

Cocoa Research

Briefing 3: New EU and UK regulations on deforestation-free commodities – A lever for change in the cocoa sector in Ghana?

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List of abbreviations

Cocobod	Ghana Cocoa Board
EPA	Environmental Protection Agency
EUDR	EU Deforestation Regulation
FC	Forestry Commission
FERCs	Forests and Ecosystems Risk Commodities
GCFRP	Ghana Cocoa Forest REDD+ Programme
GoG	Government of Ghana
LBCs	Licensed Buying Companies
LID	Living Income Differential
MLNR	Ministry of Lands and Natural Resources
MOFA	Ministry of Food and Agriculture
PPRC	Producer Price Review Committee

0. Executive Summary

Cocoa is a vital industry for Ghana, contributing significantly to its economy and providing income for many farmers. However, there are challenges to its sustainability, including poverty among farmers, child labour, and deforestation. Reconciling efficiency in production, social protections, and environmental preservation is crucial for cocoa's long-term sustainability. The existing legal frameworks and initiatives in Ghana have proven insufficient in addressing these challenges and even partially fuel them. This third briefing in a series on sustainable production and trade of cocoa¹ focuses on the EU Deforestation Regulation (EUDR) and UK Environment Act and their potential impact on the identified legal and institutional shortcomings in Ghana and our suggested reforms.

The EUDR establishes a mandatory due diligence system for operators and large traders trading in the EU to ensure their products are deforestation-free and comply with relevant local legislation of the country of production. It also introduces a country benchmarking system to assess the risk of non-compliance in producer countries. The UK Environment Act sets a legality standard for Forest Risk Commodities traded in the UK, focusing on compliance with local laws concerning land use and rights. Both regulations will impact Ghana's cocoa industry, as it heavily relies on the EU and UK markets. To maintain access to the European market, operators and traders of Ghanaian cocoa will need to address deforestation and child labour issues. For Ghana itself, the regulations present an opportunity to reform its cocoa sector and address some of the identified shortcomings. Environmental, price, and child labour concerns will need to be considered in this process.

Challenges with the deforestation and legality requirements: During workshops with civil society actors in Accra, ClientEarth and TaylorCrabbe Initiative identified several concerns related to the design of the EUDR, and the UK Environment Act. Firstly, the definitions of deforestation and forest degradation in the EUDR are not based on Ghanaian policy and legislative definitions, which may mean that deforestation, which is allowable under Ghanaian law, nonetheless contravenes the requirements of the EUDR. This may cause initial confusion among operators and traders in Ghana. In addition, the lack of comprehensive government data on Ghanaian forests makes it challenging to assess the full impact of the EUDR's definitions on any future expansion of Ghana's cocoa farms. Secondly, as a demand-side regulation, the EUDR applies a single standard for all products entering the EU market regardless of where they were produced. In other words, there is no room for tailored solutions based on national forest concerns, unlike under the Voluntary Partnership Agreement approach. Thirdly, the implementation of the legality criteria in the EUDR and the UK Environment Act may also be difficult, as European companies conducting due diligence may each interpret and apply this legality requirement differently, because local laws are complex and numerous, and may be unclear or contradictory. This could result in a failure to consider whether the commodities and products in their supply chain were produced in accordance with all the rules falling within the scope of the EUDR or UK Environment Act legality requirement. Moreover, competent authorities in Member States may lack the capacity and resources to enforce the regulation effectively across multiple jurisdictions. In particular in Ghana, the fragmented legal framework for forests and land tenure, along with limited centralised land information poses challenges for compliance. Developing **publicly available lists of relevant rules applicable in the country of production** could mitigate these risks, facilitate a common approach among operators and competent authorities and ensure no regulation is overlooked. Civil society actors in Ghana and other producer countries can play a crucial

¹ [A legal pathway to sustainable cocoa in Ghana and Côte d'Ivoire - Introduction | ClientEarth](#)

role in identifying relevant laws and, by doing so, identifying areas of legal unclarity to drive reforms to improve forest governance beyond EU supply chains.

Environmental Concerns: The EUDR and UK Environment Act have the potential to incentivise law reform in Ghana on forest conversion, particularly in the context of cocoa production. Ghana's cocoa exports to Europe are significant for its foreign exchange and income and therefore, Ghana may wish to reform its laws to facilitate this trade. To create a conducive environment for sustainable cocoa production, the causal factors driving forest conversion must be addressed.

The EUDR's producer country benchmarking feature may incentivise Ghana to address the identified challenges in its legal framework on forest conversion. This mechanism will inform EU competent authorities about the risk associated with commodities' origins, guiding due diligence and enforcement checks. By **improving forest governance and addressing legal gaps**, Ghana can aim for a low-risk rating, which may provide economic incentives and a competitive advantage in the cocoa market. The benchmarking mechanism can also assist in identifying Ghana's needs and enhancing targeted assistance for forest governance improvements through cooperation and partnerships with the EU.

The EUDR also emphasises the need for a **robust traceability system** for cocoa production to ensure deforestation-free sourcing. Existing certification standards often do not require traceability all the way to the farm level, as the EUDR does, and data sharing between private sector traceability systems is limited. Therefore, we suggest that Ghana should implement a centralised national traceability system, ensuring transparency, consistency, and public ownership of information flow. With guarantees of credibility and transparency, such a system would benefit Ghana by facilitating legal compliance, increasing transparency and security around payments, and improving smallholders' tenure security. It would also assist EU operators in meeting their obligations under the EUDR. Ghana's main state regulator, Cocobod, would be well-placed to lead the establishment of a centralised and robust traceability system, while involving the various stakeholders in the sector, in particular farmer-based organisations, and civil society organisations.

The EUDR is expected to **enhance compliance with Ghana's laws** because it provides a mechanism for third parties to report non-compliance, through the 'substantiated concerns'. Competent authorities in EU member states are obligated to assess claims and take action. This mechanism provides an opportunity for local stakeholders to act as watchdogs on errant producers and improves transparency and accountability. Financial implications for non-compliance by individual operators and traders on the EU market may also incentivise Cocobod and other actors in the supply chain to more strictly enforce Ghana's laws.

Enforcing Ghana's forestry laws can positively impact deforestation rates and potentially reduce the perceived risk associated with its cocoa production in the eyes of EU buyers and the European Commission. **By addressing legal frameworks and improving governance, Ghana can benefit from the EUDR's impact and enhance its position in the cocoa market.**

Child Labour Concerns: Neither the EUDR nor the UK Environment Act explicitly mention absence of child labour as a criterion for qualifying cocoa beans for their markets. The UK Act's legality requirement is not yet clear on whether child labour laws are included as we await secondary regulation. However, the EUDR's scope encompasses labour rights and human rights protected under international law, which includes child labour. Child labour is a violation of human rights, denying children their rights to protection, education, health, and dignity. Ghana is a party to international conventions that prohibit child labour and has domestic legislation enforcing these provisions. The high prevalence of child labour in Ghana's cocoa production poses challenges for operators to ensure compliance with the EUDR and international

commitments. **The EUDR provides an opportunity for Ghana to seek to better regulate the presence of child labour in the cocoa supply chain, including by incorporating the Hazardous Activity Framework into legislation.** This framework is currently only voluntary but performs the important task of outlining permissible and non-permissible work for children in various sectors, including cocoa. Ghana should also **implement effective policies and programs to address the root causes of child labour**, such as poverty, through education, alternative income-generating activities, monitoring systems, training, capacity-building, and awareness-raising efforts. Development partners, including the EU and the UK, can provide support in implementing these solutions.

Price Concerns: Neither the EUDR nor the UK Environment Act specifically target improving cocoa bean pricing or the livelihoods of farmers. However, the implementation of these regulations may indirectly affect farmers. The EUDR, in particular, could benefit smallholder farmers in several ways. **Clearer and more transparent traceability may simplify supply chains, reduce the involvement of middlemen and allow farmers to receive a larger share of profits.** It could also improve the reliability of sustainability premiums and commodity prices, ensuring consistent and fair payments to farmers. Digitalised services and geolocation could enhance farm management and planning. However, the EUDR may also have **unintended negative consequences for smallholders if they are excluded from supply chains or face increased compliance costs.** EU operators have the option to support smallholders as a mitigation measure, but this is not legally binding. A comprehensive review of the EUDR's impact on smallholders will be conducted after five years, but no immediate measures are provided to assist them. To address these challenges, the EU could establish **partnerships and cooperation mechanisms with producer countries, including support for smallholders in meeting the anticipated requirements of EU buyers who are subject to the regulation, improving and securing land and tree tenure and access to credit.** Moreover, stakeholder participation and assessments of the EUDR's impact on farmers should be involved. The focus should be on ensuring smallholder farmers are not negatively affected while transitioning to sustainable agricultural production and addressing deforestation and forest degradation.

