

UK DEFORESTATION DUE DILIGENCE FRAMEWORK IMPLEMENTATION: FURTHER DETAIL PUBLISHED

The UK Department for Environment Food and Rural Affairs (Defra) has published a second consultation on the proposed UK mandatory forest-risk commodities due diligence regime. The regime will seek to prevent commodities that are the product of illegal deforestation and degraded ecosystems from coming onto the UK market by obliging in-scope businesses to conduct due diligence on their supply chains. The consultation follows on from the recent enactment of the Environment Act 2021 which contains broad powers to implement the regime. In this briefing, we consider the details being consulted upon, the implications for trade, and look at some of the key differences with the parallel proposals being considered on the same subject by the EU.

BACKGROUND – THE INITIAL CONSULTATION AND THE ENVIRONMENT ACT 2021

The regime is being introduced to combat deforestation, which is assessed to cause 11% of all greenhouse gas emissions, and help in essential efforts to conserve the biodiversity of rainforests in particular.

Following an initial consultation in August 2020 (See our [September 2020 briefing](#)), the Government decided to implement a mandatory forest commodities due diligence regime (the regime) and proceeded to enact the primary powers to establish it through the Environment Act 2021 (the Act), which received Royal Assent in November 2021.

The Act provides for key elements of the regime (in Section 116 and Schedule 17):

- a prohibition on certain businesses using 'forest risk commodities' (or products derived from those commodities) in their UK commercial activities (which include production, buying or selling) unless local laws in relation to such commodities were complied with;
- A requirement for those businesses to establish and operate a due diligence system to identify, assess and mitigate the risk that they are dealing with prohibited commodities; and
- Provision for enforcement through sanctions including criminal fines offences and civil sanctions.

Key issues

- Defra has published a second consultation on proposals for mandatory due diligence on forest risk commodities
- The requirements will cover cattle (beef and leather), cocoa, coffee, maize, palm oil, rubber, and soy, produced illegally under local laws
- The requirements will apply to large businesses producing, selling or buying significant commodity volumes (thresholds to be decided)
- Obligated businesses will have to establish and operate a due diligence system and carry out annual reporting
- The proposals differ significantly from proposals being progressed separately by the EU and may give rise to WTO concerns

Much of the detail on the commodities to be included, the businesses that will be caught, the level of due diligence required and penalties for non-compliance will be set out in the future Regulations. Some of this detail is the subject of the current consultation which was published on 3 December 2021 (the Consultation). Key proposals set out in the Consultation are discussed below.

COMMODITIES AND SEQUENCING

The following commodities are proposed be included in the regime initially: cattle (beef and leather), cocoa, coffee, maize, palm oil, rubber, and soy, as their production represents around 65% of global annual tropical deforestation risk within UK supply chains. It is likely, however, that the list may be extended once the regime has initially bedded down. Timber or timber products are not included as they are separately regulated under the UK Timber Regulation.

Defra is considering phasing commodities into the regime so that those commodities presenting the greatest risk of deforestation could be regulated sooner than would be possible if the regime for all commodities was implemented at the same time. Defra believes that a regime with two commodities could be implemented within 24 months, while implementation for all 7 commodities might take up to 5 years. This takes into account the amount of time business would need to tailor commodity-specific due diligence systems, and for suitable enforcement infrastructure to be put in place.

BUSINESSES CAUGHT

Defra proposes two criteria to bring businesses within scope of the new duties: (i) a business turnover threshold and (ii) a threshold based on the amount of commodity used by the business each year. Defra is proposing that the tests would be separately applied in respect of each commodity, such that a business would have to meet both tests in relation to a certain commodity in order for the business to be obligated to comply in respect of that commodity.

Turnover: The test could be based on the business's total UK turnover, for which possible thresholds of between £50m and £200m have been floated. Different thresholds could be set for different commodities. Alternatively, a threshold based on the business's total global turnover might be used, but no figures have yet been suggested for that option.

Commodity volume: Defra proposes that a business would calculate its total volume of relevant commodity used per year (including 'embedded' volumes of the commodity in products). If the volume is below the threshold set for that commodity, the business would be exempt from the regime in relation to that commodity. The Consultation seeks views on appropriate (and potentially different) threshold volumes for each commodity and proposes a very wide range of options between one tonne and 1000 tonnes per year. Working out the volume of commodities embedded in products could be very complicated and Defra plans to allow businesses to rely on suitable conversion factors for specific products to facilitate matters (similarly to the approach taken on greenhouse gas reporting).

Businesses would have to notify the regulator if they planned to rely on an exemption in relation to a commodity.

DUE DILIGENCE

As mentioned above, the requirement to carry out due diligence will ultimately require mitigation of the risk that relevant local laws were not complied with in relation to relevant commodities. Given the complexity of some supply chains, Defra has proposed that mitigation should be undertaken to bring the risk down to a level that is "as low as reasonably practicable". This is a concept well understood in health & safety law, and will give businesses comfort that financial criteria can be taken into account in making decisions on design of due diligence systems and mitigation responses.

