

# European Parliament's recommendations on deforestation and sustainable corporate governance: complementary yet with necessary differences

In the past six months, the European Parliament has adopted two landmark resolutions to reduce the EU domestic and global environmental footprint and better protect human rights.

In plenary session on 22 October 2020, the European Parliament adopted the legislative initiative report<sup>1</sup> with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (the “**Deforestation Report**”), with 377 votes in favour, 75 against and 243 abstentions.<sup>2</sup>

In plenary session on 10 March 2021, the European Parliament adopted the legislative initiative report with recommendations to the Commission on corporate due diligence and corporate accountability (the “**Corporate Governance Report**”), with 504 votes in favour, 79 against and 110 abstentions.<sup>3</sup>

This briefing explores the complementarity of and differences between those two reports and what role they should play in the development of upcoming legislative proposal on the respective matters.

---

<sup>1</sup> Also often referred to as a 'legislative own-initiative' report.

<sup>2</sup> EP Procedure 2020/2006(INL), [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.html)

<sup>3</sup> EP Procedure 2020/2129(INL), [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html)

## What is a legislative initiative report of the European Parliament?

A legislative initiative report, referred to as an 'INL' report, is a formal request by the European Parliament to the European Commission to propose a particular legislative act or amendment. According to Article 225 of the Treaty on the Functioning of the European Union, "the European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons." The exercise of the Parliament's legislative initiative right thus requires 'a majority of its component members', ie. an absolute majority, which requires support from at least 353 of the total 705 members of Parliament. In practice, this is a high political bar to achieve (only 72 INL reports were passed by the Parliament between the introduction of Article 225 in 1993 and July 2020<sup>4</sup>) and adoption of an INL report sends a strong political signal to the European Commission.

Importantly, Article 225 does not give the European Parliament a direct right to initiate legislation, as the decision to submit a legislative proposal still sits with the European Commission. However, it should be noted that in her Political Guidelines, the President of the European Commission, Ursula von der Leyen, expressed that she supports a right of initiative for the European Parliament. She also committed that when Parliament, acting by a majority of its members, adopts resolutions requesting that the Commission submit legislative proposals, the Commission will respond with a legislative act, in full respect of the proportionality, subsidiarity and better law making principles.<sup>5</sup>

Regarding the Deforestation Report and the Corporate Governance Report, there is no doubt that the Commission will submit legislative proposals on the subject matters addressed in those reports. Indeed, in the annexes accompanying its work programme for 2021, the European Commission announced that: (i) a legislative proposal aimed at minimising the risk of deforestation and forest degradation associated with products placed on the EU market is foreseen for the second quarter of 2021; and (ii) a legislative proposal on sustainable corporate governance is planned for the second quarter of 2021.<sup>6</sup> (We understand these proposals are now likely to be published early in the third quarter.)

The question that remains is to what extent the European Parliament's recommendations in the Deforestation Report and the Corporate Governance Report will be taken into account by the Commission in its proposals on those matters. With regards to the commitment made by the President of the Commission in her political guidelines, and considering the crucial role of the Parliament as co-legislator in the EU's ordinary legislative procedure, one would expect that the Commission's legislative proposals will be in line with the European Parliament's recommendations.

## Brief Description of the European Parliament's Deforestation Report

The Deforestation Report proposes that companies will be authorised to put forest and ecosystem-risk commodities ("FERCs") and products derived from them on the EU internal market on the condition that there is no greater than a negligible risk that those goods:

- originate from land obtained via the conversion of natural forests or other natural ecosystems;

<sup>4</sup> See [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655134/IPOL\\_STU\(2020\)655134\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655134/IPOL_STU(2020)655134_EN.pdf) (page 42).

<sup>5</sup> [https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf) (page 20).

<sup>6</sup> [https://eur-lex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb-9a54-01aa75ed71a1.0001.02/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb-9a54-01aa75ed71a1.0001.02/DOC_2&format=PDF).

- originate from natural forests and natural ecosystems undergoing degradation; or
- are produced in, or are linked to, violation of human rights.

This means that companies would have to investigate the sustainability of their products before they can put them on the EU market against these three minimum criteria.

The report recommends that the Commission's proposal should cover all commodities that are most frequently associated with deforestation, degradation of natural forests and conversion and degradation of natural ecosystems due to human activity. This list of FERCs should at least comprise palm oil, soy, meat, leather, cocoa, coffee, rubber, and maize and all intermediate or final products that are derived from these commodities, and products that contain these commodities.

