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Obligations for companies in the new EU Regulation preventing trade in certain products and commodities associated with deforestation

1. Introduction

On 31 May 2023, the European Parliament and the Council of the European Union (the "EU" or the "Union") adopted Regulation 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation (the "Regulation").

The Regulation seeks to minimise the EU's contribution to deforestation and forest degradation worldwide by promoting deforestation-free supply chains, thereby reducing greenhouse gas emissions and global biodiversity loss.

2. The objective and subjective scope of the Regulation

Objective scope: the Regulation will apply to the **introduction**¹ and **placing** on the EU market, as well as to the **export** from the EU, of seven commodities and the products derived from such commodities. These commodities - referred to in the Regulation as "relevant commodities" - are the following:

- i) **cattle;**
- ii) **cocoa;**
- iii) **coffee;**
- iv) **oil palm;**
- v) **rubber;**
- vi) **soya;**
- vii) **wood**²;

In addition, Annex I to the Regulation contains a detailed list of the so-called "relevant products", i.e., products containing, fed on or produced from these commodities.

Subjective scope: the Regulation applies to **any natural or legal person** who, in the course of a commercial activity, whether in return for payment or free of charge, **introduces or places on the EU market or exports from the EU the relevant commodities and products** (the "Companies").

Without prejudice to the general purpose of the Regulation, there are a number of industries that will be particularly affected by the entry into force of the Regulation, given their greater dependence on nature³. We refer in particular to the **construction industry, agriculture, and food and beverages**. However, the reality is that

1. The introduction onto the market is the first placing of a relevant commodity or product on the Union market.

2. Regulation (EU) 995/2010, which is repealed with the entry into force of the Regulation, shall continue to apply to wood and wood products - as defined therein - produced before 29 June 2023 and placed on the Union market as of 30 December 2024. Therefore, the provisions of the Regulation will apply to wood and wood products from 31 December 2027.

3. In this respect, see Recital 5 of the Regulation.

the Regulation will also have a major impact on multiple activities such as the textile industry, the manufacture of tyres, the paper industry, and pharmaceuticals, among others.

Furthermore, it is important to note that the Regulation anticipates that its scope will be extended in the coming years⁴.

3. Obligations under the Regulation

Companies may not introduce onto the market, make available or export the relevant commodities and products, **unless** the three conditions established in Article 3 of the Regulation are fulfilled:

- i) that such relevant commodities and products are **deforestation-free** (legal and illegal)⁵;
- ii) that they have been **produced in accordance with the legislation of the country of production**, and;
- iii) that they are covered by a **due diligence statement**.

On the basis of these conditions, the Regulation creates specific obligations and assigns them to two different entities: operators and traders. Operators first place the product on the EU market or export it from the EU, while traders distribute or use the product **once** it has been placed on the EU market by an operator. The distinction between the two is relevant in that the obligations assigned to each subject vary, with operators and traders (in the case of the latter, only those who are not SMEs) having greater obligations.

The first obligation of operators (and non-SME traders)⁶ is to exercise due diligence before bringing relevant commodities or products into the EU or exporting them from the EU. The due diligence to be exercised by operators consists of three activities:

- i) gathering all information, data and documents that demonstrate compliance with the conditions of Article 3 of the Regulation, in particular, that the product is deforestation-free and that it complies with the laws of the country of origin;
- ii) assess possible risks of non-compliance with the conditions of Article 3 of the Regulation, and;
- iii) where the above assessment reveals any potential risk, take risk mitigation measures, such as carrying out independent studies or audits.

As a brief note, the countries of origin of the relevant commodity or product will be categorised into three risk levels (low, standard and high) and if the country of production of the product or commodity is low risk, a **simplified procedure** will apply, which means that only the requirement to collect information will need to be fulfilled.

Once due diligence has been carried out, operators are obliged to submit the due diligence declaration ("**DDD**") before introducing relevant commodities or products into the EU or exporting them:

- The DDD is a document through which operators confirm that due diligence has been carried out and that no risk of non-compliance has been identified or that the risk identified is negligible.