Conclusion: The EUDR and UK Environment Act can encourage law reform and governance improvements in Ghana's cocoa sector. In particular, the EUDR's producer country benchmarking may incentivise Ghana to improve forest governance. For Ghana's own benefit and since a robust traceability system is needed to comply with EUDR requirements, there's an opportunity for Ghana to strengthen its national centralised traceability system, ensuring transparency, consistent approach, and ownership of information flow. In addition, the development of non-exhaustive lists of national and sub-national laws would facilitate due diligence requirements of operators, enforcement controls for competent authorities in Member states and initiate legal and institutional reforms where areas of complexity, ambiguity, or contradiction are identified. The EUDR also presents Ghana with the opportunity to incorporate the Hazardous Activity Framework into legislation, outlining permissible and non-permissible work for children in various sectors, including cocoa and to strengthen its policy approach to eliminating child labour from cocoa farms. While the regulations don't directly address cocoa bean pricing or farmer livelihoods, their implementation may have indirect impacts. Partnerships and cooperation mechanisms are crucial to supporting smallholder farmers and assessing the regulations' impact. Collaboration between the EU, Ghana, and civil society is necessary for effective implementation and to address both consumer-led and national causes of deforestation and poverty in Ghana's cocoa supply chain.

1. Chapter 1 – Introduction

Cocoa is a very important commodity to Ghana. It is a multi-billion industry and a crucial sector in Ghana's economy. In 2019, Ghana exported about USD 2.29 billion in cocoa products, which accounted for more than 14 per cent of its overall exports.² Ghana is the second largest producer of cocoa in the world, second to Cote d'Ivoire. Together, both countries produce about 60 per cent of the cocoa that sustains the USD 130 billion global chocolate industry.³ Cocoa production also provides a source of income to over 800,000 smallholder farm families who make up about 60 percent of Ghana's agricultural force.⁴

Although cocoa is essential to Ghana's economy there are challenges and grave threats to its sustainability. Firstly, many of the farmers and cocoa workers live in abject poverty. Less than 9% of cocoa farming households earn a living income.⁵ Secondly, the labour-intensive nature of cocoa production perpetuates the cycle of poverty. Because of the low earnings of cocoa farmers, they are unable to employ the required labour. This then leads to reliance on their children for support on their farms.⁶ The result has been high statistics of child labour despite Ghana's several international and legislative commitments to the eradication of child labour. Thirdly, the expansion of cultivated areas over the last few decades has come at the cost of the country's forests, and hence the decline of its biodiversity and soil quality.⁷

The sustainability of cocoa depends on the reconciliation of three factors: the efficiency of cocoa production and trade (for all actors), social protections and environmental preservation. To support this reconciliation, a reform of national, regional, and international legal and policy tools is urgently needed. In Ghana and Côte d'Ivoire, the cocoa sector is governed by national legal and institutional frameworks that organise and regulate the production and trade of this commodity. These countries also host a variety of international and regional initiatives aimed at improving the sustainability of cocoa. However, these initiatives and legal frameworks are inconsistent and incomplete when it comes to the three factors of sustainability mentioned above, and their gaps and deficiencies partially fuel the problems described above.

This paper is the third (and final) of a set of briefings. The two first briefings (i) described the national legal and institutional frameworks currently regulating cocoa production and trade in Ghana and (ii) identified the loopholes and possible governance, legal and policy reform solutions for the major social and environmental challenges of the sector.

This third briefing will focus on the potential impacts of the regulations on deforestation in the EU & the UK on the identified legal and institutional shortcomings in Ghana and on the possible reforms suggested in the second briefing. Indeed, at the European level, two new regulations were recently introduced that will likely impact cocoa production and trade with the EU and the UK. In May 2023, the EU adopted a

² Bank of Ghana, Annual Report 2019, p. 17, <https://www.bog.gov.gh/wp-content/uploads/2020/06/AnnRep-2019.pdf>.

³ ICCO (2020): Quarterly Bulletin of Cocoa Statistics, Volume XLVI No.3, Cocoa Year 2019/20; Bhutada, Govind, "Cocoa's Bittersweet Supply Chain in One Visualization." World Economic Forum, 4 Nov. 2020, <https://www.weforum.org/agenda/2020/11/cocoa-chocolate-supply-chain-business-bar-afri-ca-exports/>.

⁴ Barima Akwasi Amankwaah, Glen Asomaning, Raymond A. Atuguba, Emmanuel Ayifah, Allie Brudney, Brian Citro, Charity Ryerson, Sandra Kwabea Sarkwah & Alexandra Tarzikhan, Cocobod's Unrealised Potential: Promoting Human Rights, Welfare, and the Environment in Ghana's Cocoa-Growing Communities, Northwestern Pritzker School of Law Center for International Human Rights, University of Ghana School of Law, Corporate Accountability Lab & SEND Ghana, June 2021, p.18.

⁵ ICCO (2020): Quarterly Bulletin of Cocoa Statistics, Volume XLVI No.3, Cocoa Year 2019/20.

⁶ Luckstead, Jeff, et al. "Estimating the Economic Incentives Necessary for Eliminating Child Labor in Ghanaian Cocoa Production." PLoS ONE, vol. 14, no. 6, June 2019, p. 2, <https://doi.org/10.1371/journal.pone.0217230>; Final Report: 2013/14 Survey Research on Child Labor in West African Cocoa Growing Areas, Payson Center for International Development, Tulane University School of Public Health, July 2015, p.73, https://www.doi.gov/sites/dolgov/files/ILAB/research_file_attachment/Tulane%20University%20-%20Survey%20Research%20Cocoa%20Sector%20-%202030%20July%202015.pdf.

⁷ Ghana's Cocoa Forest REDD+ Programme, 2017.

regulation⁸ that seeks to create an EU legal framework, based on mandatory due diligence, to regulate the placing on and the export from the EU market of Forest-Risk Commodities (FRCs) including cocoa. The Regulation seeks to curb EU-driven deforestation and forest degradation, by minimising EU consumption of products coming from supply chains associated with deforestation or forest degradation. In 2021, the UK passed an Environment Act which acts as the UK's new framework of environmental protection. Among other things, Schedule 17 of the Act prohibits the use of illegally produced FRCs in UK commercial activities. Subsidiary legislation that fleshes out the Act in terms of the scope of commodities, the size of companies and trading volumes subject to the law, details of due diligence requirements, public reporting and enforcement measures has yet to be presented.

2. Chapter 2 – Scope of the EU and UK regulations

2.1. Description⁹

The **EU Deforestation Regulation (herein after “EUDR”)** establishes a mandatory due diligence system that relies on a supply chain traceability requirement and on stand-alone definitions for deforestation and forest degradation combined with a benchmarking system. On its entry into force, due diligence will be the mandatory tool for ascertaining compliance of the products under the regulation. The EUDR prohibits the placement, making available on or export from the EU market of non-compliant commodities (seven FRCs are covered so far) and products made from them, and imposes a due diligence obligation on operators and large traders to ascertain the compliance of their products before placing them on the EU market or exporting them. The commodities include cattle, cocoa, coffee, oil palm, rubber, soy, and wood. The EUDR introduces two requirements and stipulates that on its enactment, relevant products shall not be placed, made available on, or exported from the EU market unless they are deforestation-free and have been produced in accordance with the relevant legislation of the country of production. Furthermore, operators and large traders are required to submit due diligence statements when placing relevant products on the EU market or when exporting them that confirm the compliance of their products.

As mentioned above, operators and large traders must ensure that their products were produced in accordance with the “relevant legislation of the country of production” (Art. 3(b)). However, the definition of “relevant legislation of the country of production” (Art. 2(40)) only includes a limited scope of laws, i.e. “laws applicable in the country of production concerning the legal status of the area of production in terms of: (a) land use rights; (b) environmental protection; (c) forest-related rules, including forest management and biodiversity conservation, where directly related to wood harvesting; (d) third parties’ rights; (e) labour rights; (f) human rights protected under international law; (g) the principle of free, prior and informed consent (FPIC), including as set out in the UN Declaration on the Rights of Indigenous Peoples; (h) tax, anti-corruption, trade and customs regulations”.

