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The new EU Deforestation-free Products Regulation

Key obligations for EU Member States

ClientEarth

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1 Key takeaways

a) The new EU Deforestation-free Products Regulation has been formally adopted by the European Parliament and Council and it will soon enter into force.

b) When it enters into force, it will impose obligations on EU Member States regarding its implementation and enforcement in their jurisdiction that are significantly greater than comparable requirements under the existing EU Timber Regulation.

c) All Member States will need to undertake some form of regulatory reform to update their existing national enforcement architecture, including either reforming their existing enforcement authorities to give them additional resources, powers and independence or establishing new agencies that meet the requirements of the Regulation. This must be done **within six months** of the Regulation's commencement.

d) Member States will likely also need to update their enforcement architecture in terms of national rules on penalties and the capacity of their national enforcement and customs authorities to enforce the new rules and cooperate with enforcement and customs authorities in other Member States and with the European Commission. This should be done **within 18 months** of the Regulation's entry into force (when the provisions relating to commercial operators will become applicable).

e) In undertaking these regulatory reforms, Member States should also anticipate their additional obligations under the Regulation in terms of implementation and enforcement, which will become most relevant once the provisions relating to commercial operators become applicable, including information exchange, monitoring and reporting requirements.

2 Background

On 19 April and 16 May 2023 the European Parliament and the Council of the European Union respectively adopted the final text of a new Regulation on deforestation-free products (the **"Regulation"**). The final official version will soon be published in the Official Journal of the European Union. It will enter into force 20 days later.

This new Regulation represents a leap forward in the EU's efforts to ensure that products consumed in the EU, regardless of where they were produced, do not contribute to deforestation or forest degradation globally. The new rules are a significant evolution of the existing EU rules on trade in illegal timber – the EU Timber Regulation (**"EUTR"**), and will require an equivalently significant evolution in the work of enforcement authorities in EU Member States to ensure they are followed and enforced.

These obligations on Member States will apply from the day the Regulation enters into force and may require some Member States to act quickly to put the required enforcement framework in place. The most pressing obligation is to designate one or more agencies responsible for enforcing the Regulation, known as "competent authorities". In doing so, Member States will need to ensure their national regulatory framework provides their competent authorities with adequate powers, resources and functional independence. Member States will also need to establish national rules on penalties for cases

of non-compliance and ensure their regulatory framework facilitates the inter-agency cooperation required under the Regulation.

The Regulation also includes a number of critical structural improvements to facilitate its uniform application and enforcement across the EU which will require Member States to facilitate coordination of enforcement within their territory and across the EU.

This briefing unpacks these new requirements with the aims of clarifying the actions required of EU Member States in the first 18 months of the Regulation's commencement and supporting Member States to properly prepare for its implementation and enforcement.

3 EU Member States must designate one or more competent authorities within six months

Article 14 creates a legal obligation on EU Member States to "designate one or more competent authorities responsible for fulfilling the obligations arising from [the] Regulation". Member States must notify the Commission of their designated competent authorities within six months of the Regulation entering into force.

Like the EU Timber Regulation, Member States must also inform the Commission of any changes to their designated competent authorities and the Commission will publish a list of competent authorities on its website (Articles 14(2) and (3)).

However, unlike the EUTR, Article 14(4) of the new Regulation specifies additional criteria which Member States must ensure their competent authorities satisfy: competent authorities must have "adequate powers, functional independence and the resources to fulfil the obligations set out in [Chapter 3]" of the Regulation (which details the obligations of competent authorities).

The obligations on Member States to ensure that their competent authorities are provided with adequate powers, functional independence and resources are inter-related (e.g. conditions on resources or powers can compromise functional independence) and all are indispensable to ensuring that competent authorities can and do fulfil their requirements under the Regulation. Each requirement is unpacked below.

Importantly for Member States, before they can designate a competent authority under Article 14, they must ensure that the relevant agency has the powers, resources and independence required to implement and enforce the Regulation. This is likely to require some kind of regulatory reform in most Member States (e.g. amending existing primary or secondary legislation to provide one or more existing enforcement agencies with adequate powers, resources and independence to fulfil the role of a 'competent authority' or adopting new primary or secondary legislation to establish a new agency to fulfil that role), which could prove challenging within the six-month deadline. Member States should therefore start preparing to meet this obligation at the earliest opportunity.

3.1 Competent authorities must have "adequate powers"

Member States must ensure that their competent authorities have "adequate powers" to fulfil their obligations under the Regulation.

While the phrase "adequate powers" has not been formally considered in EU jurisprudence, some guidance can be taken from jurisprudence on the requirements of EU Member States to adequately implement EU regulations and directives into national legal frameworks.[1] In that context, a requirement that implementing agencies have 'adequate powers' should be interpreted as imposing an *ongoing* obligation on Member States to ensure that their competent authorities are empowered to *fully and actively* implement the Regulation.

This would imply sufficient powers of investigation and enforcement to achieve the credible application and enforcement of the Regulation on paper and in practice, as well as adequate powers of self-governance that ensure 'functional independence' in the performance of those regulatory functions.

In that regard, the obligation on Member States to vest their competent authorities with "adequate powers" should include powers:

a) to perform the functions *expressly* described in Chapter 3 of the Regulation, namely to:
    i.) carry out compliance checks on operators and traders, especially without prior warning (Articles 16 – 19);
    ii.) to take "immediate interim measures", including seizure of relevant products or the suspension of their placement or trade on or export from the Union market, where possible infringements have been detected (Article 23);
    iii.) cooperate with competent authorities and customs authorities of other Member States and the Commission (Articles 21 and 27);
    iv.) require operators and traders to undertake corrective action in cases of non-compliance (Article 24);
    v.) carry out controls at the customs border and coordinate with customs authorities (Article 26); and
    vi.) take action in response to substantiated concerns (Article 31);
b) to undertake the actions *implicitly required* to perform those functions, for example adequate powers of entry, inspection, search and seizure, as well as powers to compel the disclosure of documents, in order to perform checks as contemplated by Articles 18 and 19; and
c) necessary to ensure those functions can be performed with independence (discussed in section 3.2 below).