Detailed guidance is expected to be produced on various aspects of the due diligence regime including, for example, identifying the reasonableness of mitigation.

CERTIFICATION AND STANDARDS

It is clear that operating a full due diligence system independently under the regime is likely to be complex and burdensome for many businesses. Defra intends to allow businesses to rely on commodity certification schemes and standards to help them comply with their due diligence duties, similarly to how timber certification schemes have been used to support compliance with the EU Timber Regulation. Guidance would then set out how particular schemes and standards could be used.

In particular, it would need to be demonstrated that relevant schemes and standards can prove legality, that there is a clear chain of custody for the commodities / products, and that the scheme / standards are subject to independent audit and are otherwise transparent. Businesses should note, however, that they may still have to carry out some element of confirmatory due diligence even when relying on certification schemes / standards.

REPORTING AND NON-COMPLIANCE

Businesses in scope will have to report annually on their due diligence exercise separately from their annual report. As well as reporting on basic information, such as volumes of commodities and commodity source locations, they will have to include information on how they conducted the due diligence and how they have applied mitigation tools.

The consultation contains little at this stage on non-compliance and associated penalties apart from proposing a maximum financial penalty at £250,000 in line with the Ivory Act.

THE PROPOSED EU DEFORESTATION REGULATION

The European Commission recently consulted on its own version of a deforestation due diligence framework. Although the UK framework powers are already implemented, the EU version is further advanced in terms of the detail. However, already, significant differences can be detected between the approaches of the UK and the EU, see the box below.

The proliferation of due diligence frameworks (both general and specific) that are emerging in Europe could cause significant management headaches and additional cost for international businesses if they have to apply different approaches in the same jurisdiction, for example where (as anticipated in relation to the UK proposals) businesses have to comply on a group basis.

Some key differences (listed non-exhaustively) between UK and EU proposals

| Aspect of proposal | UK proposals | EU proposals |
|------------------------------------|--|--|
| Commodities covered | Beef (and derivative product leather), cocoa, coffee, maize , palm oil, rubber , soy | Beef (and derivative product leather), cocoa, coffee, palm oil, soy, wood |
| Regulated Businesses | Turnover and commodity volume test for all relevant businesses in respect of each relevant commodity | All businesses placing commodities and relevant products on the EU market for the first time, and exporting from the EU. SME businesses supplying commodities / products in the EU are subject to light regime |
| Risk covered | Commodities produced in breach of relevant local laws | Commodities produced in breach of relevant local laws, or through deforestation (even if lawful) or leading to forest degradation occurring after 31 December 2020 |
| Risk mitigation requirement | Reduce risk to ' as low as reasonably practicable ' level | Reduce risk so as to be negligible |
| Sanctions | Civil penalties and criminal penalties – monetary penalties up to £250,000 | Fines proportionate to the damage and commodity/product value, confiscation of revenues, confiscation, exclusion from public procurement processes |

INTERNATIONAL TRADE IMPLICATIONS

The development of the regime is likely to attract scrutiny from the UK's trading partners, including with respect to compliance with World Trade Organization (WTO) obligations. While WTO rules do not prohibit environmental due diligence requirements, such regimes must not discriminate (either in law, or in fact) on products based on the country in which the products originate. While the regime's focus on products arising from illegal deforestation (as opposed to the EU proposals, which also extend to lawful deforestation) are likely to allay some concerns, much will depend on whether the regime imposes a disproportionately high regulatory burden on imports from certain countries over others.

NEXT STEPS

Responses to the consultation must be submitted by 11 March 2022. Given the open nature of many of the consultation proposals, it is possible that Defra will decide to carry out further rounds of consultation on the proposals. As mentioned in relation to sequencing above, it may take at least two years to bring the regime into force even if only two commodities are initially brought in scope. While the exact timing for implementation is unknown, the consultation paper confirms that the implementing Regulations will in any event provide businesses with at least 6 months to prepare for implementation

Link: [Consultation: Implementing due diligence on forest risk commodities – Defra – 3 December 2021](#)

CONTACTS



Nigel Howorth
Partner

T +44 20 7006 4076
E nigel.howorth
@cliffordchance.com



Michael Coxall
Knowledge Director

T +44 20 7006 4315
E michael.coxall
@cliffordchance.com



Anneke Theelen
Senior Associate

T +44 20 7006 3045
E anneke.theelen
@cliffordchance.com



Mathias Elspass
Partner

T +49 211 4355 5260
E mathias.elspass
@cliffordchance.com



Frederic Mainka
Associate

T +49 211 4355 5355
E frederick.mainka
@cliffordchance.com



Jeremy Stewart
Senior Associate

T +44 20 7006 4502
E jeremy.stewart
@cliffordchance.com



Anna Kirkpatrick
Senior Associate

T +44 20 7006 2069
E anna.kirkpatrick
@cliffordchance.com

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www.cliffordchance.com

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London, E14 5JJ

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