However, the Commission

has postponed the decision to protect other natural ecosystems until the first review of the regulation, which could leave this urgent problem unaddressed for many more years.

Many other ecosystems have been and continue to be destroyed to produce commodities for Europe's consumption, such as wetlands like [Brazil's Pantanal](#) to clear pasture for cows, savannahs like [the Cerrado](#) to plant soy, or [peatlands in Indonesia](#) to produce palm oil and [pulpwood](#). Just like forests, these other ecosystems support the livelihoods of many Indigenous Peoples, are home to rare species and play a huge role in storing and absorbing carbon dioxide and fighting climate change ([see textbox](#)).

It would be a significant failure if the EU's new law leaves these ecosystems exposed by shifting land clearing from forests to other natural areas.

Hornbill in Primary Forest in Papua – © Ulet Ifansasti / Greenpeace



¹ Where the protection of an area, biotype or a landscape simply transfers the destruction to other areas.

Cerrado/ Pantanal/ Peatlands:

The Pantanal is the world's largest contiguous inland tropical wetland. An annual cycle of flooding and drying gives the area a range of major habitats – among them permanent lakes and swamps, seasonally flooded savannahs, forest and flood forest – helping to make the Pantanal biome one of the most biodiverse in the Americas. In addition to a remarkable diversity of aquatic plants, it is reportedly home to over 650 species of birds, 250 of fish and 170 of mammals. Around 12% of mammal species in the Pantanal are globally endangered. The Pantanal also provides vital ecosystem services to surrounding populations, including climate stabilisation, water purification, flood reduction and an extensive waterborne transport system. The gradual release during the dry season of the water absorbed during the rainy season provides a steady water supply to millions of people downstream. The future of the Pantanal hangs in the balance due to multiple threats to its ecological stability. The most direct threat is from commodity agriculture, including cattle ranching.

The Brazilian Cerrado is the most biodiverse savannah in the world. Spanning 200 million hectares, the Cerrado is home to 5% of the planet's plant and animal species, over 4,800 of which are found nowhere else. The region is known as a 'cradle of waters', because it is critical to eight of the 12 Brazilian river basins. Yet, despite its ecological value, the Cerrado is being rapidly cleared. It lost 2.8 million hectares of natural forest and 1.8 million hectares of natural grassland between 2010 and 2017, with the main threats coming from soy farms and cattle ranches. It is estimated that nearly half of the Cerrado's natural vegetation (covering about 95 million hectares, an area larger than Venezuela) has already been destroyed. The remaining area holds an estimated carbon store equivalent to 13.7 billion tonnes of CO₂.

Peatlands are essential ecosystems, critical for preventing and mitigating the effects of climate change, preserving biodiversity, minimising flood risk, and ensuring safe drinking water. Peatlands are the largest natural terrestrial carbon store. They store more carbon than all other vegetation types in the world combined. Damaged peatlands are a major source of greenhouse gas emissions, responsible for almost 5% of global anthropogenic CO₂ emissions. Indonesian peatlands store huge amounts of carbon in their soil and biomass, especially when they are intact, with on average about 12 times more carbon stored per hectare than tropical rainforests on mineral soil in insular Asia. Despite their importance, Indonesia's peatlands are at increasing risk of degradation and burning due to agricultural expansion, especially for oil palm and pulpwood. Deforestation and peat fires have reportedly accounted for half of Indonesia's carbon emissions so far this century.

B. Adequate reference to international human rights standards

Human rights, in particular rights of Indigenous Peoples and local communities and land tenure rights, are highly impacted by deforestation and ecosystem conversion. In the explanatory memorandum of the proposal, the Commission has stated the importance of "protecting the rights of vulnerable communities". Yet in the executive part of the law, the European Commission has failed to include respect for international human rights law as a requirement to place products on the EU market, instead relying on the laws in producing countries. Many of these countries have not translated international human rights law obligations into domestic law.

Laws protecting the rights of Indigenous Peoples and other customary rights-holders in producer countries are often non-existent, weak, or poorly implemented. We have already seen examples where governments are

removing legal protections for Indigenous Peoples' land (in Brazil) or for forests crucial to local communities (in the Democratic Republic of Congo), disregarding international law obligations.

