

Comparing recent deforestation measures of the United States, European Union, and United Kingdom

Jeffrey Weiss, Katy Shin, Eva Monard, Simon Tilling and Byron Maniatis

Steptoe & Johnson LLP, Washington, D.C. and Brussels

In the last quarter of 2021, the United States, the European Union, and the United Kingdom introduced or adopted measures aimed at eliminating illegal deforestation throughout the world. All three measures recognise the harmful effects of deforestation with regard to climate change and seek to address such effects by prohibiting certain commodities produced on (illegally) deforested land from being placed on their respective markets. However, there are significant differences among the measures that warrant closer examination as they could have market access implications for companies.

This article sets out the key similarities and differences across the US, EU, and UK anti-deforestation measures, building on Steptoe's previous posts on the proposed Fostering Overseas Rule of Law and Environmentally Sound Trade Act of 2021 ('the FOREST Act') in the United States, the European Union's 'Proposal for a Regulation on Deforestation-free Products' ('the Proposed Regulation'), and the United Kingdom's Environment Act 2021 ('the Environment Act').¹

Scope of products

As noted above, the three anti-deforestation measures prohibit the entry of certain commodities originating from (illegally) deforested land onto their respective markets. Table 1 summarises the scope of products that are covered under each measure.

The covered commodities under the US and European Commission ('the Commission') proposals are nearly identical – with the exception of rubber, which is only on the US list, and coffee, which is only on the EU list. Both proposals also include whole commodity products and products derived from such commodities. It is important to note that the scope of the derivative products appears to be broader under the Proposed Regulation, as it not only includes products that contain or have been made with the relevant commodities, but also includes products that have been fed the relevant commodity. Moreover, while the Proposed Regulation seems to cover wood products in

Table 1

<i>European Union</i>	<i>United Kingdom</i>	<i>United States</i>
<i>'Relevant commodities':</i> oil palm, soya, cocoa, cattle, wood, and coffee.	<i>'Forest risk commodities':</i> to be determined by the Secretary of State. Current consultation	<i>'Covered commodities':</i> palm oil, soy, cocoa, cattle, rubber, and wood pulp.
<i>'Relevant products':</i> products that contain, have been fed with or made with relevant commodities, including palm oil, soya-bean oil, leather, chocolate, and furniture.	proposes cattle (for example, beef and leather), cocoa, coffee, maize, palm oil, rubber, and soy.	<i>'Covered products':</i> products made wholly or in part of a covered commodity.

general, as compared to the wood pulp products covered under the FOREST Act, both jurisdictions maintain laws that prohibit illegally sourced timber (the EU Timber Regulation and the Forest Law Enforcement Governance and Trade Regulation, as well as the US Lacey Act Amendment of 2008, respectively).

Unlike the proposed US and EU measures, the UK Environment Act does not specify the products included under 'forest risk commodities'. Instead, the legislation directs the Secretary of State to pass regulations to define 'forest risk commodities'. As noted above, current consultations of the Secretary of State include similar commodities as the US and EU lists, with the exception of maize, which is exclusive to the UK list. Moreover, similar to the FOREST Act, the UK proposal does not include timber or timber products, as they are regulated under the UK Timber Regulations. Although no commodities have yet been specified as 'forest risk commodities', the Environment Act adopts a similar approach to the Commission's Proposed Regulation and includes both commodities and derivative products, including 'any product of an animal fed on a forest risk commodity or a product derived from a forest risk commodity'.

Finally, for the proposed US and EU measures, reviews of the lists of commodities and products will be conducted on a regular basis. Under the FOREST Act, the list of covered commodities is to be updated at least annually, while the Proposed Regulation contemplates a review two years after enactment, and thereafter at regular intervals.

