

ClientEarth position paper to the public consultation
'Deforestation and forest degradation – reducing the impact of products placed on the EU market'

ClientEarth¹ welcomes this public consultation and supports the Commission's objective to gather stakeholder opinions on the potential additional measures at the EU level.

Forests provide a number of essential services, including providing livelihoods for more than a billion people, hosting around 80% of the world's biodiversity on land and acting as carbon 'sinks'. Greenhouse gas emissions linked to deforestation are the second biggest cause of climate change. Deforestation and forest degradation take place at alarming rates. Since 1990, it is estimated that some 420 million hectares of forest have been lost through conversion to other land uses.²

The EU's share of responsibility for global deforestation is undeniable. As the 2013 report 'The impact of EU consumption on deforestation' revealed, the EU imported and consumed 36% of crops and livestock products associated with deforestation in the countries of origin, over the period 1990-2008.³

According to the Trase Year Book 2020, the EU remains the second-largest export market for forest-risk commodities after China. As an example, over the last decade deforestation exposure has been greater for European soy imports than for Chinese soy imports.⁴

ClientEarth, alongside other NGOs, has called for years for the development of new demand side and supply side measures, particularly mandatory due diligence throughout the entire supply chain, to address deforestation and associated human rights violations. We welcomed the important step taken by the Commission, which, through the adoption in July 2019 of a Communication, set out a new framework of actions to protect and restore the world's forests.

First, we would like to share our views on the possible new regulatory measures that are being assessed with the objective of minimising the impact of EU consumption on deforestation and forest degradation. ClientEarth will also further explain why enhancing forest partnerships and supporting trade agreements that include binding provisions on the protection of forests are crucial.

New regulatory measure

Why is due diligence the most appropriate binding demand side measure to address deforestation?

Question 3.6 of the public consultation asks our opinion on a list of measures that could be suitable to address the issue of deforestation and forest degradation associated with EU consumption. This list includes, among others: voluntary labelling, mandatory labelling, replication of some aspect of the EU legislation in place for illegal, unreported and unregulated (IUU) fishing, voluntary due diligence, mandatory due diligence and a mandatory public certification scheme.

At the core of the Commission's 2018 feasibility study is an assessment of 20 different policy proposals that are grouped as three options for EU action:

¹ ClientEarth is an environmental law organisation, comprising legal, scientific, policy, and communications experts working to shape and enforce the law to tackle environmental challenges

² FAO and UNEP. 2020. The State of the World's Forests 2020. Forests, biodiversity and people. Rome

³ Study "The impact of EU consumption on deforestation", 2013

⁴ Trase Yearbook 2020 - The state of forest risk supply chains

http://resources.trase.earth/documents/Trase_Yearbook_Executive_Summary_2_July_2020.pdf

- An EU communication on deforestation based only on existing measures, including support to monitoring and transparency initiatives;
- A set of new non-legislative measures, including things like encouragement for new private sector initiatives;
- A combination of the first two including new legislative measures like a due diligence regulation for forest risk commodities – this would require companies to check the risk of illegality and/or unsustainability in their supply chains.

The feasibility study suggests that new legal tools like a due diligence regulation for forest risk commodities would have the greatest impact.⁵

Support for a mandatory due diligence framework has been echoed by the private sector during roundtables organised by the Tropical Forest Alliance and Efeca in the first semester of 2020: *'Roundtable participants expressed very clear support for the introduction of mandatory EU-wide due diligence legislation covering human rights and environmental impacts, through both a broad 'horizontal' approach to due diligence, and a commodity-specific approach ... Commodity-specific legislation is needed to define clearly the criteria on which the due diligence obligation for each commodity is based, and to create a level playing field across the EU to ensure that the same criteria are followed by all companies'*.⁶

In September 2020, the European Parliament published the European added value assessment on an EU legal framework to halt and reverse EU-driven global deforestation.⁷ In this assessment, the policy options analysed are: 1) mandatory due diligence; 2) mandatory certification standards; 3) mandatory certification standards with due diligence; and 4) mandatory labelling. According to the findings of this study, policy option 1 would decrease deforestation and associated carbon emissions by 62% compared to the baseline while having a small negative effect on the economy.