[1] See, for example, Judgment of the Court of 14 December 1971 in *Politi s.a.s. v Ministry for Finance of the Italian Republic*, Case 43-71, ECLI:EU:C:1971:122, judgment of the Court of 5 February 1963 in *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, ECLI:EU:C:1963:1, judgment of the Court of 4 December 1974 in *Yvonne van Duyn v Home Office*, Case 41-74, ECLI:EU:C:1974:133, judgment of the Court of 8 July 1987, in *Commission of the European Communities v Italian Republic*, Case 262/85, ECLI:EU:C:1987:340, and judgment of the Court of 11 July 2002 in *Marks & Spencer plc v Commissioners of Customs & Excise*, Case C-62/00, ECLI:EU:C:2002:435. See also Advocate General Geelhoed's opinion of 26 April 2005 in *Commission of the European Communities v Ireland*, Case C-494/01, ECLI:EU:C:2004:546, in particular paragraphs 26 and 27.

3.2 Competent authorities must have "functional independence"

Competent authorities must have "functional independence" in the performance of their obligations under the Regulation. In practice, this means that the regulatory framework in each Member State must not only provide that the competent authority enjoys formal and actual independence in the performance of its functions, but also that its governance, powers and access to resources do not directly or indirectly compromise that independence. In this regard, structural safeguards should be enacted to ensure that any government supervision or oversight of a competent authority (e.g. regarding its decision-making procedures, budget, staff, resources or management) does not compromise its functional independence.

"Functional independence" is a common and essential requirement for national agencies responsible for the implementation and/or enforcement of EU legislation,[2] but what exactly does it mean?

Fortunately, the Court of Justice of the European Union (**"CJEU"**) has helpful jurisprudence that explains the meaning of "functional independence" and its practical implications.

Freedom from external influence, whether direct or indirect

The CJEU has stated very clearly in a number of decisions that the essential requirement for a competent authority to have functional independence is that:

> *the national regulatory authority must carry out its regulatory tasks* ***without being exposed to any external influence****.*
>
> (Judgement of 11 June 2020 in *Prezident Slovenskej republiky*[3] at paragraph 33, emphasis added.)

[2] See for example: Article 26(1) of the European Data Governance Regulation (Regulation (EU) 2022/868) which requires that designated national competent authorities are "legally distinct from, and functionally independent of, any data intermediation services provider or recognised data altruism organisation"; Article 57(4) of the Directive on Common Rules for the Internal Market for Electricity (Directive (EU) 2019/944) which requires that designated national regulatory authorities are "legally distinct and functionally independent from other public or private entities" when carrying out the regulatory tasks conferred upon them by that Directive and related legislation; Article 39(4) of the Directive on Common Rules for the Internal Market in Natural Gas (Directive 2009/73/EC) which requires that designated national authorities are "legally distinct and functionally independent from any other public or private entity" when carrying out the regulatory tasks conferred on them under that Directive and related legislation; Article 22 of the Railway Safety Directive (Directive (EU) 2016/798) which requires that designated national investigative bodies are "functionally independent from the national safety authority, from the [European Union Agency for Railways] and from any regulator of railways."

[3] Case C-378/19, ECLI:EU:C:2020:462. This case considered the implementation of the EU Directive on common rules for the internal electricity market (Directive 2009/72/EC), which requires that national authorities are, among other things, legally distinct and functionally independent from any other public or private entity and that the staff responsible for the management of the competent authority must act independently of market and government interests.

The CJEU has also repeatedly confirmed that a general requirement for independence in the performance of regulatory functions means:

> *a status that ensures that the body in question is* ***able to act completely freely*** *in relation to those bodies in respect of which its independence is to be ensured,* ***shielded from any instructions or external influence****.*
>
> (Judgement of 2 September 2021 in *European Commission v Federal Republic of Germany*[4] at paragraph 108, emphasis added, citing *Prezident Slovenskej republiky*[5] at paragraph 32, citing in turn the judgment of 13 June 2018 in *European Commission v Republic of Poland*[6] at paragraph 67).

For the avoidance of doubt, external influence includes influence from both public and private entities.[7]

CJEU jurisprudence on the application of the Personal Data Directive (Directive 95/46/EC), which requires that national data protection authorities "shall act with complete independence in exercising the functions entrusted to them" (Article 28), is also informative to the extent it clarifies the requirement for independence in the performance of regulatory functions (in other words, functional independence). For example, in applying that requirement, the CJEU stated in its decision of 9 March 2010 in *Commission of the European Communities v Federal Republic of Germany*[8] that both direct *and indirect* influence from State bodies and private sector actors must be taken into account.[9]

In that case, the Court held that enforcement agencies:

> *must enjoy an independence allowing them to perform their duties free from external influence. That independence precludes not only any influence exercised by the supervised bodies [ie market actors], but also* ***any directions or any other external influence, whether direct or indirect, which could call into question the performance by those authorities of their task.*** (paragraph 30, emphasis added)

While the EU legislation considered in these cases phrased the independence requirement differently (e.g. complete independence in exercising regulatory functions) or included requirements in addition to 'functional independence' (e.g. for legal or organisational independence, independence of decision-making, or an absence of conflicts of interest held by agency staff), *the central test applied by the CJEU is* ***whether the relevant authority was able to perform its regulatory functions freely and without any external influence*** – that is, with functional independence.