¹ A more comprehensive analysis of each measure can be found at: (for the US) 'Potential Implications of the FOREST Act of 2021 and Related Developments in Other Jurisdictions' | Global Trade Policy Blog (steptoe.globaltradeblog.com); (for the EU) 'The European Commission's Proposed Ban on Products Driving Deforestation and Forest Degradation' | Global Trade Policy Blog (steptoe.globaltradeblog.com) and (for the UK) 'The UK's Environment Act 2021: A vehicle to "deliver the most ambitious environmental programme of any country on earth"': www.steptoe.com/en/news-publications.

A review period was not specified in the Environment Act, but one of the reasons for allowing the Secretary of State to define forest risk commodities by regulations is because it 'offers the flexibility ... to extend the range of commodities captured ... to accommodate changing patterns of deforestation', and therefore regular reviews are anticipated.

Prohibitions

All three measures prohibit the entry of illegally deforested commodities and products into their markets. However, what is considered illegal deforestation varies.

As shown in Table 2, potential coverage of the Proposed Regulation is more extensive than the FOREST Act and the UK Environment Act with regard to how deforestation is defined. All three measures prohibit market access to commodities and products that were produced in violation of the relevant laws of the exporting market, but the proposed Commission regulation also requires the commodities and products to be 'deforestation-free'. The Proposed Regulation defines 'deforestation-free' as relevant commodities and products that were produced on land that has not been subject to deforestation since 31 December 2020, and wood that has been harvested from forests without inducing 'forest degradation' after 31 December 2020.

Put simply, the Proposed Regulation can prohibit market access to relevant commodities and products produced on land that was *lawfully* deforested under the local laws of the country of production. Moreover, 'deforestation' is broadly defined under the Proposed Regulation as 'the conversion of forest to agricultural use, whether human-induced or not'. Additionally, even if the product was produced on deforested land, the definition for 'forest degradation' is also expansive. Specifically, the definition covers land where 'harvesting operations that are not sustainable and cause a reduction or loss of the biological or economic productivity and complexity of forest ecosystems, resulting in the long-term reduction of the overall supply of benefits from forest, which includes wood, biodiversity and other products or services'.

In addition, the prohibitions under the EU and UK measures extend further than the FOREST Act in terms of the list of prohibited acts. The Proposed Regulation prohibits the import, sale, and export of relevant commodities and products from the EU, and applies equally to foreign and domestic commodities and products. The Environment Act prohibits the use of covered forest commodities in UK commercial activities, which includes activities such as manufacturing, production, processing, distribution, sales, supplying, and purchasing for the purposes of producing or distributing, so it also applies to both foreign and domestic commodities and products. In contrast, the FOREST Act's restrictions are limited to imports of certain commodities and products.

Due diligence

All three measures implement a risk-based system for conducting due diligence on the supply chains of the selected commodities and products.

The FOREST Act imposes due diligence measures on importers of certain commodities and products to certify that the imports were not produced on illegally deforested land. Specifically, importers of covered products must file a declaration upon entry certifying that reasonable care was taken to assess and mitigate the risks that any covered commodity used to make the product was produced on illegally deforested land. This provision goes into effect one year after enactment. The FOREST Act directs the US Customs and Border Protection ('the CBP') to publish guidance on standards for 'reasonable care' within 90 days of enactment.

Importers of covered products from countries with action plans (explained further in the next section) are subject to more stringent due diligence measures. For these importers, a declaration with sufficient information to identify the steps in 'the supply chain and all points of origin for the covered commodity' and the 'steps taken to assess and mitigate the risks' that there was illegal deforestation along the supply chain in those countries must be filed at time of entry. This provision is also effective one year after enactment.