This study also found that policy option 1 seems to have the highest European added value⁸ based on criteria of feasibility, effectiveness and efficiency.⁹

Lastly, in October 2020 the European Parliament adopted a resolution with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation.¹⁰ This ambitious and welcome report recommends the Commission to have mandatory rules based on due diligence.

What should be the main components of the 2021 legislative proposal

As mentioned in the public consultation, the European Green Deal, the EU Biodiversity Strategy for 2030 and the Farm to Fork Strategy have confirmed the commitment of the European Commission to present, in 2021, a legislative proposal and other measures to avoid or minimise the placing of products

⁵ Feasibility study on options to step up EU action against deforestation, Part II

<https://ec.europa.eu/environment/forests/pdf/KH0418199ENN2.pdf>

⁶ 22 July 2020, Summary of Findings - TFA Roundtable Discussions on EU Action to Protect Forests

https://www.tropicalforestalliance.org/assets/Uploads/Summary-of-Findings_TFA-Roundtable-Discussions-on-EU-Action-to-Protect-Forests.pdf

⁷ EPRS study, An EU legal framework to halt and reverse EU-driven global deforestation, European added value assessment, September 2020

⁸ Estimated after a check against criteria of feasibility (both political and technical), effectiveness (in reducing deforestation and emissions) and efficacy (relation of achieved reduction in deforestation and emissions to economic costs of introducing intervention)

⁹ Ibid page II

¹⁰ https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.pdf

associated with deforestation or forest degradation on the EU market and to encourage forest-friendly imports and value chains.

As explained above, several assessments have shown that the most appropriate demand side measure to minimise the risk of commodities associated with deforestation being placed on the EU market is mandatory due diligence. ClientEarth believes that, as per other product-based due diligence requirements (e.g. EUTR), the minimum three following steps should be part of due diligence: (i) identification of the risks, (ii) assessment of the risks, and (iii) mitigating that risks to a negligible level except where the risks identified and assessed are already negligible.

- What should be the criteria against which due diligence should be conducted?

(i) *The necessity to go beyond compliance with laws in producer countries*

We believe that the upcoming legislation should include compliance with relevant laws of the country of origin of the FRC as one (**but not the only one**) of the criteria against which due diligence must be conducted.

The risk of illegal deforestation should not be the only consideration. It is also essential to consider the risk of not complying with other sustainability criteria. National legal frameworks governing forest conversion are complex. They involve laws of several different sectors, such as land, forest, environment and tax. They are also often incomplete or contradictory, and at times sporadically or selectively implemented, all of which means that conversion often is not effectively regulated¹¹ which can result in ongoing and even accelerated deforestation.

For example, while for many years Brazil was held up as a model in forest conservation efforts, it is now often cited for its alarming and increased rate of deforestation. The New York Declaration on Forests Five-Year Assessment Report describes at length, for example, how weakening environmental enforcement and institutional governance have led to increased deforestation in Brazil.¹²

(ii) *The necessity to protect the rights of local communities and indigenous peoples*

Furthermore, when a project involves the conversion of forests to another land use, this results in the loss of not only the forest but also the homes, livelihoods and cultures of Local Communities and Indigenous Peoples ('LCIPs'). Laws protecting LCIPs in producer countries are often non-existent, weak, or very poorly applied. If the only standard that businesses would have to meet is simply compliance with relevant laws of the country of origin, there is very little assurance that the rights of LCIPs will be adequately protected.

Indeed, in many countries there is still no formal legal recognition of communities' customary land tenure rights.¹³ In some tropical countries, LCIPs have only received legal recognition of their land tenure rights for a small portion of the land they occupy or customarily use.¹⁴ In numerous cases globally, communities have no security over their land and forest resources.