In this regulation, the EU must create a clear obligation to respect and protect human rights enshrined in international law. European consumers must be given certainty, when making purchases, that the products they buy are not tainted with human rights violations.

In particular, where forest and ecosystem risk commodities and their derived products originate from land on which Indigenous Peoples or local communities hold customary rights, the regulation should explicitly require operators to ensure the respect and the observance of customary law and tenure rights, guarantee effective participation of all affected rightsholders, and ensure that the Free, Prior and Informed Consent of Indigenous Peoples, and other collective customary rights-holders, is obtained.



Soya Production in the Cerrado Region, Brazil – © Marizilda Cruppe / Greenpeace

This is necessary in order to address the systemic disregard for Indigenous Peoples' rights in certain producing countries and to strengthen the protection of land and environmental defenders and of their communities, who are exposed to high level of violence, consistently linked with the agribusiness sector.

C. Rules for the financial sector

If the EU is to end its complicity in global deforestation, ecosystem destruction and human rights violations, it is important that the regulation does not let the financial sector off the hook. The Council and Parliament must impose due diligence obligations on financial institutions to ensure they do not finance deforestation, forest degradation, the conversion or degradation of other ecosystems, or associated human rights impacts.

A recent report shows that lenders based in the EU's 27 member states have made an estimated €401 million in

proceeds from forest destruction alone since 2016. Still, the Commission's proposal turns a blind eye on the whole financial sector, arguing wrongly that existing initiatives in the area of sustainable finance, such as the implementation of the EU Taxonomy Regulation and the future Corporate Sustainability Reporting Directive, CSRD (current Non-Financial Reporting Directive, NFRD) are well suited to address the deforestation impacts of the finance and investment sectors. None of these instruments mandate financial institutions to undertake adequate due diligence in their financing decisions to prevent and mitigate the financing of destructive activities.

The extension of the scope of this regulation to the financial sector would fill this gap and ensure coherence with the overall environmental and human rights objectives that the EU is pursuing. Otherwise, we risk a paradoxical situation where the EU financial sector would continue funding the destructive activities and exports of companies to other markets, while these same products cannot be sold in the EU.

3

What must be improved or changed

A. List of forest and ecosystem risk commodities and approach to determine derived products

The regulation should apply to all forest and ecosystem risk commodities identified on the basis of an objective, impartial and non-discriminatory assessment, as well as to all products derived from or containing these commodities.

Regarding the list of commodities that are relevant for the regulation, we welcome the inclusion of coffee, cocoa, soy, palm oil, wood and cattle. However, we call on the Parliament and Council to immediately extend this list to include rubber and maize.

The impact of rubber and maize on deforestation at global level is well documented and known to the Commission at least since 2013. The need to include them in the scope of the proposal was recently confirmed in the “embodied deforestation” research used by the Commission in the impact assessment. However, the Commission decided to exclude them on the basis of a methodology which, according to the authors of the above mentioned research, had *“severe flaws”*. In reaction to the exclusion, these authors wrote that “current evidence does not support recommendations to exempt key forest risk-commodities, such as maize or natural rubber, from EU legislation on imported deforestation”. The Parliament and the Council must rectify the Commission’s mistake.

We also call for the immediate extension of the scope to include all livestock (e.g. pig and poultry) and derived products, given that these are associated with deforestation, mainly because of feed production. Beyond

the need to ensure that all commodities and products whose production has a detrimental impact on forests and other ecosystems are included in the scope of the regulation, it is also necessary to prevent the market distortion that the failure to include all livestock would generate. If soy is included in the scope of the regulation but pigs and poultry are not, European livestock farmers will be required to use deforestation-free soy as feed, whereas non-EU farmers will be allowed to supply pigs and poultry to the EU without being subject to the same requirement, taking undue advantage from a loophole in the legislation.

Another problem is the Commission’s decision to select the derived products to which the regulation should apply by including them in a list and designate them with the custom nomenclature (HS codes).

