EU DEFORESTATION PROPOSAL – WEAKNESSES INTRODUCED BY THE COUNCIL

INPUT TO MEPs FOR DISUCSSIONS ON PROPOSED AMENDMENTS

Traceability

The Council has proposed to weaken the value of geolocation information by only requiring operators to obtain a single geolocation coordinate for plots of land of less than 10 hectares (see new definition of "geolocation"). It is unclear how operators could use a single geolocation coordinate to identify the land on which their commodities/products were produced or complete the due diligence requirements.

*We urge MEPs to propose amendments that require **identification of the perimeter of all plots of land** used to produce relevant commodities and products (also known as 'polygon' mapping).*

The Council is proposing to treat cattle and livestock feed for cattle products differently by requiring that: (i) only a single geolocation point is required to identify "the geographical location of each of the premises or places where the cattle were raised" (Art.9(1)(d)), as opposed to geolocation coordinates sufficient to identify the boundaries of the areas on which the cattle were raised; (ii) and that operators are not required to obtain geolocation information of the location on which soy and/or palm oil used to make livestock feed on which cattle have been fed (also by changes to Article 9(1)(d) and new recital 27(a)).

Exclusions for products "fed with" relevant commodities could introduce a structural weakness that undermines application to other livestock products (such as pork, poultry and dairy) that may be included within the scope of the regulation in the future, especially where they are produced (and fed) outside the EU. In the case of livestock feed on which due diligence has been conducted, livestock producers would likely be able to obtain the relevant geolocation information from the feed producers, thereby minimising any administrative burden.

*We urge MEPs to maintain **consistent geolocation requirements for all relevant commodities and products.***

Enforcement

The Council has proposed a number of problematic changes that undermine the enforcement requirements and introduce structural weaknesses into the enforcement framework, including proposal to address known weaknesses in enforcement of the EU Timber Regulation:

- No checks on products from "low risk" jurisdictions: the Council has deleted the quantified control objective for products from areas assessed as "low risk" pursuant to Article 28. This introduces a dangerous loophole in which potentially large volumes of products as well as the due diligence information gathered on them, is unlikely to be checked, potentially allowing operators to fraudulently claim their products originate in low-risk areas to avoid scrutiny.

- Reduced minimum check requirements for operators sourcing products from standard and high risk areas: the Council has agreed to reduce the quantified control objectives for operators sourcing products from standard risk jurisdictions from 5% to 1% and for products from high risk jurisdictions from 15% to 5%.

- No minimum check requirements for a proportion of products: the Council has deleted requirements that competent authorities check a proportion of relevant commodities and products placed on the market in their Member State (originally 5% for standard risk areas and 15% for high risk areas). Instead, the quantified control objectives apply only to a proportion of operators and traders that are not SMEs in their Member State.

The EUTR Fitness Check concluded that “evidence exists that operators clearly see a variation in the stringency with which the EUTR is enforced across MS (e.g. number of checks, level of penalties), which leads to attempts observed to import riskier timber via specific MS.” (p.37, emphasis added).

The lack of a harmonised approach to compliance checks under the EUTR has created incentives for ‘forum-shopping’ to avoid detection and enforcement, resulting in a higher volume of non-compliant products entering and circulating in the EU, which directly undermines the level playing field of the common market and indirectly puts compliant operators and traders in Member States with adequate enforcement at a competitive disadvantage.

The proposal for harmonised annual checks covering a minimum proportion of operators and traders as well as the quantity of each relevant commodity and product placed on the market is specifically intended to address this structural weakness. A proportionate approach to harmonise compliance checks is appropriate to reflect the trade in relevant commodities and products in each Member State.

- Checks on local operators and traders only: the Council has restricted the ability of competent authorities to conduct checks on operators and traders placing, exporting and making available relevant commodities and products on the market in their Member State if the operator or trader was established in a different Member State (Articles 14(1), (9), (10) and 19(1a)).

This change would introduce a major loophole into the enforcement framework and potentially prevent competent authorities from checking, investigating and prosecuting non-compliance committed by entities operating in their jurisdiction but established in another Member State, effectively providing an amnesty from enforcement for operators and traders operating outside their country of establishment. This approach is fundamentally inconsistent with the harmonised application of EU regulations across EU Member States and the principle of the fair and uniform functioning of the single market.

- No due diligence requirements for non-SME traders: the Council has removed the provision which provided that non-SME traders are treated as operators for due diligence purposes.

The Commission’s proposal to establish due diligence obligations for large traders is an important improvement compared to the EUTR, as the exclusion of traders from the due diligence requirement under the EUTR limits its overall effectiveness and has allowed deliberate circumvention, resulting in the circulation of illegal timber on the EU market. There are well-documented practices under the EUTR where shelf companies have been established in Member States with weaker enforcement to receive imports of illegally harvested timber to circumvent obligations imposed on 'operators' only, while the parent company ultimately receives the timber as a ‘trader’ (eg, in this report.)

Appropriate due diligence obligations for traders would provide effective insurance against a well-known and significant circumvention risk.

We urge MEPs to propose strong improvements to the enforcement to ensure the final outcome does not include the structural weaknesses agreed by the Council.

