

Traceability and Regulation October 2024

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European Union Deforestation Regulation: Where are we now?

The European Union Deforestation Regulation (EUDR) has created a lot of political turbulence at European, national and corporate levels.

Recent elections in the European Union and some key member states have shifted the political bias to the right. This has all happened between the EUDR entry into force and entry into application, the 18 months between 29th June 2023 and 30th December 2024.

There have been member states that have called for a delay, while others have gone further and called for the regulation to be opened up for a full amendment of the wording in an attempt to destroy it entirely. Austria, Portugal, and Germany have been particularly vocal.

There have also been calls from the European Cocoa Association (in opposition to some of its members and the brands) and the European Coffee Federation, along with the German Coffee Federation, have consistently called for a delay.

Origin countries like Brazil, Indonesia, and Malaysia, affected by the regulation have also joined in on these calls.

Following all this pressure, the Commission announced on 2nd October that they would propose a delay for voting approval by the European Parliament and the Council.

Why delay?

There are specific requirements under the regulation relating to the responsibilities of the Commission. These responsibilities need to be fulfilled prior to entry into application as they are critical to enable the relevant industries, including cocoa, to be compliant with the regulation.

The responsibilities are:

Country Risk Benchmarking:

The Commission has to risk rate each producing country, including EU member states, on the basis of low, standard and high. Operators placing relevant commodities on the EU market coming from low-risk rated countries are only required to conform to the requirements of Article 9 (which is to collect data) and have proof of the farm plots where the commodity came from. Standard and high-risk countries are required to implement Article 9 and traceability, as well as Articles 10 and 11 (which are to assess and mitigate risk).

Finally, the National Competent Authorities (NCAs) are required to inspect 9% of parcels from high-risk countries, 3% from standard-risk and 1% from low-risk countries.

The Commission announced about 6 months ago that they would not be able to finalise the risk rating on time so, for an interim period, every country would be rated as standard. The implications are that countries that would have been low-risk would now have to implement Articles 9, 10, and 11, rather than just Article 9.

This has specifically frustrated EU member states believing they would be low-risk. The delay in benchmarking has plunged their timber, soy, and cattle industries into far more effort and resources than would have been necessary if the benchmarking had been completed on time.

There are also political implications that the Commission has to manage, where objections from producing countries expecting to be rated as high-risk are already calling on the World Trade Organisation (WTO) to prevent the regulation from entering into application because of discrimination of their countries.

Information System:

The information system being developed by the Commission had some patchy reviews from its first pilot testing and has caused concern at the corporate (operator) level. The main issues relate to the user-friendliness of the system in supply chains where multiple smallholder farm plot locations would be required to be uploaded to the platform. The subsequent development of the platform has been considerably improved, but the damage has already been done.

The resulting outcome has been the lobbying concentrated on the concept that if the Commission isn't ready then why should we be ready? Let's delay until they are.

Guidelines and FAQs:

The regulation is not complicated, but the interpretation of the wording is.

This requires guidelines and clarifications. The Commission chose two methods to bring clarification one being the FAQs and the other being guidelines.

The initial version of the FAQs was published in December 2023 bringing almost as much confusion as clarification, thus bringing a promise that an updated version along with the guidelines would be published imminently.

Tomorrow never comes! Initially, there was a promise that the updated FAQs would be available in February 2024 then the next week, then the next week, and so on. Finally, the updated FAQs were published in October 2024. Again, the damage had already been done. There was a leaked Guideline published by Politico but nothing official came out which teased but did not deliver. With nothing forthcoming, the credibility of the whole process collapsed and ended up adding fuel to the fire of the requests for delay.

National Competent Authority's Readiness

The NCA for each member state has an obligation to be appointed and ready between entry into force and entry into application. The general opinion was that they were not going to be ready and, in some cases, not even appointed. There has been a view that the NCAs will be under-resourced with the requirement to implement the regulation across seven commodities.

The European Union Timber Regulation (EUTR) served as a preparation ground for the vast majority of the appointed NCAs for the EUDR.

In relation to cocoa, the most relevant member states, being the Netherlands, Germany, Belgium, and France, are ready and I do not believe that their NCAs would say that a delay was required for them to do so.

Voluntary Partnership Agreements (VPA)

The earlier stages of the development of the regulation highlighted the need to support highly affected origin countries in complying with the requirements of the regulation. The expectation was that there would have been programmes of support timed to precede the entry into application. This never happened. The regulation moved far ahead of the support needed to help comply.

What is the procedure for the delay?

The Commission has proposed an amendment to the wording of the regulation to delay the entry into application from 30th December 2024 to 30th December 2025 for in-scope operators and for Small and Midsize Enterprises (SMEs) from 30th June 2025 to 30th June 2026 to the European Parliament and the Council.

The Agreement and Adoption

The steps that need to be followed are:

- The appointment of a rapporteur to manage the process;
- A trilogue negotiation between the Commission, the European Parliament, and the Council to agree on the wording of the proposed amendment;
- A vote in the European Parliament plenary session;
- A vote at Council;
- Finalising the wording through a trilogue discussion between the European Parliament, the Council, and the Commission;
- Lawyers' approval and translation of the agreed wording of the amendment to delay;
- Translation; and
- Publishing three days later.

Timing

The Rapporteur has been appointed.

The trilogue negotiation to agree on the wording of the proposal to delay has been completed.

The Council has voted and approved the wording.

Parliament needs to vote in plenary with the following timing of available sessions in the schedule: 13th/14th November, 25th November, or 16th December.

What does this mean? Will there be a delay?

The certainty that there will be a delay in entry into application will only be clearer when the vote has happened in parliament.

The whole process has to be completed prior to 30th December 2024 (the application date) otherwise the original timing reverts.

If the parliamentary vote is not completed on either the 13th/14th or the 25th/26th November, then in all likelihood the time will run out so the proposed delay will not be adopted. If any attempt is made to amend the wording for elements other than a delay (at least 71 votes in Parliament are needed to support such a proposal) the process would extend the time needed thus overrunning the allowable time, meaning we revert to the original timeline.

There has been a lot of progress since the announcement from the Commission, particularly the completed vote by the Council so the likelihood of the proposed delay being adopted is very high, but not an absolute certainty.

What to do now?

A friend recently compared the current situation to a student who, after being told their exam was postponed for two months, still ends up revising at the last minute.

The participants who have not got their supply chains ready by now will still not be ready in twelve months because they will still leave it to the last minute!

A delay will enable the NCAs to be ready which will therefore mean that there will not be a "soft" launch, and their audits will be much more controlled and competent. This means that operators will have a less forgiving kick-off than they would otherwise have had under the initial timing.

The benchmarking will likely be a political process to keep producing countries from running to the WTO or Member States from disrupting the process even further.

The final uncertainty is how will the NGOs react to the delay. They will not be happy and will use the time to highlight non-compliance in the supply chain irrespective of whether the regulation has entered into application. They will use the time to plan and prepare substantiated claims for when the regulation is in play.

The delay might make the situation more punitive sooner for operators than if there had been a soft start with the original timing.

It would seem that operators should continue working to be ready by the end of December until there is certainty that there will be a delay. Those operators who have not used the past 18 months to prepare should avoid revising at the last minute and use the next twelve months to get ready.