In addition to the ‘legality requirement’ described above, operators and large traders will have to verify that their products are “deforestation-free” (defined in Art. 2(13)¹⁰). The innovation of the single deforestation-

⁸ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 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 and repealing Regulation (EU) No 995/2010, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2023.150.01.0206.01.ENG&toc=OJ%3AL%3A2023%3A150%3ATOC.

⁹ For a description on key obligations for EU Member States under this Regulation, please refer to ClientEarth's following briefing: Briefing_New EU Deforestation Reg_Implications for Member States_May 2023.pdf.

¹⁰ ‘Deforestation-free’ means (a) that the relevant products contain, have been fed with or have been made using, commodities that were produced on land that has not been subject to deforestation after December 31, 2020, and (b) in case of relevant products that contain or have been made using wood, that the wood has been harvested from the forest without inducing forest degradation after December 31, 2020.

Article 2(3) : ‘deforestation’ means the conversion of forest to agricultural use, whether human-induced or not.

free definition (based on the UN-FAO definitions) is expected to increase the effectiveness of the regulation by preventing the loopholes associated with legal deforestation based on the local laws of each country of production and to prevent the creation of wrong incentives for producer countries to lower environmental standards to facilitate access of their products to the EU market. The EUDR sets a cut-off date of **31st December 2020**, after which any deforestation associated with the production of a FRC would render it illegal to import into or export from the EU. The **due diligence obligation** requires operators and large traders to gather information and conduct a risk assessment to assess the risk of non-compliance of their product with the deforestation-free and legality requirement and undertake risk mitigation procedures where they cannot ascertain that there is no risk or merely a negligible risk that their products are not compliant with those criteria.

In addition to the mandatory due diligence requirement for relevant products, the EUDR introduces a country **benchmarking system**.¹¹ Through this system, the EU Commission intends to assess the risk that relevant commodities and products produced in a country or parts thereof are not deforestation-free. Criteria for this risk assessment are primarily based on statistical information (such as rate of deforestation and forest degradation, and rate of expansion of agricultural land for relevant commodities and production trends of relevant commodities and of relevant products). Governance information (such as implementation of international agreements and implementation and enforcement of a national legal framework to avoid and sanction activities leading to deforestation and forest degradation) may also be included. The mechanism will then assign each country or parts thereof one of three possible levels of risk: low, standard, and high. The obligations for operators and the competent authorities of EU member states are differentiated according to the level of risk of the producer country, with simplified due diligence duties for relevant products sourced from low-risk countries and enhanced scrutiny by competent authorities conducting checks on companies sourcing from high-risk countries and the relevant products.

The implementation of this benchmarking system is meant to achieve three objectives¹²:

1. To incentivise countries to guarantee stronger forest protection and governance;
2. To facilitate trade and better calibrate enforcement efforts by helping competent authorities to focus resources where they are most needed (i.e. supply chains from high risk areas); and
3. To reduce companies' compliance costs (through simplified due diligence for products from low risk areas).

Unlike the EUDR, **Schedule 17 of the UK Environment Act**¹³ seeks to set only a legality standard for FRCs traded in the UK in a bid to reduce the UK's global deforestation footprint and to promote the sustainable production of these commodities. The main operative provision in the UK Act is that "a regulated person in relation to a forest risk commodity must not use that commodity or a product derived from that commodity in their UK commercial activities unless relevant local laws were complied with in relation to that commodity". The Act requires regulated persons to establish and implement a due diligence system that gathers information on FRCs, assesses risk and mitigates the identified risk. Unlike the EUDR, the list of FRCs has not been specified yet but will be listed in upcoming secondary legislation. The scope of laws for the legality standard has been limited to local laws concerning land use and land ownership and there is no sustainability requirement.

Article 2(7) : 'forest degradation' means structural changes to forest cover, taking the form of the conversion of: (a) primary forests or naturally regenerating forests into plantation forests or into other wooded land; or (b) primary forests into planted forests.

¹¹ Article 29 of the EUDR.

¹² Preamble of the proposed Regulation under "Detailed explanation of the specific provisions of the proposal", p. 19.

¹³ Passed in November 2021

Both the EU and UK are important markets for Ghana's cocoa. In 2020, Ghana exported over 44% and 3.92% of its cocoa beans to the EU and the UK respectively.¹⁴ The new regulations in the EU and UK are expected to have implications and impacts on cocoa production and trade as cocoa beans must now be produced without causing deforestation (for EU) and in accordance with the relevant laws of Ghana (for EU and UK). Although Ghana could consider transitioning to alternative markets with less demanding regulations, the country's heavy reliance on the EU market for cocoa makes this a challenging proposition. Further, Ghana will have to address the challenges of Child Labour and deforestation to satisfy national ideals and international obligations under treaties.

Consequently, we believe the legal and institutional shortcomings that have been identified in our previous briefings must be addressed to create conducive circumstances to produce cocoa beans that will qualify for the EU and UK markets. It is therefore expected that these two regulations will provide Ghana the opportunity to pursue a reform of the cocoa sector that comprehensively and effectively addresses the identified shortcomings. The implications and impacts for environmental, price and child labour concerns are considered in turn below. **The question is whether these regulations can act as a lever to address the social and environmental concerns of the cocoa sector in Ghana. More specifically, can these regulations contribute to resolving the shortcomings of national legal and institutional frameworks relating to cocoa?**

2.2. Challenges with the deforestation and legality requirements

Prior to delving into the implementation of these regulations, we have taken note of several obstacles and issues raised during our workshops with civil society actors.¹⁵ These concerns have provided valuable insight into the contextual factors that will influence the enforcement of these regulations. We consider them below.

Firstly, the **non-negotiable definitions for deforestation and forest degradation**¹⁶ in the EUDR apply irrespective of policy and legislative definitions in Ghana. Products that don't meet the deforestation and forest degradation-free definition in the EUDR will be non-compliant, even if Ghanaian law would determine that their production has been legal. In other words, the definitions in the EUDR apply to both illegal and legal deforestation based on Ghanaian law and do not allow for an appreciation of forest use in Ghana; that is, off-reserve and on-reserve use of forests.¹⁷ According to Ghanaian law, farming, and urbanisation on off-reserve areas which have been demarcated for agricultural use does not amount to illegal deforestation. Furthermore, some woodlands that are not considered forests in Ghanaian policy because they have been demarcated for agricultural use will nonetheless meet the definition of a forest under the EUDR.¹⁸ Further, the fallow method of farming, a traditional agricultural practice where a piece of land is intentionally left uncultivated or unplanted for a period to allow the land to rest and restore its fertility

¹⁴ Sasu, D. D. (n.d.). Share of cocoa beans exported from Ghana as of 2020, by country of destination. Retrieved March 19, 2023, from <https://www.statista.com/statistics/1309354/share-of-cocoa-bean-exports-from-ghana-by-destination-country/>.

¹⁵ In 2020, ClientEarth launched a series of "cocoa legal clinics", in partnership with TaylorCrabbe initiative, to share knowledge with civil society organisations and cocoa producers about the legislative and regulatory frameworks in place for the production and trade of cocoa in Ghana and the EUDR regulation and its implications for Ghana.

¹⁶ Article 2(3) : 'Deforestation' is defined as 'the conversion of forest to agricultural use, whether human induced or not'.

Article 2(7) : 'Forest degradation' means 'structural changes to forest cover, taking the form of the conversion of (a) primary forests or naturally regenerating forests into plantation forests or into other wooded land; or (b) primary forests into planted forests'.

¹⁷ This Ghanaian domestic distinction will be taken into account for compliance with the legality requirement though.

¹⁸ Article 2(4) : 'Forest' is defined as 'land spanning more than 0,5 hectares with trees higher than 5 metres and a canopy cover of more than 10%, or trees able to reach those thresholds in situ, excluding land that is predominantly under agricultural or urban land use'.

naturally, may have led to the generation of naturally occurring forest. The conversion of such forest on such land would not be considered illegal deforestation in Ghana but may amount to deforestation under the EUDR, if the area is fully restored to meet the forest definition in the EUDR and then deforested to re-plant agricultural products. Another concern is the uncertainty of the current state of forests of Ghana.¹⁹ Due to the lack of comprehensive government data concerning Ghanaian forest, in terms of coverage and scale, it is difficult to determine how far reaching the consequences of the definition provided under the EUDR would be, without further studies and research.

As a demand-side regulation, the EUDR restricts the products that can be imported from Ghana to the EU. Unlike the VPA approach, it does not offer room for collaboration between the EU and producer countries to determine tailored solutions to each country context, in accordance with national forest concerns.²⁰ Instead, the EUDR applies a single standard for the whole EU market for all relevant products regardless of where they were produced.