As the case of the EUTR shows, this approach entails major risks of omissions/loopholes (e.g. the EUTR does not apply to musical instruments, or it applies to “furniture” but not to “seats”, such as sofas and chairs, given that the legislator failed to list the relevant HS codes in the regulations’ annex).

Instead, we recommend that a clause is introduced to ensure that the new regulation applies to *“all products that contain, have been fed with or have been made using relevant commodities”* and that operators are required to determine whether the products that they intend to place on the market (or export) meet this definition, and to inform the competent (and/or custom) authorities via their due diligence statements. To facilitate compliance and enforcement, the Commission could be tasked to provide enforcement authorities with guidance on those products most likely to contain forest and ecosystem risk commodities to help them in the development of their

inspection plans. This approach seems more practicable than it would be for the legislator or the Commission to maintain a full and dynamic list of all possible products derived from or containing forest and ecosystem risk commodities.

B. Forest-related definitions

The regulation should lay out a strong, effective and comprehensive set of forest-related definitions to guide operators, traders and competent authorities in the application and enforcement of the regulation, reflecting those used in the Accountability Framework Initiative. The Parliament, in its resolution of 22 October 2020, recommended that definitions used in the regulation be “based on objective and scientific considerations” and take into account relevant sources providing suitable definitions including the Accountability Framework Initiative.

The Accountability Framework Initiative is “a collaborative initiative to accelerate progress and improve accountability for ethical supply chains in agriculture and forestry”, which has been developed through a consultation process that involved a comprehensive set of stakeholders at global level. It provides a list of definitions that are fit for the purpose of ensuring the compliance

of commodities and products with a deforestation-free standard and the Parliament and the Council should use them to improve the Commission’s proposal.

In particular:

1. The regulation should clearly distinguish between natural and non-natural (planted) forests in order to ensure that natural forests are protected from conversion into tree plantations; the proposal is currently based on three definitions (“forests”, “planted forests” and “forest plantations”) without clearly specifying which ones are afforded legal protection. The legislators should also introduce a definition of “primary forest”.
2. The definition of deforestation should capture any loss of natural forest which is the result of: “i) conversion to agriculture or other non-forest land use; ii) conversion to a tree plantation; or iii) severe and sustained degradation.” This definition is suggested in the Accountability Framework Initiative for the purpose of preventing deforestation in supply chains and is therefore in line with the objective of the proposal. On the contrary, the definition used by the Commission is unduly restrictive, since it only catches “the conversion of forest to agricultural use”, failing to tackle deforestation linked with land use changes other than for agriculture.

Fire Monitoring in the Amazon – © Christian Braga / Greenpeace



3. As recommended by the Accountability Framework Initiative, the definition of "degradation" should encompass any *"changes within a natural ecosystem that significantly and negatively affect its species composition, structure, and/or function and reduce the ecosystem's capacity to supply products, support biodiversity, and/or deliver ecosystem services"*. Instead of focusing on the degradation itself, the definition used in the proposal refers to *"harvesting operations"* and their sustainability, without however having proper regard to their effects. This entails the risks that certain exploitative practices may be considered *"sustainable"* even if, in reality, they are leading to, or aggravating, the degradation of forests. Furthermore, the current definition would allow the continued exploitation of land that is undergoing degradation for causes that are different from harvesting operations (e.g. pests, droughts or fires). Finally, the definition proposed by the Commission fails to acknowledge the importance of forests for biodiversity, instead putting excessive and unjustified emphasis on their economic productivity.

C. Country benchmarking

An official system of country benchmarking can be a useful tool to provide guidance to both operators complying with and competent authorities enforcing the due diligence obligation.

The experience with the EUTR shows that, too often, information on the level of risks involved in sourcing timber from certain countries was not made available to competent authorities in a timely way. The information often did not have the official status that would have clearly and unequivocally obliged operators to take it into account in the course of their due diligence.

However, as currently designed in the Commission's proposal, the country benchmarking risks undermining the effectiveness of the regulation and creating loopholes.