In this context, CJEU jurisprudence regarding requirements for "independence" *in the performance of regulatory functions* should inform the application of the requirement for "functional independence" in Article 14 of the Regulation.

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[4] Case C-718/18, ECLI:EU:C:2021:662.
[5] Case C-378/19, ECLI:EU:C:2020:462.
[6] Judgement of 13 June 2018, Case C-530/16, ECLI:EU:C:2018:430.
[7] See for example Judgement of 2 September 2021 in *European Commission v Federal Republic of Germany,* Case C-718/18, ECLI:EU:C:2021:662, at paragraph 109.
[8] Judgement of 9 March 2010, Case C-518/07, ECLI:EU:C:2010:125.
[9] This view was upheld by the CJEU in its judgement of 16 October 2012 in *European Commission v Republic of Austria*, Case C-614/10, ECLI:EU:C:2012:631, which considered the same question and further clarified that any influence which, directly or indirectly, "is liable to have an effect on the supervisory authority's decisions" should be avoided (paragraph 43).

Based on the jurisprudence cited above, Article 14 should therefore be interpreted as requiring Member States to ensure that competent authorities are *independent of any external influence* from public or private actors, whether direct or indirect, in the performance of their regulatory functions.

However, functional independence in practice requires more than formal statements of independence in a competent authority's governing statute, as a range of institutional and organisational factors can indirectly compromise an agency's functional independence unless adequate safeguards exist. These factors are explored further below

Functional independence in principle and in practice

In addition to safeguarding a competent authority from indirect external influence, Member States must also ensure that the implementation of the regulatory framework governing their competent authority ensures functional independence in practice. This "must be examined in the light of the relevant national provisions as a whole",[10] including the broader institutional and legal framework in which the authority exists. In particular, statements of principle in the regulatory framework that the relevant agency must act as 'an independent body' cannot be taken at face value.

An important lesson from CJEU jurisprudence is that, despite formal functional independence on paper, *a lack of institutional independence can compromise an agency's functional independence* through formal and informal institutional arrangements. For example, where an enforcement agency sits within a larger institutional hierarchy, such as where the agency operates under the authority of a government minister or sits within a government ministry, and its decisions, activities, staff, management or budget etc are subject to some form of institutional control (a relatively common structure for national enforcement agencies). That is, unless adequate safeguards are put in place to avoid undue influence.

While Member States retain discretion as to the structure and organisation of their national agencies, and requirements for independence do not prohibit the integration *per se* of enforcement agencies into the relevant national ministry, the CJEU has emphasised that Member States must take "all the measures necessary in order to ***guarantee***" that the requirements for independence are met (judgement of 13 June 2018 in *European Commission v Republic of Poland,*[11] at paragraph 103, emphasis added). This would include ensuring that any institutional supervision or discretionary powers over the agency are subject to binding procedural safeguards that "eliminate all risks of conflict of interest" arising in the performance of regulatory functions by the agency or its staff (at paragraphs 86 and 95).

Strict procedures for the appointment and dismissal of agency officers

A particular area where a lack of institutional independence can compromise functional independence concerns the process by which an enforcement agency's staff and senior officers are appointed and removed. In this regard, the CJEU's judgement of 13 June 2018 in *European Commission v Republic of Poland*[12] (discussed above) provides clear guidance that a "broad freedom to appoint and dismiss" officers of an enforcement agency by a government minister is, in itself, "liable to effect the independence" of the agency's officers where the exercise of their functions concern State-owned or State-controlled entities within the minister's portfolio (at paragraph 87). The Court went on to note that while the relevant EU directive did not limit the broad discretionary powers of Member States regarding

[10] Judgement of 13 June 2018 in *European Commission v Republic of Poland*, Case C-530/16, ECLI:EU:C:2018:430, at paragraph 71.
[11] Judgement of 13 June 2018, Case C-530/16, ECLI:EU:C:2018:430.
[12] Judgement of 13 June 2018, Case C-530/16, ECLI:EU:C:2018:430.

the appointment and dismissal of officers of national agencies, where the independence of those agencies is required, such discretionary powers must either be "regulated strictly by legislation" or exercised "on the basis of objective criteria which are clearly and exhaustively set out and verifiable" (at paragraph 86).

The CJEU confirmed in 2020 in *Prezident Slovenskej republiky*[13] that requirements of independence:

> *do not preclude the government of a Member State from appointing and removing the chairperson of the national regulatory authority.* ***That power of nomination and dismissal must, however, be exercised in such a way that the independence of that authority is guaranteed****, in the sense that all the requirements [of the relevant EU law] must be met.* (paras 39 and 40, emphasis added)

As with the autonomy of Member States regarding the organisation and structure of their enforcement agencies, Member States are free to determine procedures for the appointment and removal of their agency's officers *provided that* those procedures do not compromise the agency's functional independence – either directly or indirectly, in principle or in practice.[14]

Independent decision-making in the performance of regulatory functions

A competent authority's decision-making processes in the course of performing its regulatory functions must logically also be independent for it to enjoy functional independence. In this regard, the CJEU has confirmed that 'independent decision-making' implies that:

> *within the sphere of the regulatory duties and powers referred to in [the relevant EU law], NRAs [national regulatory authorities]* ***take their own decisions autonomously and solely in the public interest****, so as to ensure compliance with the objectives pursued by that [law],* ***without being subject to external instructions from other public or private entities****. (emphasis added)*
>
> (Judgement of 2 September 2021 in *European Commission v Federal Republic of Germany* at paragraph 109, citing *Prezident Slovenskej republiky* at paragraphs 32 and 33).