Secondly, **the legality criteria**, as defined in the EUDR and the UK Environment Act, might also be difficult to implement. The task to identify the relevant legislation in the country of production lies primarily with European companies conducting their due diligence. The risk here lies in individual companies developing incomplete lists of relevant laws, which do not identify all applicable laws. Left to European companies alone, there is a risk that they may interpret and apply this legality requirement restrictively – as has been the case in the EU Timber Regulation (EUTR) – and fail to consider whether the commodities and products in their supply chain were produced in accordance with all the rules falling within the scope of the EUDR or UK Environment Act legality requirement. In some cases, requirements imposed by local laws may also be hard to determine because they are complex, unclear or contradictory.

In a scenario where each individual operator and large trader is developing their own list of applicable laws, this also creates a tall order for competent authorities who may lack the capacity and resources to fully undertake legal analysis across many jurisdictions worldwide while in the process of conducting the checks necessary to properly enforce the Regulation.

In the framework of the EUTR, competent authorities have not generally challenged companies on legal issues involving environmental conservation or land tenure, because they lack the necessary capacity and resources' to investigate and assess the relevant legal frameworks in third countries to the extent necessary to properly enforce the EUTR. In a Forest Trends survey of EUTR competent authorities, 88 percent said they had sanctioned a company for failing to meet harvesting laws, but only 13 percent said they had sanctioned companies for legal issues relating to biodiversity conservation or land tenure.²¹ Competent authorities report that bringing successful cases on customary land tenure issues is, in practice, close to impossible, as it requires fieldwork at the community level if those rights have not been formally registered.

Operators and traders may also be poorly equipped to identify all the applicable rules in their sourcing areas with which they must check compliance. Were each operator to create their own interpretation of what the legality requirement requires this would be a duplication of effort and ultimately put a higher

¹⁹ Arguably, the EUDR will produce more data on forests in Ghana because of the traceability requirement and data collected by the Forest Observatory.

²⁰ Article 30 of the EUDR does offer room for some collaboration between the EU and the producer countries but it does not allow for negotiation on the meaning of 'deforestation-free' or on the scope of products covered by the regulation for example.

²¹ Saunders, Ten steps towards Enforceable Due Diligence Regulations that protect forests, Forest Trends, September 2020, available at https://www.forest-trends.org/wp-content/uploads/2020/09/10_Steps_Due_Diligence.pdf

burden on competent authorities to ensure operators are performing their requirements under the Regulation.

One option for mitigation of this risk is for publicly available lists of relevant rules applicable in the country of production to be developed. This could be an opportunity for producer country stakeholders: by proactively developing such lists, they could facilitate a common approach among operators and ensure no regulation is overlooked by operators and competent authorities. This would allow them as well to identify areas requiring law reform and to start a national dialogue in this respect.

These lists would serve as non-exhaustive guidance for both operators and competent authorities but would not exempt operators and large traders from identifying additional relevant applicable rules when conducting their due diligence. The guidance could clearly state the points in national laws against which compliance should be systematically established by competent authorities.

In Ghana, laws on forest conversion and land-use are scattered across different laws which leads to overlaps and surplus. Ghana's forest resource framework has been described as a perilous quagmire of constitutional obligations fleshed out through substantive and procedural provisions.²² This uncoordinated framework has resulted in inconsistent provisions, overlap of obligations and difficulty in understanding the duties and rights related to forests. The fragmented legal framework makes enforcement of these laws difficult. This is because the responsible authorities are often unaware of the full extent of their authority and what the law says. This creates a loophole for forest offenders to commit forest related offences. Furthermore, this is compounded by the legal framework for land tenure in Ghana which also is complex and inaccessible due to multiple sources of law, including statutory, common, and customary laws peculiar to particular communities. Ghana operates a dual land tenure system, comprising customary and statutory land tenure, which creates complexities and varying procedures. Additionally, there is a lack of centralised land information, leading to fragmented records across different institutions. Lengthy and bureaucratic procedures for land transactions discourage formal transactions and contribute to insecurity. Limited legal literacy, especially in rural areas, further worsens the inaccessibility of the legal framework.

These challenges highlight the importance for European cocoa buyers to conclusively identify the areas from which they source and invest in adequate due diligence to identify all the relevant laws applicable to the production of cocoa in each sourcing area. The breadth and complexity of laws related to cocoa production across Ghana would require a national process to identify those laws and produce a comprehensive list and keep it up to date, which should be informed by all relevant stakeholders.

We believe there is an opportunity here for civil society in Ghana and other producer countries to engage in this process of identifying relevant laws. By confronting experiences and particular interests with the other stakeholders in an inclusive and participatory process, civil society can help identify potential inconsistencies and overlaps in legislation. Thereby, civil society would have the potential to drive reforms in countries of production and consequently improve forest governance beyond EU-supply chains.

²² CK Akapame, *Chasing Legal Timber: Developments in the Commercial Trade of Timber and Wood Products in Ghana- Laws, Institutions and Practices*, Sage Publications, 2019.

3. Chapter 3 – Environmental concerns

3.1. Recap on Gaps and Recommendations

With a view to analysing the extent to which these regulations can contribute to addressing gaps in national legal and institutional frameworks for cocoa, we summarise them as follows.

Ghana's cocoa forest landscape has one of the highest deforestation rates in Africa, at 3.2% per annum with expansive and low-yielding cocoa farming as a major contributor. Among the identified factors creating a conducive environment for forest conversion in Ghana in cocoa farming are some gaps in Ghana's legal and institutional framework. The gaps include unclear laws on forest conversion, which make enforcement ineffective and inefficient; current tree and land tenure arrangements creating disincentives for conservation of trees, lack of accountability for downstream actors in the production chain which result in no consequence in sourcing cocoa from illegal production areas and weak enforcement of laws and regulations.

First, **Ghana's laws regulating forest reserves lack clarity on the issue of forest conversion.** The laws primarily outline the reasons for establishing forest reserves but do not explicitly prohibit conversion. This is further complicated by conflicting government policy documents on the matter. To align with Ghana's commitment under the Cocoa Forest Initiative (CFI) to prevent deforestation and forest degradation in the cocoa sector, it is essential to clarify the management and conservation laws of forest reserves in Ghana. This can be achieved by clarifying the activities that are permitted to take place in forest reserves through the creation of clear and comprehensive laws.

Secondly, the **ownership structure of trees in Ghana is a major issue in the adoption of agroforestry practices in cocoa farming.** Currently, all naturally occurring trees, including those on privately held land, are owned by the state, with the benefits of tree harvests being shared between loggers, traditional authorities, and the government, excluding landowners. This discourages landowners and smallholders from nurturing trees on their cocoa farms and leads to a lack of investment in preventing illegal logging. Additionally, smallholders are not compensated for damages and yield losses when mature trees are harvested, either legally or illegally. To address these issues, it is recommended that the government align tree ownership with land ownership, reform benefit-sharing arrangements to include farmers who tend off-reserve trees or implement a tree registration framework to encourage agroforestry in off-reserve areas.

Further, the **challenge of weak land ownership rights** affects most smallholder cocoa farmers in Ghana, where their right to farm a piece of land is often temporary and based on the condition of planting cocoa trees. This discourages farmers from replacing aging cocoa trees with new varieties, as it may lead to renegotiation of land use fees or changing the original agreement. This in turn encourages forest conversion. Most customary land tenure arrangements are not documented, leaving farmers without land security and unable to access credit facilities due to lack of collateral. To address this challenge, it has been recommended that the main government agency for cocoa (Cocobod) should work with the Lands Commission and the Customary Land Secretariat to design a simple, sustainable, and affordable land administration system for customary land registration to secure land tenure for cocoa farmers.

Also, the **current lack of consequences for government agencies and private actors that support illegal cocoa farms** is another major concern. This is due to the absence of a national monitoring system to ensure the sustainability, legality, and traceability of the cocoa production, which is only carried out by the private sector on a voluntary basis. The traceability system's voluntary nature and lack of legal obligation led to a lack of accountability and a proliferation of illegal and irresponsible cocoa farming

practices across forested areas. To address this, it is recommended to implement a Legality Standard for Cocoa Beans with Independent Monitoring, drawing from the lessons learned from the Forest Law Enforcement, Governance, and Trade Voluntary Partnership Agreement (FLEGT VPA). This would require an update to the Ghana Cocoa Board Act 1984 (PNDCL 81) to include sustainability and legality standards for cocoa production in addition to its current focus on production and quality assurance. Also, Ghana should establish a robust and centralised traceability system. This approach would be more effective than the current piecemeal approach by individual companies.