The first problem is the creation of a category of "low risk countries". Considering how widespread deforestation and forest degradation are globally, it is inappropriate to consider that an entire country could be qualified by law as "low risk" (given, in particular, that risks should be assessed at the "plot of area" level). Furthermore, there is a risk that countries will be placed in the "low risk" category on the basis of a flawed assessment. This may happen if the criteria on which such assessment is based are not clear, pertinent, objective and measurable – with the dire consequence that conversion, degradation and legality issues in a given country may be ignored by operators

and authorities for long periods of time.

The second issue is that the proposal goes as far as removing core parts of the due diligence process (risk assessment and mitigation) for commodities and products produced in countries that are deemed to be "low risk". Exempting vast volumes of commodities and products from the scope of the due diligence risks of opening major loopholes in the law. Worse, it also increases the risk of fraud (low risk countries may become a hub for the laundering of commodities from high risk ones).

For these reasons we recommend that the country benchmarking system be maintained but the relevant categories limited to "standard" and "high" risk countries. The benchmarking should be based on clear, pertinent, objective and measurable criteria that address both sustainability and legality requirements and be conducted with transparency and timely. Country benchmarking should be taken into account when conducting due diligence and guide enforcement efforts, but should not modify due diligence obligations. The benchmarking should also take into account information provided by third parties, including local communities, Indigenous Peoples and NGOs.

D. Cut-off date

The cut-off date proposed by the Commission (31 December 2020) remains problematic and we urge the Council and Parliament to set a significantly earlier cut-off date.

Indeed, maintaining the cut-off date proposed by the Commission risks undermining initiatives such as the Amazon Soy Moratorium, which was established in 2006 to prevent the sale of soy from areas deforested in the Amazon region after 2008. It would also allow the placing on the EU market of commodities and products that originate from land that has been illegally deforested but whose status has been or could be retroactively legalised.

Finally, the proposed cut-off date would reward companies that have continued sourcing commodities and products from deforested land, independently of (or, worse, breaching) policy commitments they publicly made, while being aware of the dire impact of deforestation and ecosystem conversion on climate and biodiversity.

The fact that the Commission, at least, recognised in its assessment that *"the cut-off date should not lie in the future, as this could risk triggering a "deforestation rush" in countries, which may be tempted to clear forests quick-*

ly — and essentially achieving the opposite objective of what is sought with the EU intervention” (see Commission’s impact assessment study, [staff working document Part I](#), page 29) is, however, welcome.

E. Enforcement framework, penalties and liability regime

Building on the experience gained since 2013 with the enforcement of the EUTR, the proposal contains a number of useful provisions laying out the framework for the enforcement of the future regulation. It includes the status and tasks of member states’ competent authorities, their duty to carry out inspections, their relations and interactions with competent authorities in other member states and with other national authorities (e.g. customs) and the Commission.

These provisions promise to make the enforcement of the new regulation more effective than that of the EUTR, for instance by requiring that competent authorities be given sufficient resources and by providing guidance on how and with what frequency they should conduct checks on operators.

At the same time, a number of crucial improvements for this part of the proposal are necessary and the Council and Parliament should ensure that they are introduced in the final version of the regulation.

In particular:

1. The possibility for competent authorities to offer technical assistance to operators and traders should not impinge on their duty to enforce the law. Therefore, the enforcement and technical assistance roles should be kept structurally separate. The regulation should clearly state that receiving technical assistance from a competent authority should not give operators and traders any legitimate expectation that they will not be checked or sanctioned if they breach the regulation;
2. In the same vein, competent authorities’ powers to adopt “market surveillance measures” (commonly known as “remedial orders”) in case of non compliance should not be used as an alternative to the application of penalties. Instead, competent authorities should adopt such measures “in addition” to penalties in order to prevent operators from repeatedly breaching the regulation;
3. Penalties should not be limited to fines: repeated offences should lead to the suspension of an operator’s ability to act in the internal market, in particular by preventing them from submitting due diligence state-

ments (and hence from placing commodities and products on the internal market, or from exporting them).

Public enforcement by competent authorities should be complemented with the recognition of operators and traders’ civil liability, when the failure to exercise due diligence results in violation of third parties’ rights (notably the rights of Indigenous Peoples and local communities).