Table 2

<i>European Union</i>	<i>United Kingdom</i>	<i>United States</i>
<p>No relevant commodities and products can be placed, made available on or be exported from the EU market, unless the following conditions are met:</p> <ul style="list-style-type: none"> • deforestation-free; • produced in accordance with relevant legislation of the country of production; and • covered by a due diligence statement. <p>(12-month grace period after entry into force)</p>	<p>No use of forest risk commodities or products derived from that commodity in UK commercial activities unless '<i>local laws were complied with in relation to that commodity</i>' in the country of production.</p>	<p>No covered commodities or products that are produced from <i>illegally deforested land</i> (that is, deforestation in violation of the law of the country where deforestation is occurring) can enter the US market.</p> <p>No covered product from countries with action plans can enter the US market, unless the importer files a declaration upon entry certifying that certain due diligence measures were taken to assess and mitigate risks of <i>illegal deforestation</i> in the supply chain.</p> <p>(Effective one year after enactment)</p>

Under the Proposed Regulation, operators and traders (other than SMEs) must undertake due diligence to ensure that relevant commodities and products are not prohibited pursuant to the Proposed Regulation, and submit a due diligence statement certifying compliance. Operators are those who place 'relevant commodities and products on the Union market or export them from the Union market' in the course of commercial activities, while traders are those 'in the supply chain other than the operator who, in the course of commercial activity, makes available on the Union market relevant commodities and products'.

To comply with these due diligence measures, operators and traders are required to: (i) collect and keep records of information related to the supply chain of the relevant commodities and products; (ii) conduct risk assessments of potential non-compliance with the requirements; and (iii) perform risk mitigation measures if there is a non-negligible risk of non-compliance. If this is not possible, they will be prohibited from placing or making available the relevant commodities or products on the EU market or exporting therefrom. Large companies will be given a 12-month grace period before they will need to certify compliance, while microenterprises will be given a 24-month period.

The Environment Act enacts a similar due diligence system as the Proposed Regulation. Businesses of a certain size that use a forest risk commodity or derivative product in their UK commercial activities must establish and implement a due diligence system. This system must: (i) identify and obtain information about the commodity/product; (ii) assess the risk of non-compliance with local laws; and (iii) mitigate such risks. The Environment Act tasks the Secretary of State to provide further guidance with respect to the types of information to obtain, standards to assess risk, and ways to mitigate risk. The Secretary of State is also consulting on the risk mitigation level and considering proposals to 'eliminate risk or reduce risk to as low as reasonably practicable'. Moreover, the threshold for when a business will be within scope is under consultation. Businesses within scope, but that only use small amounts of the commodity, can apply for an exemption. There will be a transition period of at least six months.

Country risk assessment

Accompanying the due diligence measures explained above, the FOREST Act and the Proposed Regulation require additional due diligence for commodities and products produced in countries with higher risk of deforestation.

Under the Proposed Regulation, the Commission will create a benchmarking system that classifies countries as low, standard, or high risk based on assessment criteria that evaluate a country's rate of deforestation and forest degradation, its initiatives to tackle deforestation and forest degradation, as well as specific assessments linked to particular commodities. Relevant commodities and products originating from countries identified as low-risk would have less stringent due diligence obligations,

where only the first step of the due diligence measure would apply. However, relevant commodities and products originating from high-risk countries will be subject to higher scrutiny of their due diligence performance by Member States. Concerns have been raised as to whether such a system conflicts with EU Member States' WTO obligations.²

The FOREST Act also classifies countries as high-risk or not high-risk, and applies additional due diligence measures to high-risk countries. The United States Trade Representative ('USTR'), in consultation with the State Department and the United States Agency for International Development ('USAID'), would identify countries with inadequate and ineffective protections against illegal deforestation. For countries identified as high-risk, USTR would develop action plans with measurable goals and benchmarks. Covered products originating from countries with action plans would be subject to stricter due diligence requirements. The FOREST Act requires USTR to identify high-risk countries within 180 days of enactment and to develop action plans for them within three years.

Unlike the Proposed Regulation and the FOREST Act, the Environment Act does not provide for different tiers of risk assessment based on a central list produced by the UK Government; instead, it is for businesses to determine whether there is a low, medium, or high risk of illegal land use in a source country, and plan its mitigation according to that level of risk.

International cooperation

The FOREST Act and the Proposed Regulation contemplate cooperation with other countries. The FOREST Act allows limited cooperation with producer countries for the purpose of developing action plans. The action plans ultimately must implement certain goals, such as new laws to eliminate illegal deforestation in the producer country, measures to ensure that the country has sufficient capacity to enforce deforestation laws, processes to address and remedy previous illegal deforestation activities, and comprehensive monitoring and data sharing with the producer country to track deforestation and potential impacts on commodity supply chains.