Lastly, there is a **challenge with the regulation of environmental impacts** caused by cocoa production. Currently, the only legal restriction on land clearing for cocoa is the prohibition of land clearing within National Parks and Forests, and a restriction to grant farming rights over stool, family, and clan land not exceeding 50 years. However, due to insufficient resources of mandated state agencies and a lack of will, enforcement has been ineffective. To address this, it is recommended to strengthen the Community Resource Management Area (CREMAs) through a solid legal framework. This would encourage the adoption of climate-smart techniques and discourage irresponsible cocoa farm expansions. By granting authority to rural communities, CREMAs can serve as an effective tool to set and locally enforce rules on where people can farm, nurture trees, and regulate hunting, as well as assist authorities in monitoring and arresting illegal loggers and forest encroachers. Additionally, a reform of the criminal justice system to allow citizens to sponsor or conduct prosecution of Environmental Offences, and improved access to information on activities in forest reserves and agriculture, will enhance transparency and accountability.

3.2. Impact of EU & UK regulations

a. Incentivising Legal Reform on Forest Conversion

The EUDR has the potential to incentivise law reform on forest conversion. The EU cocoa market is an important source of demand for Ghana's cocoa, and the country's cocoa exports to the EU are a significant source of foreign exchange and income for the country. Consequently, causal factors that have been identified to incentivise forest conversion must be addressed to provide a conducive environment for sustainable cocoa production.

The producer country benchmarking feature²³ of the EUDR is expected to incentivise Ghana to address the identified challenges in its legal framework on forest conversion. The country benchmarking mechanism will inform EU competent authorities on the level of risk associated with the origin of certain commodities when conducting checks. The benchmarking mechanism provides a clear and structured way for the Commission to assess and assign risk ratings to producer countries as well as provide guidance to all parties in performing their duties under the EUDR dependent of the level of risk assigned. While it will guide operators when carrying out due diligence on products from a particular country, it will also guide competent authorities when planning and conducting checks on products entering their jurisdiction, with more checks required on products from high-risk areas.

The mechanism may provide an economic incentive to producer countries like Ghana to improve its forest governance to address the rampant deforestation in the Cocoa-Forest Landscape, in anticipation of a low-risk rating. As noted above, forest governance will improve if the gaps and constraints identified in the legal framework for cocoa production are addressed. A low-risk rating signals less cost and risk for operators to source their commodities from Ghana and this will give Ghana a competitive advantage on the cocoa market. Further, the benchmarking mechanism may provide a basis

²³ Article 29 of the EUDR.

for identifying and assessing Ghana's needs in this regard and this will enhance targeted assistance for effective improvement in forest governance through partnerships.

To achieve the great benefits the EUDR portends, the EU must work closely with Ghana to ensure that the EUDR drives governance reforms within the cocoa forest landscape. A close partnership will enhance the credibility, legitimacy, and impact of the EUDR. A multi-stakeholder process of national stakeholders will facilitate the reforms required to improve forest governance and produce locally suited solutions to the identified gaps and constraints in the legal framework.

b. Traceability Systems

Another implication of the EU regulation is the need for a robust traceability system for cocoa production. This system should provide information on the place and time of cultivation. To satisfy the deforestation-free criterion of the EUDR, the **ability to trace commodities and products through the supply chain to the point of origin** will be both necessary and critical to prove that production of the commodity has caused no deforestation. EU operators will be required to identify the geolocation coordinates of the plots of land where the commodities and products in their supply chains were produced, as well as the date or time range of production (Art. 9(1)(d)). This will allow EU operators to use available satellite imagery tools to check the land-use history of the relevant area for deforestation. The implication of this for Ghana is that there is a **need for a robust traceability system for cocoa production** that allows transmission of the necessary information about the place and time of cultivation through to export.

It is true that some certification standards already include traceability and independent auditing requirements, but these schemes are voluntary and focus mostly on traceability back to the first point of purchase (cooperative, LBC, etc.). Therefore, data on traceability to farm level is often unavailable or unreliable.²⁴ Proliferation of different company-led systems and standards has led to an increased burden of reporting for farmers and cooperatives.²⁵ In addition, access to and ownership of data remains an issue due to unidirectional flow of information and limited cooperation or information sharing between private sector traceability system.²⁶ The government of Ghana has started georeferencing cocoa farmers^{27,28} with a view to setting up national traceability systems.²⁹ However, for the time being, there is no national traceability system in place in Ghana.

The duty to implement credible and transparent traceability systems to demonstrate that cocoa beans sourced from Ghana are deforestation-free will be the responsibility of EU operators; however, Ghana will benefit from facilitating this process to ensure continued export to the EU and for Ghana's own benefit for monitoring legal compliance and payments. It will also improve the tenure security of smallholders if records of land use rights are included in the traceability system. Implementing a centralised traceability system in Ghana could prevent the proliferation of privately-owned systems and ensure a consistent and robust approach where Ghana has full ownership of the information flow. In any case, any traceability

²⁴ IDH, GISCO, C-lever.org, 2021: Technical Brief on Cocoa Traceability. P. Stoop, N. Ramanan, H. Geens, A. Lambrecht and S. Dekeister.

²⁵ *Ibidem*.

²⁶ *Ibidem*.

²⁷ As of April 2022 the Coffee-Cocoa Board in Côte d'Ivoire had georeferenced 993,031 cocoa farmers (estimated to represent approximately 76% of family cocoa farms, based on estimates that there are between 800,000 to 1.3 million farming households involved in cocoa production in Côte d'Ivoire: Itohan-Osa Abu, Zoltan Szantoi, Andreas Brink, Marine Robuchon, Michael Thiel (2021), 'Detecting cocoa plantations in Côte d'Ivoire and Ghana and their implications on protected areas', *Ecological Indicators* Vol. 129, p.1, available at: <https://doi.org/10.1016/j.ecolind.2021.107863>).

²⁸ Based on research commissioned by ClientEarth and undertaken by Aid environment in April-May 2022 using 2020 trade data.

²⁹ In November 2017, the governments of Ghana and Côte d'Ivoire and 35 leading cocoa and chocolate companies committed in November 2017 to achieve full traceability to the farm-level under the Cocoa & Forests Initiative (which has since been expanded to include initiatives in Cameroon and Colombia) – see World Cocoa Foundation, 'Cocoa & Forests Initiative', available at: <https://www.worldcocoaafoundation.org/initiative/cocoa-forests-initiative/>

system would need to provide all guarantees of good governance and make it possible to verify that the legal conditions have been complied with. As operators will incur liability on this basis under the EUDR, the traceability system will need to be credible and reliable. In our view, to ensure the effectiveness and reliability of traceability efforts, there is a need to bring full transparency to the cocoa supply chain, notably through the publication of the quantities produced and sold at each point in the supply chain, with transport documents indicating their origin and destination. Transparency will also be instrumental in terms of management and data sharing, as this could help operators to comply with the requirements of the EUDR, support competent authorities in better controlling commodities, and allow interested parties to analyse data and possibly submit a substantiated concern³⁰ to competent authorities.

Further, the institutional arrangement in Ghana that requires all cocoa beans produced in the country to be first sold to Cocobod before export, gives Cocobod, the main state regulator, an indirect duty to lead the establishment of a centralised and robust traceability system. This will ensure the production of credible and useful information for operators to perform the required due diligence. Cocobod may have to devise a mechanism to then shift the cost of operating this traceability system to private operators that use the information for their sourcing.

c. Accessible Laws

Another opportunity for Ghana is to use the legal requirement in the EUDR to make its laws and regulations within the scope of the EUDR and the UK Environment Act accessible and coherent. This will facilitate the due diligence of operators and give Ghana a competitive advantage in the trade of its cocoa beans. Regarding the legality requirement, the regulation provides the following definition for “relevant legislation of the country of production”: the laws applicable in the country of production concerning the legal status of the area of production in terms of (a) land use rights; (b) environmental protection; (c) forest-related rules, including forest management and biodiversity conservation, where directly related to wood harvesting; (d) third parties’ rights; (e) labour rights; (f) human rights protected under international law; (g) the principle of free, prior and informed consent (FPIC), including as set out in the UN Declaration on the Rights of Indigenous Peoples; (h) tax, anti-corruption, trade and customs regulations(Art 2(40)). Fortunately, the EUDR recognises previous efforts to improve legality like the FLEGT-VPA process and considers a FLEGT License as satisfying the legality condition of the regulation for timber.