The 2018 CJEU decision of *European Commission v Republic of Poland*[15] (discussed above) also clarified that a lack of organisational independence can, by itself, jeopardise an agency's capacity for independent decision-making where it's regulatory functions concern the interests of State agencies. In that case, the Court held that the relevant agency did not have the independence of decision-making required by the relevant EU directive because the agency was integrated within the responsible government ministry and this lack of organisational independence "by itself" jeopardised the agency's

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[13] Case C 378/19, ECLI:EU:C:2020:462.
[14] See *Prezident Slovenskej republiky* at paragraph 37; Judgement of 6 March 2008 in *Comision del Mercado de las Telecomunicaciones v Administración del Estado*, Case C-82/07, ECLI:EU:C:2008:143 at paragraph 24, judgement of 6 October 2010 in *Base NV and Others v Ministerraad*, Case C-389/08, ECLI:EU:C:2010:584; judgement of 17 September 2015 in *KPN BV v Autoriteit Consument en Markt (ACM)*, Case C-85/14, ECLI:EU:C:2015:610. In these rulings the CJEU ruled that while Member States enjoy institutional autonomy as regards the organisation and structuring of national regulatory authorities, that autonomy may be exercised only in full compliance with the objectives and obligations laid down in the relevant EU law.
[15] Judgement of 13 June 2018, Case C-530/16, ECLI:EU:C:2018:430.

decision-making independence "through the risk of subordination to the interests of the [relevant] Minister" (at paragraph 107).

This final point is particularly important where Member States retain both a degree of oversight over their competent authority and an interest in any sector subject to the Regulation, whether a direct interest (in the sense of being a participant in the sector) or indirect (such as through the control, management or supervision of agencies involved in the governance of the sector). This may be particularly relevant where competent authorities are subject to supervision from national agriculture or forestry ministries and public agencies also play a role in the governance of the national agriculture or forestry sectors.

Formal accountability can safeguard functional independence

A crucial lesson for Member States is that while functional independence does not *necessarily* require institutional, legal or organisational independence (e.g. a separate legal entity without institutional or organisational links to other bodies), a lack of institutional, legal or organisational independence can directly or indirectly compromise functional independence. Put another way, any legal, institutional or organisational links between a competent authority and other public or private actors risks directly or indirectly influencing the authority's performance of its regulatory functions.

This is an important and delicate distinction for Member States as they consider how to build on their existing enforcement framework, capacities and expertise under the EUTR to meet the broader responsibilities and new obligations under the Regulation. Importantly, while competent authorities must be functionally independent, the Regulation does not require Member States to create completely independent agencies that are structurally and legally separate from existing regulatory authorities or institutions of executive government. Indeed, some form of government supervision may be needed to hold a competent authority accountable for the proper performance of its regulatory functions.

Fundamentally, however, Member States must ensure that any government supervision is exercised in accordance with the objectives and obligations of the Regulation and conducted in a way that does not compromise the authority's functional independence (such as through adopting structural guarantees like those discussed in *European Commission v Republic of Poland*[16] cited above).[17]

In this regard, Member States should ensure that the decisions, actions and omissions of their competent authorities are subject to an effective right of appeal to an independent administrative or judicial body in accordance with Article 32 of the Regulation. In particular, national law should confirm that any person who has submitted a substantiated concern pursuant to Article 31 has a "sufficient interest" in seeking a review of the legality of the acts, decisions or omissions of the competent authority in relation to that substantiated concern under Article 32. Such a right of review provides an important structural safeguard for a competent authority's proper performance of its regulatory functions.

[16] Judgement of 13 June 2018, Case C-530/16, ECLI:EU:C:2018:430.

[17] See Judgement of 6 March 2008 in *Comision del Mercado de las Telecomunicaciones v Administración del Estado,* Case C-82/07, ECLI:EU:C:2008:143 at paragraph 24, judgement of 6 October 2010 in *Base NV and Others v Ministerraad*, Case C-389/08, ECLI:EU:C:2010:584; judgement of 17 September 2015 in *KPN BV v Autoriteit Consument en Markt (ACM)*, Case C-85/14, ECLI:EU:C:2015:610. In these rulings the CJEU ruled that while Member States enjoy institutional autonomy as regards the organisation and structuring of national regulatory authorities, that autonomy may be exercised only in full compliance with the objectives and obligations laid down in the relevant EU law.

3.3 Competent authorities must have adequate resources

Discrepancies between Member States in the resourcing of their competent authorities under the EUTR has been a significant challenge to its uniform application across the EU. For example, the EUTR Fitness Check found that:

> *The human and financial resources available to CAs [competent authorities] varied substantially across MS […] Most of the MS, including major timber importers, have less than 10 FTE available for implementation and enforcement of EUTR. For instance, Belgium, Denmark, Finland, Ireland, Malta and the Netherlands have between 2 to 3 FTE each. […] it seems that some countries devote very limited resources to the implementation and enforcement of the EUTR considering the number of operators and volume of import.*[18]

To address this structural shortcoming, the Regulation includes a new obligation on Member States to ensure that their competent authorities have "the resources to fulfil the obligations set out in [the Regulation]" (Article 14(4)). Adequate resources are also a precondition to ensuring that competent authorities enjoy functional independence and are able to exercise the powers and take the actions required of them under the Regulation.