While producer countries are not involved in the European Commission's risk classification, the Proposed Regulation directs the Commission to notify and extend an opportunity to countries to participate in the classification process, if the Commission intends to change the country's risk level. The Proposed Regulation also provides for cooperation and engagement between the Commission and producer countries so as to develop partnerships to jointly address deforestation and forest degradation. Types of cooperation include: structured dialogues, support programmes, and provisions in agreements to 'enable producer countries to make the transition to an agricultural

² See <https://www.washingtonpost.com/world/2021/11/17/eu-commodity-imports-deforestation/>.

production that facilitates' compliance. Implementation of such provisions will be considered by the Commission when classifying risk levels.

The UK Environment Act does not contain any specific provision for international cooperation, but the consultation indicates that where producer countries wish to establish standards on sustainable production, the UK will 'continue to support and help strengthen those standards to deliver robust environmental outcomes while supporting local economies'.

Enforcement

The rules regarding enforcement of the Proposed Regulation will need to be implemented across the EU's Member States. Each EU Member State's relevant authorities is responsible for enforcement. To enforce the due diligence measures of the Proposed Regulation, EU Member State authorities must ensure that annual compliance checks cover at least 5 per cent of the relevant operators and 5 per cent of the quantity of each of the relevant commodities placed, made available, or exported from their markets. For relevant commodities and products produced in high-risk countries, however, Member States are obligated to annually review 15 per cent of operators and 15 per cent of the quantity of the relevant commodities placed, made available, or exported from their markets.

The FOREST Act assigns enforcement obligations to multiple federal agencies, including US Customs and Border Protection and Departments of Agriculture, Interior, and Justice. In addition, the US Animal and Plant Health Inspection Service ('APHIS'), in collaboration with other federal agencies, will conduct random audits of importer filing declarations, and share declarations with other federal agencies to ensure effective enforcement. Under the bill, CBP will establish enforcement mechanisms within 180 days after enactment, and include a process for receiving information from the public of potential violations.

The enforcement provisions under the UK Environment Act will be built out through regulations implemented by the Secretary of State. Such regulations may include

guidance on how enforcement authorities will exercise their powers (for example, inspection, examination, search and seizure) as well as recordkeeping requirements.

Timeframe for passage

Unlike the UK Environment Act, which was enacted in November 2021, and the Proposed Regulation, which the Commission hopes will be adopted by 2023, the likelihood of the FOREST Act's passage and timing are uncertain. The bill's sponsors are committed to moving it, but it is unlikely to be voted on in 2022 and the political environment for climate measures in the United States could change dramatically in 2023. In 2022, while the FOREST Act and Proposed Regulation continue to be developed, it will be important to monitor the crafting of UK secondary legislation to bring the due diligence obligations of the Environment Act into force.

Conclusion

While this article provides a general overview of the similarities and differences of the US, EU, and UK measures, businesses interested in the potential compliance implications for their supply chains would benefit from a closer reading of each measure and an analysis of how the measures may impact their supply chains. All three measures are likely to increase costs for producers and/or purchasers of the relevant commodities and products derived from these commodities to a significant degree, even precluding market access in some cases. While the Commission's Proposed Regulation appears to be the most restrictive of the three measures, at least at the moment, both the EU and US measures are likely to undergo major changes, and the UK implementing regulations are still to come. It is also a near certainty that these three will not be the only jurisdictions to adopt anti-deforestation measures. Firms that are conducting business in one or more of these jurisdictions and that may be impacted need to follow closely the development of these measures, examine their supply chains, and begin evaluating options to mitigate potential risks and take advantage of opportunities.³

³ This article was first published at Steptoe & Johnson LLP | Global Trade Policy ([steptoeglobaltradedblog.com](https://www.steptoeglobaltradedblog.com)).