Beyond timber, we believe there will be a mutual benefit for stakeholders in Ghana and the EU have clarity in the form of non-exhaustive lists of national and sub-national laws under each of the categories of rules provided for in the regulation. As mentioned above, this will make the relevant laws and regulations accessible and coherent to facilitate due diligence requirements of operators and this will be an opportunity for Ghana to examine areas of complexity, ambiguity, and contradiction and, where necessary, undertake some legal and institutional reforms.

d. Compliance with Local Laws

It is expected that the EUDR will enhance compliance with laws of producer countries like Ghana. In addition to local avenues to ensure compliance concerning cocoa production in Ghana, interested parties will have the option, under the EUDR, to ensure compliance by reporting operators that flout the requirements of the EU Regulation through the designated agencies in the EU member states (competent authorities). The EUDR in Article 31 provides a mechanism for third parties such as civil society organisations, natural or legal persons to submit “substantiated concerns” to competent authorities, which

³⁰ Article 31 of the EUDR provides for a mechanism whereby natural or legal persons are entitled to submit substantiated concerns to competent authorities in Members states when they consider that one or more operators or traders are failing to comply with the provisions of the Regulation.

are defined as a “a duly reasoned claim based on objective and verifiable information regarding non-compliance with this Regulation and which could require the intervention of competent authorities”.³¹ On receipt of these concerns, competent authorities are obliged to assess the claims and carry out the necessary checks and hearings of operators and traders with a view to detect breaches and to prevent the further placing on and export from the EU market of non-compliant products. In addition, the EUDR obliges EU member states to put in place judicial or administrative review procedures for instances in which competent authorities fail to properly investigate and follow-up on substantiated concerns. This access to justice provision is likely to further strengthen public enforcement of the rules. Operators and traders also have a duty when they become aware of a substantiated concern to immediately inform the relevant competent authority of the EU member state where the product has been placed on the market or exported.

The substantiated concern mechanism allows local stakeholders on the ground to be watchdogs on errant producers supplying the EU market. It also gives stakeholders an alternative when local mechanisms are not effective. This will improve transparency and accountability in the supply chain. The financial implications for malfeasance of operators and traders on the EU market will incentivise their insistence on compliance by Cocobod in sourcing the traded cocoa beans.³² With Cocobod as the sole trader and main regulator of cocoa production in Ghana, it is expected that Cocobod will be incentivised to ensure that all actors in the supply chain comply with the relevant laws of Ghana.

The producer country benchmarking feature³³ of the EUDR is also expected to incentivise enforcement of Ghana’s forestry laws. It is important to note that the benchmarking mechanism contemplates the benchmarking assessment being solely based on risks of listed commodities being produced in a way that does not comply with the ‘deforestation-free’ requirement. It does not include risks that listed commodities are produced in a way that does not comply with the legality requirement. However, while the criteria for benchmarking will primarily include statistical information like the rate of deforestation and degradation, governance information such as the implementation of international agreements and the implementation and enforcement of a national legal framework to avoid and sanction activities leading to deforestation and forest degradation may also be considered. Although benchmarking is likely to rely mainly on statistical data, Ghana still has a compelling reason to enforce its forestry laws. Doing so will have a positive impact on deforestation rates, making it a worthwhile endeavour and potentially reducing its perceived level of risk in the eyes of EU buyers and leading to a lower risk-assessment by the European Commission.

4. Chapter 4 – Human rights concerns – child labour

4.1. Recap on gaps and recommendations

Despite Ghana's commitments to eliminate child labour, recent statistics reveal that child labour remains prevalent in the country's agricultural sector, particularly in the cocoa industry. The 2018 Global Slavery Index reported that there were 668,000 children engaged in child labour, including hazardous tasks, within the cocoa sector, with the majority (98.02%) being compelled to work by their own family members. It appears one contributing factor to these high numbers is the broad and general statutory definitions used to assess child labour in the cocoa sector, which fail to consider the specific circumstances and variations within the industry. It has been noted that “a broad spectrum of experiences exists, from the culturally enriching exposure of children to long standing family traditions to the harmful forced labour of young children who do not otherwise attend school”.³⁴

³¹ Article 2(31) of the EUDR.

³² That is, if Member States apply sufficiently dissuasive penalties which they are obliged to under Article 25 of the EUDR.

³³ Article 29 of the EUDR.

³⁴ Barima Akwasi Amankwaah, *op.cit.*

Another issue is the absence of legal categorisation for hazardous work. Although Ghana has a Hazardous Activity Framework (HAF) that outlines permissible and non-permissible work for children in various sectors, including cocoa, the HAF is not legally binding and serves only as a guideline document. Incorporating the HAF into legislation by amending the Children's Act, 1998 (Act 560) could lead to classification and action on prohibited activities that undermine the development and wellbeing of children. Furthermore, Ghana needs to ratify and incorporate its treaty obligations into domestic legislation to ensure consistency and prevent a shift from regulated to unregulated sectors. For example, the UN Convention on the Rights of the Child Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography should be ratified.

To effectively combat child labour, it is essential to strengthen monitoring and enforcement of existing laws. This can be achieved by providing training and resources to institutions like the Labour Department and educating the Ghana Police to recognise child labour activities, particularly within family settings. Raising public awareness and educating communities, especially in farming areas where child labour is common, is crucial. Challenging the traditional acceptance of such practices requires sensitisation efforts to emphasise the importance of ending child labour.

An integrated approach is necessary, which considers the perspectives of children and their families. Their input should be valued, and they should be informed about the underlying issues. Failing to involve them may result in a mere shift from one harmful activity to another. Additionally, addressing the pricing of cocoa beans will help ensure fair earnings for farmers, reducing their reliance on child labour (see next section for a more detailed discussion of pricing).

4.2. Impact of EU & UK Regulations

Neither the EUDR nor the UK regulation explicitly reference absence of child labour as a criterion to qualify cocoa beans for their markets. The UK Act defines its legality requirement as compliance with “local law (a) which relates to the ownership of the land on which the source organism was grown, raised or cultivated, (b) which relates to the use of that land, or (c) which otherwise relates to that land and is specified in regulations made by the Secretary of State”. Unless specified in the implementing acts in the future, it is not entirely clear and open to interpretation as to whether child labour laws fall within the scope of the UK Act (e.g. as a law that ‘relates to the use of land’ for cocoa production). However, the EU regulation’s scope³⁵ entails “relevant legislation of the country of production” which have been defined to include labour rights and human rights protected under international law.³⁶

Child labour is linked to human rights because it typically violates the rights of children, who are entitled to protection and education under international human rights law. The worst forms of child labour, such as slavery, trafficking, debt bondage and forced labour, are human rights abuses and are prohibited by the Convention on the Rights of the Child and the International Labour Organization’s Minimum Age Convention, to which Ghana is a party. Children who are forced to work at a young age are often denied the opportunity to attend school and receive an education, which is a fundamental human right. Additionally, child labour often involves long hours, dangerous working conditions, and physical, sexual, and psychological abuse, which are all violations of children’s rights to health, safety, and dignity.

Therefore, child labour issues fall within the scope of the EUDR legality requirement if reflected in national laws of producer countries. As for Ghana, it is a state party to the International Labour Organization (ILO)

³⁵ Article 3(b) of the EUDR.

³⁶ Article 2(40) of the EUDR.

Convention No. 138 concerning Minimum Age for Admission to Employment and ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, both of which set the minimum age for employment at 18 years³⁷ and prohibit the worst forms of child labour, respectively. These requirements have been expressed in domestic legislation i.e., the Labour Act, 2003 (Act 651) and the Children's Act, 1998 (Act 560). Further, as a state party to these conventions, Ghana has an obligation under international law to enforce these provisions within its jurisdiction and to take measures to eliminate child labour.

Accordingly, it is expected that Ghana's high statistics of child labour in cocoa production will create challenges for operators that have to ensure that the cocoa beans were produced without flouting Ghana's laws and international commitments on child labour.

In theory, the EUDR might help clear child labour from the production of cocoa but there is a fear the new EU regulation will effectively shut out poor smallholder farmers who tend to rely on their children for labour because they are unable to afford to hire adult labourers. The poverty of many of the smallholder farmers in the sector has been noted as a causal factor in encouraging child labour. Poverty perpetuates child labour in cocoa production by creating a cycle of exploitation where families living in poverty are forced to send their children to work to earn a livelihood. The demand for cheap cocoa beans has driven down prices, leading farmers to cut costs by using child labour instead of paying adult wages. Children are often paid less than adults and made to work longer hours. Long hours of work on cocoa farms limits access to education, meaning that children are pulled out of school to work. This further perpetuates the cycle of poverty, as these children are denied the opportunity to receive an education and are more likely to remain in poverty as adults. The EUDR presents Ghana the opportunity to incorporate the prescriptions of the Hazardous Activity Framework (HAF)³⁸ into legislation to outline permissible and non-permissible work for children in various sectors, including cocoa. This will make the HAF mandatory and will form part of the list of legislation operators will be required to consider in their due diligence efforts. In addition, incorporating the HAF into legislation will enhance clarity on permissible and non-permissible activities for children.