Functional independence requires secure access to adequate resources

While the concept of 'the resources to fulfil the obligations…' is not further defined in the Regulation, Recital 64 provides guidance for Member States in satisfying this obligation. Recital 64 states that:

> *Member States should ensure that **adequate financial resources are always available** for the appropriate staffing and equipping of the competent authorities. **A high level of resources is needed** in order to carry out checks efficiently and **stable resources should be provided at a level appropriate to the enforcement needs at any given moment**.* (emphasis added)

Further clarity can be drawn from the 2018 CJEU judgement in *European Commission v Republic of Poland*[19] (discussed above), where the Court held that, while a requirement of 'organisational independence' did not prohibit the relevant agency being supported by government staff or budgets or require the agency to have a separate budget from the relevant government ministry, it was nevertheless:

> ***imperative that access to such resources be guaranteed** […] under clear rules that may not be amended by the [responsible minister] alone… [and] that **independent access for that body to the financial resources that must be granted to it for carrying out its tasks are guaranteed**.* (paras. 99-100, emphasis added)

The references in Recital 64 to "a high level of recourses" and "stable resources" being "needed" and "always available" also suggests that resourcing must not only be sufficient, but that it must also be stable and secure such that a competent authority's access to resources is not conditional or subject to

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[18] Commission Staff Working Document – Fitness Check on the EUTR and the FLEGT Regulation (2021), p. 13, available at: https://environment.ec.europa.eu/document/download/44d4ef8b-8c76-4535-9d04-b65be3479887_en?filename=SWD_2021_328_1_EN_bilan_qualite_part1_v2.pdf.

[19] Judgement of 13 June 2018, Case C-530/16, ECLI:EU:C:2018:430.

external influence or intervention. Likewise, any procedures regarding the allocation or review of a competent authority's recourses should not compromise, in principal or in practice, its guaranteed access to those resources "at any given moment" or its functional independence.

What level of resourcing would be adequate?

What amounts to adequate resources for each competent authority will mainly be determined by the activities, staff, equipment and capacities needed by that competent authority to fully and efficiently fulfil its obligations under the Regulation in the relevant Member State. This assessment should specifically consider the minimum annual checks that the competent authority will be required to complete pursuant to Article 16 and the actions required to undertake them. Anticipating the number of minimum annual checks will in turn require consideration of the number of operators and traders active in the relevant Member State and the volume of relevant products being imported or traded in or exported from that Member State.

More specifically, Article 16 requires that competent authorities check at least 1%, 3% and 9% of all operators and non-SME traders placing or making available on the market or exporting relevant products that contain or have been made using relevant commodities produced in low, standard and high risk areas respectively. These minimum requirements apply separately *for each commodity group* (i.e., these percentages apply separately to relevant products containing or made using cattle, cocoa, coffee, palm oil, soy, rubber and wood: Article 16(11)). They must also check 9% of the quantity of each relevant product that contains or was made using a relevant commodity produced in a high risk area, also applied separately to each commodity group (Article 16(9)).

At any given moment, competent authorities must also be able to conduct *ad hoc* checks when they obtain information concerning potential non-compliance (Article 16(12)) and to undertake immediate action in response to relevant products that present a high risk of non-compliance ***before*** they are placed on or made available on the market (Article 17). Their resourcing must properly anticipate and enable this quick response capacity.

In addition to the number of checks, there must be sufficient financial resources available to a competent authority to ensure the quality of checks. In practice, this means that a competent authority should have resources to conduct spot checks and field audits, potentially also in third countries (Article 18(2)(e)). Competent authorities should also have the financial resources to access technical and scientific expertise where checks raise concerns of non-compliance, including anatomical, chemical or DNA analysis or Earth observation data (Article 18(2)(c) and (d)).

Fundamentally, the Regulation implicitly requires competent authorities to have expertise not only on the timber sector, but also on the other commodity sectors that fall within its scope. Therefore, a competent authority should have staff with adequate knowledge, experience and technical expertise on the production and trade of all commodity sectors within the scope of the Regulation in order to be considered adequately resourced to fulfil its obligations under the Regulation. Obtaining this internal technical expertise may require additional financial resources for training and recruitment.

4 Obligations on Member States that must be completed within 18 months

4.1 Member States must lay down national rules on penalties

The establishment of a robust and comprehensive national enforcement architecture is a precondition for the effective enforcement of any law. As EU law is enforced at national level, the Regulation obliges Member States to lay down national rules on penalties applicable to instances of non-compliance and notify the Commission of those rules (and any subsequent changes to them) without delay (Article 25). While Member States retain significant discretion as to the design of those rules (and their subsequent implementation), they must meet several requirements set out in Article 25 and in EU law more broadly.

Member States should also note that on 15 December 2021, the European Commission proposed a revision of the Environmental Crime Directive (Directive 2008/99/EC) which aims at enhancing compliance with EU environment protection legislation by supplementing administrative sanction frameworks with criminal law penalties. While the proposed revision of that directive has not yet been adopted, it is expected that the new EU Deforestation-free Products Regulation will be included within the scope of the directive and Member States will be required to establish a national criminal offence for any unlawful and intentional violation of Article 3 of the Regulation.

In anticipation of this revision to the Environmental Crime Directive, Member States may already wish to consider how to integrate a national criminal offence for non-compliance with Article 3 of the Regulation when establishing their national rules on penalties as required under the Regulation. In 2021, ClientEarth, together with WWF and INTERPOL, published comprehensive recommendations for the establishment of effective national rules in relation to forestry crime.

4.2 Penalties must be effective, proportionate and dissuasive

Like under the EUTR, the Regulation requires that the penalties provided for in national rules “shall be effective, proportionate and dissuasive” (Article 25(2)). These concepts (effectiveness, proportionality and dissuasiveness) are closely inter-related as they all deal with the relationship between the seriousness of the offence and the type and severity of the penalty. They are common requirements for sanctions required under EU law and the CJEU has clarified these concepts in numerous cases[20] and ClientEarth has explored the meaning of these requirements in the context of the EUTR and relevant CJEU jurisprudence in a previous briefing.[21]

With regard to the Regulation, these three requirements can be extrapolated as follows.