¹¹ ClientEarth, 2018, Legal Toolkit on forest conversion <https://www.clientearth.org/toolkit-forest-conversion-laws/>

¹² NYDF Assessment Partners. (2019). Protecting and Restoring Forests: A Story of Large Commitments yet Limited Progress. New York Declaration on Forests Five-Year Assessment Report. Climate Focus (coordinator and editor). Accessible at forestdeclaration.org. (pages 75&76)

¹³ RRI 2015. Who Owns the World's Land? A global baseline of formally recognized indigenous and community land rights. RRI, Washington DC

¹⁴ Legal Toolkit on Forest Conversion Factsheet 5: Communities' rights – the need for recognition, <https://www.documents.clientearth.org/library/download-info/legal-toolkit-on-forest-conversion-factsheet-5-communities-rights-the-need-for-recognition/>

Therefore it is essential that any upcoming legislation include the protection of the land tenure rights and resources of LCIPs.

(iii) *The necessity to protect other ecosystems*

Finally, the upcoming legislative proposal should ensure that products placed on the EU market are at no risk of coming from the destruction of other natural ecosystems. The continuous demand for land for agricultural expansion is not only a threat to forests but also to other valuable natural ecosystems such as peatland or savannah. Protecting forests needs to go hand in hand with the protection of other natural ecosystems.

- To whom the legislation should apply?

Respecting the core elements of the due diligence framework as a legal requirement should be applicable to all businesses placing forest risk commodities on the EU market. Not including all sizes of companies could create loopholes and undermine legislation as thresholds can be set too high or smaller companies with riskier supply chains can fall out of the remit of regulatory requirements when minimum thresholds are not met. If the new legislation truly intends to prevent product associated with deforestation from entering the EU market, it should ultimately cover companies of all sizes.

- Role of the financial sector

We note with disappointment that the public consultation fails to consider the role of the finance sector. Investigations have shown that between 2016-2020, forest-risk commodity companies in the three tropical forests regions of Southeast Asia, Brazil and Central and West Africa received over USD 153.9 billion in credit¹⁵. In light of such findings, we believe that this issue is of **critical importance** and strongly recommend that the European Commission assess the link between the finance sector and the production of forest risk commodities and unequivocally include the finance sector in its legislative proposal.

- How to ensure an effective enforcement of any upcoming legislation?
 - Sufficient human and technical resources must be allocated to the authority in charge of implementing and enforcing the law;
 - Effective, sufficiently dissuasive and proportionate levels of sanctions must be available. This means, at a minimum, that the penalty regime must ensure that the goal set by the legislative body is reached and that non-compliance is economically unattractive in case of non-compliance;
 - Opportunities must exist for third parties to submit substantiated concerns with a strong, clear and formal procedure where the plaintiff will be informed of the admissibility of its complaint and the outcomes of subsequent investigations, including opportunities for judicial appeal; and
 - The actions and processes of the authorities in charge of implementation and enforcement and the results of checks carried out and sanctions imposed must all be conducted transparently and all appropriate information must be publicly available.
- What role could certification play under mandatory due diligence?

¹⁵ <https://forestsandfinance.org/ff-briefing-2020/>

Current forest risk commodities certification schemes have well-documented limitations¹⁶ and are no substitute for rigorous due diligence by companies on their supply chains. In accordance with the provisions of the EU Timber Regulation, operators can use the certification tool when self-assessing and mitigating the risk of timber being illegally logged, but cannot use it on its own as evidence of compliance with the legislation. ClientEarth believes that the upcoming law should follow a similar approach by not overly relying on certification or industry-led schemes and instead establishing a rigorous and legally binding due diligence requirement on companies.

- Should the legislative proposal include a reporting obligation?

In order to be effective, future legislation should require that all companies conduct and report on their due diligence.

Legislation should specify in detail the elements that should be included in a report, including the format of the report and its frequency, relevant plans for implementation of due diligence, risks identified and measures taken to mitigate the risks, and full public disclosure.