In addition, Ghana must implement effective policies and programs to address the root causes of child labour, such as poverty (to which low cocoa prices are a significant contributing factor - price concerns are analysed in the next chapter). For example, this could involve setting up educational programs and alternative income-generating activities for families, which would reduce their reliance on child labour in the cocoa industry. Additionally, the creation of child labour monitoring and reporting systems could ensure effective enforcement of laws and regulations against child labour. Furthermore, it would be essential to provide training and capacity-building support for farmers, cooperatives, and other actors in the cocoa sector to help them understand their obligations and responsibilities under local and international law and to promote ethical practices, including the elimination of the worst forms of child labour. Finally, there should be advocacy and awareness-raising efforts aimed at improving the public's understanding of child

³⁷ The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than **18 years** (article 3 (1) of Convention No. 138 of the ILO). Notwithstanding the provisions of paragraph 1 of this Article, national laws or regulations or the competent authority may, after consultation with the organisations of employers and workers concerned, where such exist, authorise employment or work as from the age of **16 years** on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity (article 3 (3) of Convention No. 138 of the ILO). In any case, the minimum age specified shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than **15 years**. It is also provided that a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of **14 years** (article 2 (3) and (4) of Convention No. 138 of the ILO).

³⁸ Available at https://www.cocoainitiative.org/sites/default/files/resources/hazardous_ghana_framework_2008.pdf

labour, including the reasons why it persists and what can be done to prevent it. To effectively implement these solutions, Ghana may request support from development partners such as the EU.

5. Chapter 5 – Price Concerns

5.1. Recap on Gaps and Recommendations

The wide disparity between the pricing of cocoa beans on the international market and the revenue that is earned by cocoa farmers is a major concern in the sector. Many of the cocoa farmers and workers live in abject poverty with less than 9% of cocoa farming households earning a living income. The labour-intensive nature of cocoa production perpetuates the cycle of poverty. At the heart of this is the pricing of cocoa beans.

It has been recently estimated that for farmers to earn a living wage, the farm-gate price as fixed for 2020-21 must double from a price of USD 1,837 to USD 3,116 per metric tonne.³⁹ The farm-gate price that farmers receive is set by multistakeholder platform known as the Producer Price Review Committee (PPRC).⁴⁰ There have been concerns on how the PPRC operates.⁴¹ The concerns range from the lack of transparency and accountability in its procedures in setting the farm-gate price to its legitimacy to represent and consider that concerns of farmers in this process.

There are several ways in which the price paid to farmers could be increased through government action and the below recommendations are drawn from a ClientEarth-commissioned report into this issue in 2021.⁴²

First, **producer-country interventions** on pricing of the beans. An example of this is the Living Income Differential (LID) introduced together by Ghana and Côte d'Ivoire, where producer-country governments set the price of their cocoa exports and raise it to meet some objectives. Although, the LID sets out to alleviate the poverty of cocoa farmers, activities and procedures on its collection and disbursement are not transparent and this constrains accountability. Presently, there is no accessible policy document on the LID, including how its collected, disbursed and audited.

Secondly, **partnership agreements** could be used to set up an effective export price regime. This could take the form of bilateral arrangements, which require other concerns such as environmental and human rights risks to be addressed, in return for higher prices. Bilateral agreements between the EU, or UK, and cocoa-producing countries are, therefore, one mechanism to improve the sustainability of cocoa production on the ground, in exchange for capacity-building support and, possibly, improved market access in the EU or UK.

Thirdly, consumer countries may also intervene by introducing **import taxes or consumer taxes** to raise revenue from trade in cocoa to be able to reward producer countries for exporting them. It is expected that this option will have practical problems in implementation such as how to ensure that farmers are the ultimate beneficiaries of this scheme due to the numerous actors in the chain.

³⁹ Necessary Farm Gate Prices for a Living Income: Existing Living Income Reference Prices Are Too Low. Consultation Paper for the 2020 Cocoa Barometer, Voice Network, Jan. 2020, p. 2, <https://www.voicenetwork.eu/wp-content/uploads/2020/01/200113-Necessary-Farm-Gate-Prices-for-a-Living-Income-Definitive.pdf>; Reuters Staff. "UPDATE 1-Ghana Raises 2020/21 Cocoa Farmgate Price by 28%." Reuters, 24 Sept. 2020, <https://www.reuters.com/article/cocoa-ghana/update-1-ghana-raises-2020-21-cocoa-farmgate-price-by-28-idUSL5N2GL5J1>

⁴⁰ <http://mofa.gov.gh/site/media-centre/press-briefing/372-review-of-the-producer-price-of-cocoa-for-the-2021-22-cocoa-season>

⁴¹ See Second Briefing of this series on Cocoa: <https://www.clientearth.org/latest/documents/cocoa-research-briefing-2-major-concerns-and-recommendations-ghana/>

⁴² Duncan Brack (2021) Securing higher prices for cocoa Price mechanisms in international trade. <https://www.clientearth.org/media/un1bzofi/cocoa-price-and-trade-paper-duncan-brack.pdf>

Finally, **international commodity agreements** - such as the OPEC for the petrol sector - for the trade in cocoa is another option that can be considered.

5.2. Impact of EU & UK Regulations

Neither the EUDR nor the UK Regulation are expressly targeted at improving the pricing of cocoa beans or improving the livelihood of farmers. However, the implementation of the two regulations may have some indirect impacts on the livelihood of farmers. While the indirect impacts of the UK Act cannot be described with certainty, pending subsidiary legislation that will elaborate on the Act with respect to the range of goods covered, the quantity thresholds for exemption, the specifics of due diligence obligations, measures for public reporting and enforcement, the mandatory requirements of the EUDR may have the consequences described below.

The EUDR could create opportunities for smallholder farmers to improve their earnings. First, some studies have suggested that the EUDR's traceability requirement could incentivise simplified supply chains by reducing complexities and decreasing the number of middlemen.⁴³ Should this occur, smallholder farmers may benefit from receiving a larger share of the profit, as middlemen are effectively cut out.

Second, the EUDR could contribute to improving the livelihood of smallholders by improving the reliability of receiving sustainability premiums and the set commodity price.⁴⁴ Currently, farmers face challenges with receiving payments consistently, not because they do not produce the cocoa in line with sustainability requirements, but because unscrupulous cooperatives and middlemen force farmers to accept non-premium prices, especially at times of the year when farmers need money (such as when the payment of school fees falls due). A supply chain that is supported by advancements of digital services will enhance a stable system for prompt and consistent payment. Thus, by creating access to a digitised system, the requirements for traceability could potentially bring positive changes, including the implementation of electronic, secure, and reliable payments to producers.⁴⁵ In effect, the EUDR could contribute to the security of income of farmers, the equitable sharing of profits, as well as contribute to the fight against fraud in payments systems.

Thirdly, the geolocation of farms using digitalised services would enhance grouping farmers into cooperatives and generate better information on land tenure. This could potentially improve the national mapping, planning, and the monitoring of farms.⁴⁶

Although the intended cause of the EU regulation is to reduce EU-driven deforestation in producer countries, the policy may also result in unintended consequences on smallholders if their EU buyers decide to exclude them from their supply chains and if safeguards and measures are not put in place. Most of Ghana's cocoa beans are produced by smallholder farmer families (approximately 800,000) who have little or no access to credit and who receive very low return for their production. The adoption of the EUDR brings about new obligations for EU operators and traders in the global cocoa supply chain, the requirements of which are likely to trickle down to smallholders, resulting in potential increases in compliance and record-keeping costs. Smallholders may view these costs as a burden, given the difficulties they encounter in obtaining financing, developing their skills, or obtaining legal proof of

⁴³ Blot, E. and Hiller, N. (2022). 'Securing the position of smallholders in zero-deforestation supply chains', Policy Briefing, Institute for European Environmental Policy.

⁴⁴ Aid Environment (2022) EU Deforestation Regulation: Will the traceability requirement hold smallholder producers back?, <https://aidenvironment.org/eu-traceability-blog/>

⁴⁵ European Cocoa Association (2022), Position Paper on the proposed EU Regulation on Deforestation and Forest degradation.