Finally, member states should ensure that the intentional violation of the prohibition of placing non-compliant commodities and products on the EU market (or exporting them) is made a criminal offence and subject to appropriate criminal sanctions. For this purpose, we support the express inclusion of the new regulation in the scope of the Commission proposal for a directive on the protection of the environment through criminal law (COM(2021) 851 final, Article 3(1)).

F. Reporting and transparency

The proposal foresees the obligation for operators to “publicly report as widely as possible, including on the internet, on their due diligence system including on the steps taken by them to implement their obligations”.

This obligation to report is of extreme importance for the effective implementation of the regulation, in that it requires operators to proactively disclose to the public relevant information on their compliance with the law. This facilitates widespread scrutiny on the implementation of the due diligence and supporting the enforcement action by competent authorities.

However, the design of the reporting requirement in the Proposal (Article 11(2)) is weak and contains loopholes that need to be corrected:

1. It only applies to operators that are not SMEs: contrary to the due diligence requirement, which correctly applies across the board, the reporting obligation only applies to large enterprises. This means that SMEs that are operators will be authorised to act “under the radar” and to evade public scrutiny even if their activity entails exactly the same level of risk as that of large operators.
2. It only covers general information on the due diligence system “including on the steps taken” to implement the operators’ obligations: this generic formulation risks reducing the reporting obligation to an abstract corporate communication exercise. To be meaningful, the reporting obligation should contain specific information on the commodities and products placed on the market, on their area of



PT Megakarya Jaya Raya (PT MJR) Oil Palm Concession in Papua – © Ulet Ifansasti / Greenpeace

production, on the structure of the supply chain, on potential risks of non compliance detected and on the measures taken to mitigate those risks.

The Parliament and the Council should address these weaknesses and ensure that the reporting obligation applies, like the due diligence obligation, to all operators irrespective of their size, and that it contains specific information on their commodities and products, their supply chains, and their assessment and mitigation of potential risks.

Likewise, the co-legislators should improve the transparency requirements foreseen in the proposal for member states and the Commission. The current text (Article 19) foresees, for member states, a general obligation to report annually on the implementation and enforcement of the regulation in their jurisdiction and, for the Commission, the publication of an “annual EU-wide overview of the application” of the regulation based on the data submitted by member states. Under Article 31, the public will receive a “completely anonymised dataset” on the information recorded in the register of the due diligence statement.

Civil society organisations (when helping with the enforcement of the regulation) and traders buying commodities and products already on the internal market (when selecting operators to include in their supply chains) need to have access to information about individual operators, their records of compliance with the regulation and possible infringements.

This information is “environmental” in nature, pursuant to the Aarhus Regulation (Regulation (EU) 1367/2006) and it should be clear in the new regulation that competent authorities must make it accessible to any interested parties.

Likewise, the regulation should foresee the creation of a public register of operators and traders that have been found to be in breach of their due diligence obligation, in order to guide other traders, as well as consumers, in their market choices and to provide incentives and rewards to those market actors that comply with the law’s requirements.

G. Review cycles

The review cycle laid out in Article 32 of the proposal considers the possibility of introducing three structural changes in the regulation. However, these must be considered separately as not all of them are desirable.

Paragraph 1 tasks the Commission with the presentation of a report and a legislative proposal with a view of extending “*the scope of this Regulation to other ecosystems, including land with high carbon stocks and land with a high biodiversity value such as grasslands, peatlands and wetlands and further commodities*”.

As explained in Sections 2 a. and 3 a. of this briefing, the failure to include ecosystems other than forests, as well

as commodities such as rubber, maize and livestock other than cattle, in the scope of the regulation, are two of the major weaknesses of the proposal.

While it is certainly positive that the Commission recognises the need to close these two gaps, there is no justification for delaying the relevant measures for a period of two years after the entry into force of the new regulation, given in particular that the evidence that supports them is already available and abundant.