4. In this respect, see Article 34 of the Regulation.

5. «Deforestation-free»: a) the relevant products that contain the relevant commodities, or have been fed or processed with the relevant commodities, produced on land that has not been subject to deforestation after 31 December 2020; and

b) in the case of relevant products which contain wood or have been processed from wood, the wood must have been harvested from the forest without causing degradation after 31 December 2020.

6. Hereinafter, "operators" shall also include traders other than SMEs (Article 5 of the Regulation).

7. The geolocation of all parcels of land on which the relevant commodities containing the relevant product were produced or used for the production of the relevant product, as well as the date or time interval of production.

- The DDD shall contain various data that allows the product or commodity to be properly identified, including the country of production and its geolocation⁷.
- Each DDD will have a reference number that will be transmitted to the subsequent links in each supply chain.
- By submitting the DDD, **an operator assumes responsibility** for the product's compliance with Article 3 of the Regulation. It is important to note that any operator relying on a DDD already submitted by a third party remains responsible for the compliance of the products that they place on the market under Article 3 of the Regulation⁸.

In order for operators to exercise due diligence as required by the Regulation, they are obliged to set up a due diligence system ("**DDS**"):

- The DDS is the set of procedures and measures that operators must put in place in order to ensure that the products they place on the market or that they export comply with the conditions of Article 3 of the Regulation.
- The DDS must be reviewed annually or whenever there is a new development that requires it, and operators other than SMEs, micro-enterprises or natural persons are obliged to inform the public annually about their DDS and the measures taken to comply with the Regulation.

The Regulation requires operators and traders - including SMEs - to keep all documentation necessary to prove compliance with Article 3 of the Regulation for **five years**.

4. The minimum sanctions provided for by the Regulation

The competent authorities may apply **provisional measures**, such as the seizure of products, if they detect possible instances of non-compliance with the Regulation and, if such non-compliance is confirmed, the competent authorities will require the operator or trader in question to take appropriate and proportionate **corrective measures**, such as the immediate withdrawal of the product, to remedy the non-compliance.

Without prejudice to the corrective measures, in the event of non-compliance, the competent authorities shall apply the sanctions regime previously established in each Member State - in the case of Spain, via a regulation with the status of a law that has not yet been enacted - which must contain, **at a minimum**, the sanctions provided for in the Regulation:

- i) Fines proportionate to the environmental damage and the value of the relevant commodities and products concerned, with the aim of depriving the offender of the economic benefits of their infringements. If the offender is a legal person, **the fine may amount to 4% of the total annual EU turnover** in the financial year preceding that in which the fine is set.
- ii) Confiscation of the relevant products.
- iii) Confiscation of the proceeds of the transaction with the relevant products.
- iv) Temporary exclusion for a maximum period of 12 months from public procurement procedures and from access to public funding (procurement, subsidies or concessions).
- v) A temporary ban on the introduction, placing on the market or export of the relevant commodities or products, in the event of a serious infringement or repeated infringement.
- vi) Prohibition from using the simplified due diligence procedure, in case of serious infringements or repeated infringements.

8. This will be the case, for example, where a second operator is involved (relevant products contained in other relevant products) and is also an SME, as referred to in Article 4(8) of the Regulation.

In addition to the above sanctions, the Regulation provides, in the case of final judgments against legal persons, for the publication of (i) the infringing activity, (ii) the sanction imposed, (iii) the date of the judgment and (iv) the name of the infringing legal person⁹.

5. Temporal scope of the Regulation

Although the Regulation is already in force, the obligations arising from the Regulation for **large and medium-sized** companies will be enforceable from **30 December 2024**.

Obligations for **micro** and **small enterprises** will be enforceable from **30 June 2025**.

Wood and wood-based products will have to comply with Article 3 of the Regulation from 31 December 2027¹⁰.

9. See Article 25(3) of the Regulation.

10. See footnote 2 of this Briefing.

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