⁴⁶ Ivorian farmers' organisations (2022), Letter to the European Council and the European Parliament - Support for the geolocation requirement in the draft EU regulation on deforestation free supply chains.

compliance. These additional expenses create hurdles for smallholders trying to enter the European market, such as administrative fees for acquiring legal documentation, including land tenure, ownership, and record-keeping. Moreover, maintaining or improving farm yields without resorting to deforestation may require smallholders to acquire new skills, undergo training, and update their production methods and inputs, all of which can be financially taxing. European operators could also bear these costs, upskilling their smallholder supply chains to ensure that smallholders are not excluded. Currently, they are under no legally binding obligation to do so under either European or Ghanaian law.

In effect, the livelihoods of such smallholder farmers are highly vulnerable and are often dependent on their integration into global supply chains.⁴⁷ **Consequently, the global approaches for food system transformation that aim at environmental and climate change outcomes must put livelihoods at the centre of such approaches or else there is a risk of reaching these objectives “on the back of the rural poor.”⁴⁸**

The EUDR, attempts to provide some measures or safeguards to avoid unintended negative impacts on smallholders because of the new requirements imposed on EU buyers and cocoa products entering the EU. Article 11(1) of the EUDR suggests to operators the option of mitigating the risk by “supporting the compliance with [the] Regulation of their suppliers, in particular smallholders, through capacity building and investments”. It is important to note that the choice of mitigation measures is left to the discretion of operators, and they may well decide not to invest in smallholders, and this would not be considered flouting the law. Also, the disadvantages for smallholders are mentioned in both the impact assessment report⁴⁹ and in the introductory text of the regulation⁵⁰, with the cut-off date and a comprehensive review in Article 34(6) after 5 years of implementation as measures to address these challenges. However, the provision for a comprehensive review of the implementation of the EUDR (to assess the impact on smallholders, Indigenous Peoples, and local communities, and consider additional support for their transition to sustainable supply chains consistent with the Regulation’s requirements) is not satisfactory because it will be done after five (5) years of entry into force without clarity at the time of writing of any supporting measures to assist smallholders, both financially and structurally to deal with the possible hardship in the meantime. This gap increases the risk of negative consequences on the livelihood of smallholders and may derail significant achievements in relation to Sustainable Development Goals such the SDG 1 (no poverty), SDG 2 (Zero hunger) and SDG 10 (reduced inequalities).

To further forestall the unintended impacts to farmer’s livelihoods, the EU, using the provision in Article 30 of the EUDR, could establish partnerships and cooperation mechanisms that will enable smallholder farmers to meet the anticipated requirements of EU buyers who are subject to the regulation. As provided in Article 30, the Commission, on behalf of the Union, and interested Member States, should engage in a coordinated approach with producer countries concerned by the regulation to jointly address the root causes of deforestation and forest degradation. This includes supporting smallholder farmers to produce cocoa in effective compliance with the requirements of the EUDR, improving and securing land and tree tenure and access to credit. This can be achieved using existing and future partnerships and other relevant cooperation mechanisms, such as structured dialogues, administrative arrangements, and joint roadmaps. These mechanisms should enable the transition to an agricultural production that facilitates compliance with the requirements of the regulation while paying

⁴⁷ Grabs, J (2021), Designing effective and equitable zero-deforestation supply chain policies, Glob. Environ. Chang.

⁴⁸ Davis (2022), Do not transform food systems on the backs of the rural poor, Food Secur.

⁴⁹ Staff Working Document – Impact Assessment “Minimising the risk of deforestation and forest degradation associated with products placed on the EU market” available on https://environment.ec.europa.eu/publications/proposal-regulation-deforestation-free-products_en

⁵⁰ Recitals 29 and 50 of the Introductory text of the EUDR.

particular attention to the needs of Indigenous Peoples, local communities, and smallholder farmers. This should also provide support for systematic assessments of the impact of the Regulation on farmers.

Any design and implementation of a solution should involve the full participation of all stakeholders, including smallholder farmers, to ensure their needs are considered in the development and implementation of such processes. Civil society should be involved in these assessments as they are well placed to inform government and the EU on impacts on farmers, particularly given the limited availability of social and environmental data in Ghana.⁵¹ Overall, the solution should focus on ensuring that smallholder farmers are not negatively impacted as a result of the EU regulation on forest risk commodities through partnerships and cooperation mechanisms that enable the transition to sustainable agricultural production while ensuring the participation of all interested actors and addressing the causes of deforestation and forest degradation.

6. Chapter 6 – Conclusions and Reflections

The EUDR and UK Environment Act may incentivise **law reform and governance improvements** in forest conversion in the cocoa sector, in Ghana. Using this opportunity to develop a legality definition for cocoa production in the form of non-exhaustive lists of national laws categorized under the regulations will not only facilitate due diligence requirements for operators but will enable Ghana to address any complexity, ambiguity, and contradiction in its legal framework.

The **producer country benchmarking** feature of the EUDR may encourage Ghana to address the local causes of deforestation by providing economic incentives for improving forest governance to achieve a low-risk rating. However, to realise these benefits, the EU must collaborate closely with Ghana to improve cocoa sector governance to enhance credibility, legitimacy, and impact of the benchmarking process.

The EUDR also necessitates a **robust traceability system** for cocoa production from cultivation to export. While some certification standards have traceability and auditing requirements, data on traceability to farm level is often unavailable, and there are multiple company-led systems and standards leading to increased reporting burdens. Establishing a centralised traceability system in Ghana would prevent the proliferation of privately-owned systems, ensuring a consistent and robust approach where Ghana owns the information and regulates its flow. Transparency is crucial for data sharing and management, allowing stakeholders to comply with EUDR requirements, control commodities, and analyse data.

Another opportunity for Ghana is to use the legal requirement contained in the EUDR and the UK Environment Act to **make its laws and regulations within the scope of these regulations accessible and coherent**. This will facilitate the due diligence of operators and give Ghana a competitive advantage in the trade of its cocoa beans. Stakeholders in both Côte d'Ivoire and the EU would also benefit from a reference framework for verifying legality criteria. This reference framework could take the form of **non-exhaustive lists of national and sub-national laws for each of the categories of rules set out in the regulations**. This will make the relevant laws and regulations accessible and coherent to facilitate due diligence requirements of operators and enforcement by EU competent authorities. It is crucial that civil society, Indigenous Peoples, local communities, and smallholders, as well as experts, practitioners, and businesses in Ghana, participate in the development of this list of laws, as they are best placed to understand the complexities of their legal frameworks. Moreover, this would be an **opportunity for Ghana to examine areas of complexity, ambiguity, and contradiction in its own legal frameworks and,**

⁵¹ Blot, E. and Hiller, N., *op.cit.*

where appropriate, undertake certain legal and institutional reforms to clarify and strengthen the relevant rules.

Moreover, the EUDR provides an opportunity for Ghana to seek to **better regulate the presence of child labour in the cocoa supply chain, including by incorporating the Hazardous Activity Framework into legislation**. This framework is currently only voluntary but performs the important task of outlining permissible and non-permissible work for children in various sectors, including cocoa. Ghana should also implement effective policies and programs to address the root causes of child labour, such as poverty, through education, alternative income-generating activities, monitoring systems, training, capacity-building, and awareness-raising efforts. Development partners, including the EU and the UK, can provide support in implementing these solutions.

Although neither the EUDR nor the UK Regulation are expressly targeted at improving the pricing of cocoa beans or improving the livelihood of farmers, the implementation of both regulations may indirectly impact the livelihoods of smallholder farmers. The indirect impacts of the UK Act cannot be described with certainty as subsidiary legislation that elaborate on the Act have yet to be passed. The **EUDR, however, creates opportunities for farmers to improve their earnings and contribute to the fight against fraud. However, safeguards and measures must be put in place to prevent unintended consequences**. Establishing partnerships and cooperation mechanisms to ensure smallholder farmers are not excluded from the EU market as a result of the EUDR requirements is crucial. The EU should collaborate with civil society to conduct systematic assessments of the impacts of the regulation on farmers and inform the government and the EU of any adverse effects.

In conclusion, the EUDR presents an opportunity to incentivise law reform in forest conversion in Ghana's cocoa sector. However, the effective implementation of the EUDR requires close partnership and cooperation between the EU and Ghana. To ensure the transition to sustainable agricultural production and to address the root causes of deforestation and forest degradation in the cocoa supply chain, smallholder farmers must be supported to improve their practices through partnerships and cooperation mechanisms that include all stakeholders.

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