Likewise, in Article 32 (3), the Commission states the importance of ensuring that *"all products that contain, have been fed with or have been made using relevant commodities are included"* in the product list annexed to the regulation. If this is the case, as we submit in Section 3 a. of this briefing, then there is no reason to wait for two years after the entry into force of the regulation. The Parliament and the Council should abandon the approach chosen in the proposal (based on the listing of derived products on the basis of their HS codes) and immediately introduce a general clause for derived products, in order

to ensure that the regulation is comprehensive and effective from the start.

On the other hand, Article 32 (2) suggests that the Commission may, five years after the entry into force of the regulation, evaluate *"the need for and feasibility of additional trade facilitation tools to support the achievement of the objectives of the Regulation including through recognition of certification schemes"*.

As we submitted in Section 1 c. of this briefing, certification schemes are neither reliable nor effective, nor transparent enough to be recognised as a method of compliance with the law. It is extremely premature to consider that, in the space of less than a decade, there might be certification systems available that could be awarded official recognition and play a role other than *"complementary information"* in the context of the due diligence. We therefore recommend that the Parliament and the Council repeal the reference to certification in Article 32(2) of the proposal.

Fires in Pantanal, Brazil – © Rogerio Florentino / Greenpeace



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Accompanying measures

In order to facilitate the achievement of the objectives of the regulation and increase the EU's contribution to global forest protection efforts, the Commission has stated in article 28 its intention to provide producing countries with support and to cooperate with them in order to address the root causes of deforestation. The objectives pursued are numerous and it would be helpful if clear priorities were set. In particular, it is important that the EU gives priority support to the adoption of agro-ecological practices and production systems that are free from forest and ecosystem destruction and which respect human rights. Support should specifically empower Indigenous Peoples, local environmental defenders and civil society organisations, local communities, and smallholders, and prioritise securing the land tenure rights of Indigenous Peoples and other groups with customary land rights.

The EU should also commit to support smallholders, Indigenous Peoples and local communities in producer countries. It is positive that article 32 (2) (b) of the proposal requires the Commission to evaluate the impact of the regulation on these actors. However, this evaluation should take place at the latest within two years after the entry into force of the regulation, and not after five years as currently proposed.

Furthermore, the regulation should expressly empower the EU to establish, following the evaluation, targeted measures and programmes for smallholders, Indigenous Peoples and local communities, in order to:

- Ensure that their production methods and scale are able to comply with the sustainability criteria set out in the regulation, and that their commodities and products are traceable and their origin transparent;
- Promote, when necessary, their transition towards, and the maintaining of, socially and environmentally sustainable agricultural practices which do not make them exclusively dependent on commodity production for export but support a transition focused on agro-ecology;
- Facilitate and support their inclusion in supply chains leading to the EU internal market by creating conditions and incentives that enable them to comply with the EU regulatory requirements;
- Provide support and incentives for them to conserve their forests and natural ecosystems on their lands that are used for commodity production.

These measures and programmes could also be directed at operators, large traders and other actors in the supply chain, in particular to incentivise them to include smallholders, Indigenous Peoples and local communities.

EU public resources should be used in a way that effectively, structurally and demonstrably benefits forests and other ecosystems, and also supports and protects smallholders, Indigenous peoples, and local communities, as well as local environmental defenders and civil society organisations. These resources should not provide support to companies that have profited from forest and ecosystem destruction, as they should bear the cost of conversion to sustainable practices with their own resources. Article 28 should also maintain the principle that, for cooperation agreements with producing countries to be taken into account in the context of the country benchmarking, their "effective implementation" is an essential element of the assessment.

Concerning cooperation with major consumer countries, we welcome the stated intention to work with them to minimise "leakage" and call on the EU and its member states to further specify what concrete actions or steps the EU will take to encourage third countries to adopt legislative measures similar to the future regulation, in view of bringing about a paradigm shift in the regulation of supply chains and to thereby enhance the protection of forests, ecosystems and human rights. We note that the EU and China committed in September 2021 to "*engage collaboratively in support of reducing global deforestation through enhancing cooperation in conservation and sustainable management of forests, making supply chain more sustainable, and combating illegal logging and associated trade*" and we look forward to both parties setting out concrete steps to make this a reality.

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