Access to justice

The Council has proposed to delete Article 30 on access to justice, instead inserting a recital (new recital 53a). This appears to be based on a mistaken assumption that the Aarhus Convention and Aarhus Regulation already provide sufficient access to justice rights. This is incorrect. The relevant provision of the Aarhus Convention - Article 9(3) on access to justice in environmental matters - is considered to have only indirect effect as a matter of EU law. This leads to significant gaps in application in many Member States as national judges are not clear as to when it should apply. Likewise, the Aarhus Regulation is strictly limited to acts and omissions of the EU institutions and bodies and does not provide in any way access to courts in respect of the decisions, acts or

omissions of national authorities. Neither are likely to apply to acts or decisions of competent authorities under the deforestation-free products regulation.

We urge MEPs to maintain a strong access to justice provision in the regulation, if necessary with changes that recognise national restrictions on standing to bring administrative review applications and that are consistent with existing access to justice provisions under EU law, such as Art. 11 EIA Directive (2011/92/EU) and Art. 25 Industrial Emissions Directive (2010/75/EU), therefore contributing to greater legal certainty.

Access to information

The Council has weakened the Member State public reporting requirements in Article 19(1a) of the Council draft such that Member States need only publicly report "aggregate" information on the application of the regulation and have unjustifiably excluded important information in which the public has an interest from the scope of the reporting requirements: the results of checks carried out, the contents of these checks, the quantity of relevant commodities or products checked in each case, the countries of origin and the measures taken in cases of non-compliance. The Commission's proposal included this information.

Nor is there any mechanism to provide individuals with access to records of compliance checks in accordance with Directive 2003/4/EC on public access to environmental information - a possibility that currently exists under the EUTR (Art.11(2)). Transparency on the application of the regulation is a fundamental precondition for public participation in its implementation.

*We urge MEPs to propose changes to strengthen the public reporting obligations on Member States to **include detailed and meaningful information on implementation and enforcement**, and to include a provision in Article 14 stating **that records of checks shall be made available** in accordance with Directive 2003/4/EC should be added to Article 14(13).*

Human rights

While the Council has included a reference to human rights in the definition of "relevant legislation of the country of production" this does not require respect for international human rights that are not protected under legislation in the country of production. That definition already included producer country rules on third parties' rights, which arguably would include any national rules to respect human rights, such that the Council's amendment does not add anything in practice.

*We urge MEPs to include **a stand-alone requirement** that the production of relevant commodities and products must not have caused or contributed to violations of international human rights, and that the risks of such violations are included in the due diligence obligations on operators.*

Forest degradation effectively deleted

The Council has agreed an extremely narrow definition of "forest degradation" that is unlikely to prevent the degradation of European or third country forests and instead exclude many forests used for wood production from the scope of the regulation.

The proposed definition applies only to "primary forests" (essentially forests undisturbed by human activities) – a limitation that does not apply to the definition of "deforestation" and would exclude all forests already under management (sustainable or otherwise) or regeneration, and appears to only include instances of conversion to "plantation forests" or "other wooded land". In other words, instances where forests undisturbed by human activity are converted into something other than a "forest".

This would appear to be an even narrower definition of “deforestation”, **effectively removing forest degradation from the scope of the regulation**.

This change would also effectively exempt wood products harvested from all forests other than “primary forests” from the forest degradation requirement, as impacts of wood harvesting on forests other than “primary forests” will be outside the forest degradation definition. This could even be **a step backwards from the existing EUTR framework** and mean that logging of timber in the EU is subject to even less controls than is currently the case.

This approach also creates a **risk of non-compliance with WTO rules**. We understand that there has been a strong push from some Member States to essentially ensure that any definition of deforestation and “forest degradation” does not include within its scope any type of deforestation and degradation that is happening in their country. Because the regulation mainly targets commodities and products produced outside the EU, with timber being the main listed commodity produced in the EU, the regulation should apply the same standard to wood products as to other agricultural products in order to avoid arguments from third countries that the regulation discriminates against their exports. A weak definition of 'forest degradation' may allow stronger arguments that the regulation unfairly discriminates against products from third countries and that the environmental objective exception under the WTO rules does not apply because the same standards are not being applied to protect forests within the EU.

Forest degradation is often a precursor to deforestation in timber harvesting as well as deforestation related to production of other commodities, and forest degradation remains a significant problem in the EU. A robust 'forest degradation' definition is essential to protect the EU's remaining forests.

We urge MEPs to adopt a definition of “forest degradation” that ***applies to all forests, reflects the true meaning of forest degradation, and specifies clear criteria*** *in order to ensure it is implementable in practice.*

Delayed entry into force

The Council has proposed to delay the commencement of the substantive provisions of the regulation by six months (from 12 to 18 months). Unfortunately, our planet cannot wait and this law is already long overdue. Similarly, many major soft commodity traders have been integrating and implementing zero-deforestation commitments and supply chain monitoring mechanisms for years.

There is not a moment to lose.

We urge MEPs to maintain no more than a 12 month phase-in period for the substantive provisions.

Delayed cut-off date

The Council has seemingly arbitrarily proposed to postpone the cut-off date for the “deforestation-free” definition from 31 December 2020 to 2021. We understand this was purportedly to avoid retrospectivity, which is prohibited under the Finnish constitution. However, this does not make sense – 2021 is still in the past, and the “deforestation-free” requirement (or any other provision of the regulation) purports to apply retrospectively.

We urge MEPs to adopt a cut-off date well before 2020.