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[20] See for example: Judgement of 26 September 2013, *Texdata Software*, C-418/11, EU:C:2013:588, at paragraph 50; judgement of 7 October 2010, *Stils Met*, C-382/09, EU:C:2010:596, at paragraph 44; judgement of 8 September 2005, *Yonemoto*, C-40/04, EU:C:2005:519, at paragraph 59; judgement of 8 June 1994, *Commission / United Kingdom*, C-382/92, EU:C:1994:233, at paragraph 55.
[21] ClientEarth (2018), ‘National EUTR penalties: are they sufficiently effective, proportionate and dissuasive?’, available at https://www.clientearth.org/latest/documents/national-eutr-penalties-are-they-sufficiently-effective-proportionate-and-dissuasive/.

a) Penalties will be "**effective**" if they are:

   i. as strict as penalties imposed for breaches of national laws that are comparable in nature and importance, such as any existing national laws regulating the production and trade of prohibited products;[22] and

   ii. sufficient to ensure that the objective of the Regulation is achieved despite the infringement (i.e, that non-compliant products are prevented from being placed on, made available on or exported from the EU market) and future infringements are prevented.[23]

b) Penalties will be "**dissuasive**" if their severity and the risk they represent for offenders provide a genuine deterrent effect, create sufficient incentives for operators and traders to comply with their obligations under the Regulation, and make non-compliance economically unattractive. In particular, the national penalties framework must create *a sufficiently material risk* that cases of non-compliance will be met with sufficiently severe penalties, and ensure that non-compliant operators and traders receive penalties that put them at a disadvantage compared to compliant operators and traders.[24]

c) Penalties will be "**proportionate**" if they are suitable to achieve the objectives of the Regulation in response to the scale and severity of the particular non-compliance, while not going beyond what is necessary to attain those objectives. Article 25(2)(a) provides further clarity by specifying that penalties in the form of monetary fines must be "proportionate to the environmental damage and the value of the relevant commodities or products concerned", calculated in a way that ensures that the relevant operator or trader is effectively deprived of the economic benefits of their non-compliance, with higher fines for repeated infringements, and the maximum "set at least at 4% of the operator's or trader's total annual Union-wide turnover".

Although CJEU jurisprudence clarifies the meaning of these concepts, there have been significant differences in Member State's penalty regimes under the EUTR, both in terms of their seriousness and their application. The EUTR Fitness Check found that the types of penalties and their maximum level vary significantly across Member States: most Member States (23 in total) provide for administrative fines and seizures and more than half provide for criminal fines, imprisonment and suspension of trade (16, 17 and 15 Member States respectively). Almost all competent authorities can issue notices of remedial action and impose immediate interim measures, although the grounds for such measures differ across Member States. Potential fines also differ greatly, ranging from €50 to an unlimited amount.[25]

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[22] See for example: judgement of 8 September 2005, *Yonemoto*, C-40/04, EU:C:2005:519, at paragraph 59; judgement of 8 June 1994, *Commission / United Kingdom*, C-382/92, EU:C:1994:233, at paragraph 5.
[23] See judgement of 7 October 2010, *Stils Met*, C-382/09, EU:C:2010:596, at paragraph 44
[24] The CJEU has repeatedly stated that the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely dissuasive effect. See judgement of 25 April 2013, *Asociaţia Accept*, C-81/12, EU:C:2013:275, at paragraph 63. The Court also specified that the national enforcement policy must create a serious risk that, in the event of an infringement of EU law, sufficiently severe penalties will be applied. See judgement of 12 July 2005, *Commission / France*, C-304/02, EU:C:2005:444 , at paragraph 37 and judgement of 27 March 2014, *LCL Le Crédit Lyonnais*, C-565/12, EU:C:2014:190, at paragraphs 50 and 51.
[25] Commission Staff Working Document – Fitness Check on the EUTR and the FLEGT Regulation (2021), p.14, available at: https://environment.ec.europa.eu/document/download/44d4ef8b-8c76-4535-9d04-b65be3479887_en?filename=SWD_2021_328_1_EN_bilan_qualite_part1_v2.pdf.

New requirements in the Regulation seek to mitigate this risk of uneven application of penalties across Member States by providing a list of penalties which all Member States must include in their national rules (Article 25(2)). The list mandates the inclusion of the following elements:

a) Sufficiently significant fines with a maximum of at least 4% of annual Union-wide turnover, as described above;

b) Confiscation of non-compliant products;

c) Confiscation of revenues gained from a transaction involving non-compliant products;

d) Exclusion for up to 12 months from public procurement processes and from public funding;

e) In case of serious or repeated infringements, temporary prohibition from placing and making available relevant commodities or products on or exporting them from the EU market;

f) In case of serious or repeated infringements, prohibition from using the simplified due diligence procedure in Article 13.

This list is non-exhaustive and prescribes minimum kinds of penalties to which Member States may add.

The obligation to enact these national rules will become effective when the Regulation enters into force. There is no explicit deadline for Member States to enact their national rules on penalties, though implicitly these rules must be in place before the provisions relating to operators and traders become applicable (18 months after the Regulation enters into force). In that sense, Member States will have no more than 18 months to enact *and implement* their national rules on penalties.

4.3 Member States must take "all measures necessary" to implement their national rules on penalties

In addition, Member States must take all necessary measures to ensure that their national rules on penalties are implemented (Article 25(1)). This is an ongoing obligation that requires Member States to both complete any preparatory work required to allow competent authority's to start imposing penalties for non-compliance on the day the Regulation becomes applicable to operators and traders (18 months after the Regulation enters into force), and to ensure their ongoing application. This can include, amongst other things, completing any administrative or procedural steps necessary to allow national rules on penalties to be properly implemented and enforced, the establishment of strong enforcement policies that provide clarity to competent authorities, inspectors, customs officers and other agencies involved in enforcement procedures (such as the police, prosecutors and judges) about how national rules on penalties should be applied, as well as ensuring those agencies have the formal powers and capacities to cooperate, coordinate and apply the rules in practice.