In order to determine whether FERCs or related products comply with the sustainability and human rights criteria of the proposal, companies should conduct due diligence against those criteria and according to the steps described in the Deforestation Report. Those due diligence steps mean that a company placing FERCs or related products on the EU market will have to identify, assess and mitigate any risks that their goods do not meet the sustainability criteria described above and ensure that there is no greater than a negligible risk that their goods do not meet those criteria before placing them on the market.

The Deforestation Report also recommends that the Commission establish a public enforcement regime as well as a private accountability regime.

## **Brief description of the European Parliament's Corporate Governance Report**

The Corporate Governance Report proposes that companies within its scope shall take all proportionate and commensurate measures and make efforts within their means to prevent adverse impacts on human rights, the environment and good governance<sup>7</sup> from occurring in their value chains, and to properly address such adverse impacts when they occur.

The report recommends that the legislative proposal apply to large undertakings irrespective of their sector and to all publicly-listed small and medium-sized undertakings, as well as high-risk small and medium-sized undertakings. Undertakings established outside the EU selling goods or providing services in the internal market also fall within the scope of the proposal.

Companies within the scope of the proposal should identify and assess the potential or actual adverse impacts within their value chain and should establish and effectively implement a due diligence strategy that will describe all proportionate and commensurate policies and measures taken by the company with a view to ceasing, preventing or mitigating potential or actual adverse impacts on human rights, the environment or good governance.

Furthermore, the report recommends that the Commission table legislation that will ensure that companies can be held accountable and liable in accordance with national law for the adverse impacts on human rights, the environment and good governance that they cause or to which they contribute in their value chain, and aims to ensure that victims have access to legal remedies.

---

<sup>7</sup> i.e. matters related to corruption and bribery.

## What are the similarities between the two reports?

Both reports use due diligence as a tool to ensure that companies address the sustainability requirements of the respective legislative proposals. They also both highlight: (i) the need for stakeholder engagement in the conduct of due diligence; and (ii) the need for more transparency and reporting from companies.

They both recommend the need to have an administrative enforcement body and an adequate penalty regime in case of failure to comply with the legislation as well as a civil liability regime in order to provide better access to justice and remedies for victims.

However, it is important to note that the two reports contain significant differences regarding the way in which they aspire to achieve their ultimate objectives.

## What are the key differences between the two reports?

While both reports recommend the adoption of a due diligence tool, this tool will serve a different purpose under each proposal. With respect to the Deforestation Report, as noted above, due diligence will be used in order for companies to ensure that the FERCs and related products that they put on the EU market do not: (i) originate from land obtained via the conversion of natural forests or other natural ecosystems; (ii) originate from natural forests or natural ecosystems undergoing degradation; or (iii) have links to human rights violations such as the violation of land tenure rights of Indigenous Peoples or local communities. This is a product-specific approach to due diligence which does not apply to all operations of the company, but rather applies to a limited scope of goods (FERCs and related products) and their supply chains.

With respect to the Corporate Governance Report, due diligence is not directly designed to restrict the placing on the market of specific commodities linked to specific environmental damage or human rights violations. It is first and foremost a tool to prevent adverse environmental and human rights impacts within the whole value chain of a company and to mitigate actual adverse impacts when they are identified.

This approach to corporate due diligence would apply to all sectors, as opposed to a product-based due diligence that applies to a limited category of commodities. The FERC due diligence approach contained in the Deforestation Report offers precise criteria that companies trading in that limited category of commodities should respect in order to be able to place their products on the market. It gives specific rules to apply to a targeted category of products.

In addition, the scope and criteria of each due diligence tool are also different. On one hand, the Corporate Governance Report proposes a horizontal due diligence tool for environmental, human rights and good governance risks linked to a company's operations. On the other hand, the Deforestation Report proposes a product-based due diligence tool for risks of deforestation, conversion and degradation of forests and other natural ecosystems, and human rights violations linked to specific products.

The purpose served by each due diligence tool is equally different. On one hand, the horizontal due diligence tool in the Corporate Governance Report requires companies to which it applies to take proportionate and commensurate measures to address and avoid the risks identified. On the other hand, the product-based due diligence in the Deforestation Report requires companies to avoid placing products to which it applies on the internal market where the risks identified are greater than negligible.

## How are the reports complementary?

Both reports seek to make EU supply chains more sustainable. The Corporate Governance Report offers a horizontal approach that targets all sectors. Because this approach is horizontal it does not provide particular requirements depending on the sector in which a company operates. However, not all sectors face the same risks or potential sustainability impacts.