Other key measures

Introducing new demand side measure is an action coming from the first priority of the 2019 Communication. While ClientEarth believes that the upcoming legislative proposal will be essential to protect forests, ecosystems and the rights of local communities and indigenous people, it cannot be a stand-alone solution and some emphasis should also be given to the other key priorities and actions of the Communication.

Working in partnership with producer countries (Priority 2 of the Commission's Communication)

ClientEarth believes that partnership with producer countries should include:

- Supporting local communities and indigenous peoples: Supporting LCIPs to secure and enforce their rights has a significant impact on conserving the world's last remaining forests. Community-led solutions such as community forestry systems, as well as local indigenous knowledge should be promoted. Forest partnerships should include the promotion and recognition of the rights of LCIPs to Free, Prior and Informed Consent (FPIC), legal recognition of customary tenure rights, and women's rights and appropriate representation.
- Supporting small-scale producers: Small-scale agriculture is a major driver of deforestation in many countries, so supporting smallholder farmers to transition to sustainable agricultural practices is key to ensuring country-wide sustainable agriculture and ensure sure they are not left behind or disadvantaged as partner countries adopt more sustainable approaches. Other small-scale sustainable livelihood opportunities, such as community carbon sequestration, should also be supported.

¹⁶ Research undertaken for the European Commission found that: *"The certification schemes still come with some principal limitations to be handled...one key issue is the challenge of monitoring, disclosure and enforcement"*. ECOFYS, Milieu & COWI, Feasibility study on options to step up EU action against deforestation, 2018. p.128.

- Strengthening legal frameworks and establishing multi-stakeholder and participatory processes: partnerships should ensure that legal frameworks in partner countries are strengthened, including through inclusive multi-stakeholder approaches and dialogues on forest policies and governance. These must clearly include the transparent and accountable enforcement of those legal frameworks.

FTAs and Trade and Sustainable Development Chapters (Priority 3 of the Commission's Communication)

Trade should be a means to achieve better social and environmental standards, rather than an end in itself. Negotiators should therefore ensure that Free Trade Agreements (FTAs) do not put further pressure on the environment, social and human rights, and in particular do not negatively impact forest ecosystems and the livelihoods of local communities and indigenous peoples.

We find that a much more fundamental reform of the current approach to trade and sustainable development is required to ensure that all signatories to FTAs are genuinely committed to achieving social and environmental outcomes as well as to ensure that the trade agreement itself is a building block towards more sustainable trade. This reform process should involve:

- The development of mechanisms for ensuring effective monitoring of the impacts of the FTA, both before and after it comes into force. The EU and its trade partners should work to better understand the impacts of FTAs on environmental and social outcomes, including the differential impacts of trade on particular supply chains.
- Proper enforcement of meaningful commitments to key international environmental and social standards. The EU and its trade partners should develop mechanisms for ensuring that all parties demonstrate their commitments to key international environmental and social standards (e.g. to reducing carbon emissions, ensuring protection against deforestation and protecting the rights of indigenous peoples) both before and after the FTA comes into force.
- Action to ensure that the expanded trade which takes place through FTAs is environmentally and socially beneficial. In areas of trade where there is no way of ensuring this, parties should refrain from granting preferential access with respect to those goods and services. Where access is granted, specific action should be taken, targeted at the environmental and social issues in particular supply chains.

**

Clotilde Henriot

Trade and Environment Lead

020 3030 5973

chenriot@clientearth.org

www.clientearth.org



Brussels
60 Rue du Trône (3ème étage)
Box 11, Ixelles, 1050 Bruxelles
Belgique

Beijing
1950 Sunflower Tower
No. 37 Maizidianjie
Chaoyang District
Beijing 100026
China

Berlin
Albrechtstraße 22
10117 Berlin
Germany

London
Fieldworks
274 Richmond Road
Martello St. Entrance
E8 3QW
United Kingdom

Warsaw
ul. Mokotowska 33/35
00-560 Warszawa
Polska

Madrid
García de Paredes
76 duplicado
1º Dcha
28010 Madrid
Spain