For many Member States, this will require a significant change in enforcement practices compared to the EUTR, under which penalties are rarely imposed and relatively low compared to the maximum available.[26]

[26] See ClientEarth (2021) 'The proposed EU law on deforestation-free products. What are the changes compared to the EUTR framework?', at p. 9. Available at https://www.clientearth.org/latest/documents/the-proposed-eu-law-on-deforestation-free-products-what-does-it-include-and-what-is-left-out/.

4.4 Capacity to undertake and impose "interim measures"

The Regulation obliges competent authorities to identify situations where relevant products present such a high risk of non-compliance that they require competent authorities to undertake immediate action ***before*** the products are placed on, made available on or exported from the Union market (Article 17(1)). Where competent authorities identify such situations, they must take immediate interim measures under Article 23 to suspend the placing or making available of those products on the market or their export. Article 23 also obliges Member States to provide for the possibility of their competent authority undertaking immediate interim measures when possible infringements of the Regulation are detected.

As a consequence, Member States will need to enable their competent authorities to identify high risk products before they are placed on, made available on or exported from the market in their territory and empower their competent authority to take immediate interim measures as contemplated by Article 23. For imports and exports, this implicitly requires a high level of coordination and information sharing between competent authorities and customs authorities.

Although most competent authorities under the EUTR are able to impose interim measures, they are not mandatory (EUTR Article 19(5)) and used sparingly in practice.[27] The legal basis for interim measures under the EUTR differs across Member States (ranging from forest management law, general administrative law, penal codes, EUTR-specific legislation and other legal bases), as does the types of interim measures that are applied.[28] In this context, it is worth noting that the interim measures mentioned in Article 23 of the Regulation (seizure or suspension of the placing or making available on and export from the Union market of the relevant products) are non-exhaustive. Member States can therefore provide for additional immediate interim measures, but must authorise their competent authorities to seize potential non-compliant products and empower them to require operators and traders to suspend their proposed transactions involving the relevant products.

4.5 Authorise customs authorities to control shipments of relevant products and suspend their release

While competent authorities remain ultimately responsible for the overall enforcement of the Regulation (Article 26(2)), national customs authorities must also be authorised to perform the role required under the Regulation in the control and inspection of relevant products at the customs border. Article 26(3) provides that customs authorities "shall carry out controls on the customs declarations lodged in relation

[27] Only Croatia, Poland and France did not provide for the application of interim measures. See Commission Staff Working Document – Fitness Check on the EUTR and the FLEGT Regulation (2021), at p.14. Available at: https://environment.ec.europa.eu/document/download/44d4ef8b-8c76-4535-9d04-b65be3479887_en?filename=SWD_2021_328_1_EN_bilan_qualite_part1_v2.pdf; For the 2021 reporting period, competent authorities issued a total of 23 temporary seizures and six permanent seizures. See EUTR: Union-wide Overview for the Year 2021 – Overview based on the analysis of information on the application of the EU Timber Regulation (Regulation EU No. 995/2010), submitted by EUTR Member States (2022), at p. 3. Available at https://ec.europa.eu/environment/forests/pdf/EUTR%20Overview%202021_743575405.pdf.

[28] In Belgium, for example, interim measure in addition to the seizure of timber products and suspension of the authority to trade timber products include the temporary confiscation, sealing, returning or destroying of products, see Annual Report EUTR 2020 III.I Remedial actions and immediate interim measures, at p. 3. Available at: https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/annual_report_eutr_2020_iii.i_remedial_actions_and_immediate_interim_measures.pdf.

to relevant products entering or leaving the [EU] market". Those checks are to be carried out in accordance with provisions of the Union's Customs Code (Regulation (EU) No 952/2013).

Until the "electronic interface" that is intended to streamline coordination between customs authorities, competent authorities and the Commission is in place (contemplated under Article 28), operators and traders must disclose the reference numbers of the due diligence statements for shipments of relevant products in their customs declarations and customs authorities "shall exchange information and cooperate" with competent authorities and take that information and cooperation into account when allowing any relevant products to be released into the EU or exported (Article 26(5)(a)). Until that "electronic interface" is established, Member States will therefore need to ensure national procedures are in place that allow their competent authorities and customs authorities to exchange information and cooperate, as well as authorising their customs authorities to suspend the release of shipments of relevant products to allow coordination with competent authorities.

Once that "electronic interface" is established, competent authorities will be able to 'flag' due diligence statements for shipments of relevant products that present a high risk of non-compliance and which should be checked before they are released into the EU or exported, and customs authorities must then facilitate those checks by suspending the release of the relevant products until checks can be carried out by the competent authority (Articles 26(6) – (9)).

4.6 Ensure national rules provide access to administrative or judicial procedures

Article 32 of the Regulation provides that any person with a "sufficient interest" as determined by national legal norms "shall have access to administrative or judicial procedures" to review the actions of the competent authority in that Member State. Member States will be responsible for ensuring that their national legal frameworks provide this access to administrative or judicial procedures regarding the actions of their competent authority.

This should be included in any legal reforms Member States undertake in setting-up their competent authorities.

In practice, the national regulatory framework governing each competent authority should explicitly provide that its decisions, actions and omissions are subject to a formal procedure of administrative or judicial review which any person with a "sufficient interest" (determined under the existing national system of legal remedies) can initiate. National legal frameworks should also clarify that any person who has submitted a substantiated concern pursuant to Article 31 of the Deforestation Regulation has a "sufficient interest" for the purpose of initiating that procedure of administrative of judicial review in relation to their substantiated concern. In order to be consistent with their obligations under Article 9(4) of the Aarhus Convention, Member States should also ensure that any such procedure is fair, equitable, timely and not prohibitively expensive and provides adequate and effective remedies, including injunctive relief where appropriate.