The EU has already demonstrated that some sectors need specific rules and requirements to ensure that the particular risks and impacts for business operations, products or services in a particular sector are adequately addressed (e.g. the EU Minerals Regulation<sup>8</sup> and EU Timber Regulation<sup>9</sup> only apply to specific commodities).<sup>10</sup> The Deforestation Report demonstrates that specific risks and impacts linked to particular commodities need to be addressed in order to reduce the EU's deforestation footprint.

There is a clear and obvious benefit in having both a horizontal sustainability due diligence framework (such as that contained in the Corporate Governance Report) that establishes common requirements for businesses to assess and reduce the risks of sustainability impacts in their operations and value chain, as well as specific requirements for certain sectors and commodities that are known to have heightened and particular sustainability risks (such as the sectors addressed in the Deforestation Report).

For the relatively few business that would be subject to both horizontal and product-based due diligence requirements, those businesses would benefit from the specific criteria provided under the product-based due diligence framework for their particularly risky supply chains while also benefiting from the general requirement under the horizontal due diligence framework for developing appropriate and forward-looking measures at the company level to reduce and avoid adverse sustainability impacts occurring in the future.

With the two proposals soon to be tabled, the EU has a unique chance to offer new general rules on sustainable corporate governance as well as specifying detailed requirements for businesses dealing with specific commodities that carry a particular risk of contributing to deforestation, ecosystem conversion or related human rights violations.

## Could deforestation be covered as one of the adverse environmental impacts in the Commission's proposal on horizontal corporate due diligence?

In June 2021, the European Commission intends to table a legislative proposal aimed at minimising the risk of deforestation and forest degradation associated with products placed on the EU market. It is expected that this proposal will cover selected bulk commodities and selected derived products.<sup>11</sup>

---

<sup>8</sup> Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

<sup>9</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

<sup>10</sup> To be noted that similarly the OECD has developed sectoral guidance which helps enterprises identify and address risks to people, the environment and society associated with business operations, products or services in particular sectors <https://mneguidelines.oecd.org/duediligence/>.

<sup>11</sup> <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=48456> (page 10).

Bearing this in mind, the question has been asked as to whether deforestation should also be covered as one of the adverse environmental impacts in the parallel proposal regarding horizontal corporate due diligence<sup>12</sup> on which the Commission is working. We believe that it is indeed appropriate and necessary that deforestation is included in that proposal as this would ensure that companies that are not subject to the product-based due diligence but whose value chain may nevertheless be linked to deforestation would have to identify, assess and mitigate this risk. The benefit of this would be that companies trading in other products or active in other sectors with a deforestation risk (e.g. mining), that would not be covered by the product-based due diligence proposal, would nevertheless have to take action at the company level to investigate and avoid risks of deforestation, as well as other adverse environmental impacts, in their value chains.

## Conclusion

The current parallel discussions about the possibility of two due diligence proposals addressing similar negative impacts linked to EU supply chains has led to some confusion. However, there should be no confusion about the different purpose, scope or nature of the recommendations made by the European Parliament in the Deforestation Report and the Corporate Governance Report. The European Commission should build on the complementarity of these two reports and the two separate approaches to due diligence that they outline and ensure that the respective legislative proposals currently under development incorporate the recommendations made by the European Parliament on each matter.

In addition, ClientEarth and a coalition of NGOs have developed comprehensive recommendations to the European Commission for forthcoming legislative proposal aimed at minimising the risk of deforestation and forest degradation associated with products placed on the EU market.<sup>13</sup> Our recommendations in respect of the forthcoming Sustainable Corporate Governance legislative proposal will be made available soon.

Clotilde Henriot

Trade and Environment Lead

[chenriot@clientearth.org](mailto:chenriot@clientearth.org)

[www.clientearth.org](http://www.clientearth.org)

Michael Rice

Lawyer, Forest-risk Commodities

[mrice@clientearth.org](mailto:mrice@clientearth.org)

**Beijing Berlin Brussels London Los Angeles Luxembourg Madrid Warsaw**

ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.

<sup>12</sup> as the European Parliament recommended in the Corporate Governance Report.

<sup>13</sup> <https://www.clientearth.org/latest/documents/ngo-recommendations-on-the-future-eu-regulation-to-address-the-forest-ecosystem-and-human-rights-impacts-associated-with-products-placed-on-the-eu-market/>.