4.7 Establish an annual plan for compliance checks

In addition to ad hoc compliance checks, competent authorities must, under Article 16(5) of the Regulation, establish an annual plan for checks that identifies the operators and traders to be checked in order to meet the minimum quantified objectives for checks under Article 16(8) – (10) (i.e. the 1%, 3%

and 9% requirements for relevant products originating from low, standard and high-risk areas respectively).

These annual plans must be developed:

a) following a risk-based approach using national risk criteria "identified based on an analysis of risks of non-compliance" and taking into account particular criteria listed in Article 16(3) and "shall build on" any indicative risk criteria communicated by the Commission under Article 16(4) (Article 16(5)); and

b) based on the total number of operators and traders who placed, made available on, or exported from the Union market relevant products in the previous year, and the volume of such products originating from high-risk areas (Article 14(11)).

Accordingly, Member States will need to have these annual plans for checks in place when the provisions relating to operators and traders become applicable (18 months after the Regulation enters into force). Member States will therefore also need to develop their national risk criteria, their risk-based approach to checks, and have collected data on the number of operators and traders placing and making available on the market and exporting relevant products from their territory "in the previous year" during the first 18 months of the Regulation's application.

5 Power to recover costs of enforcement

Member States are explicitly permitted by Article 20 to authorise their competent authorities to reclaim "the totality of the costs of their activities with respect to instances of non-compliance" from the relevant operator or trader. This explicitly includes any costs "of carrying out testing, of storage and of activities relating to the relevant products that are found to be non-compliant products and are subject to corrective action", and may include other costs incurred with respect to instances of non-compliance.

Member States wishing to take advantage of this provision should include clear powers and procedures for their competent authority to implement this process in its governing regulatory framework.

6 Additional new obligations on Member States – most relevant after 18 months

In addition to the obligations with short-term deadlines on Member States discussed above, there are a number of new requirements for Member States and their competent authorities that are worth noting. These primarily relate to how Member States implement and enforce the Regulation after its provisions relating to operators and traders become applicable (18 months after its entry into force).

a) **Exchange information and cooperate with other authorities** (Article 21):

   Competent authorities will have an obligation to cooperate internally within their own Member State (where more than one competent authority is designated), with customs authorities from their own Member State, with competent authorities and customs authorities from other Member States, with the Commission, and if necessary, with administrative authorities of third countries, in order to ensure compliance with the Regulation. In doing so, they must establish "administrative arrangements" with the Commission concerning the transmission of information

regarding investigations and exchange information necessary for the enforcement of the Regulation with other Member States' competent authorities. They must also immediately alert competent authorities in other Member States and the Commission if they detect *any possible infringements* or serious shortcomings that may affect another Member State, including to enable the withdrawal from the market of non-compliant products in other Member States. Competent authorities will also have obligations for cooperation and information exchange in the context of compliance checks under Articles 16(7) and 27 (discussed below).

b) **Share annual plans for checks and coordinate on enforcement** (Articles 16(7) and 27):

In addition to complying with specific requirements regarding *how* competent authorities identify which operators and traders to check (according to their annual plans for checks that are based on a risk-based approach that includes certain mandatory risk criteria), competent authorities must also share their annual plans for checks with other competent authorities and the Commission. They must also exchange information and coordinate with other competent authorities and the Commission on the development and application of the risk criteria used in their annual plans for checks in order to improve the effectiveness of the enforcement of the Regulation. Under Article 27, competent authorities must also "cooperate closely and exchange information" with other competent authorities, customs authorities and the Commission to ensure that checks are effective and performed in accordance with the requirements of the Regulation.

c) **Report annually on implementation and enforcement** (Article 22):

Member States must report annually to the Commission by 30 April each year on the application of the Regulation in their territory in the previous year. This report must include the information described in Article 22. This includes, for example, details of the compliance checks carried out and any corrective action required or penalties imposed in cases of non-compliance.

d) **Facilitate public access to records of checks** (Article 16(15)):

Records of checks carried out under the Regulation and reports of their results are deemed to constitute "environmental information" for the purposes of the EU Directive on public access to environmental information (Directive 2003/4/EC). Pursuant to that Directive, Member States will be obliged to ensure that their competent authorities and any other public authority in possession of records of checks and reports of their results makes that information available to any person upon request and that there are national rules and procedures to facilitate public access to that information (i.e. procedures to ensure that information is made available as soon as possible or, at the latest, within one month of a valid request, that records of checks and reports of their results are organised in ways to actively facilitate public dissemination and are progressively made available in electronic databases which are easily accessible to the public, and that any refusals or failures to disclose such information are subject to review by a court of law or other independent and impartial body).

e) **Monitor patterns in the trade of relevant products** (Article 15(3)):

Competent authorities must continuously monitor and exchange information with the Commission regarding "any significant change in the pattern of trade of relevant products that can lead to the circumvention" of the Regulation. This would presumably involve competent authorities monitoring the information disclosed in due diligence statements and comparing it with data from previous years, including against a baseline year before the Regulation enters into force. For

example, this could include monitoring any changes in numbers of operators and traders, quantities of relevant products entering and leaving the market in their territory, the relative quantity of each relevant product, and the countries of production of those products declared in due diligence statements.

In conclusion, the new EU Deforestation-free Products Regulation includes new and significant obligations on EU Member States compared to the existing EU Timber Regulation, some of which Member States must meet within relatively short time-frames. Member States should start preparing to meet and implement these obligations at the earliest opportunity.

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