



YPOG Briefing:

What do chocolate, books and wellies have in common? – The EUDR

Or why small and medium-sized enterprises should also keep an eye on the EUDR.

Munich/Cologne, 14th of November 2024 | Carolin Raspé, Matthias Schatz

Apart from the fact that these items can sweeten a rainy autumn afternoon, they will also trigger obligations under the Deforestation Regulation in the future.

The European Parliament has decided today to postpone the date of application of the EU Deforestation Regulation 2023/1115 (EUDR) by one year, from the 30th of December 2024 to the 30th of December 2025. For small and medium-sized enterprises (SMEs), the EUDR will only apply by the 30th of June 2026. In addition, the parliament proposed very short-term changes by introducing the category of no-risk countries. As a regulation, it will apply directly upon its entry into force and does not require any implementation laws by the EU member states.

At first glance, you might think that this regulation only affects forestry companies. However, its scope is much broader: it covers a wide range of products and companies that are only remotely related to forests. The regulation covers not only wood and wood products, but also products made from rubber or soya. The manufacture or sale of rubber gloves and used car tyres falls within the scope of the regulation, as do food start-ups that produce plant-based alternatives from soya beans or soya flour. It is therefore worth taking a closer look at the scope of application and the obligations to check whether your own company is affected and to take the necessary precautions in good time, especially as violations of the regulation can result in significant penalties.

I. Scope of application

The EUDR applies to persons and companies that place "relevant products" on the market, make them available or export them from the EU that contain "relevant commodities" or are associated with their manufacture. Unlike, for example, the Supply Chain Directive (EU Corporate Sustainability Due Diligence Directive 2024/1760 - CSDDD), the EUDR therefore has a product-related scope of application that initially applies regardless of the size of the company. To determine the scope of application, a two-stage assessment is recommended: (1) Does the company deal with a "relevant product" and (2) in what role does the company handle the product?

1. Relevant commodities and products

The "relevant commodities" listed in the EUDR are cattle, cocoa, coffee, oil palm, rubber, soya and wood. "Relevant products" means products listed in Annex I of the EUDR that contain, have been



fed with or have been made using relevant commodities. If the product is not explicitly listed in Annex I, it does not fall within the scope of the EUDR even if it contains a "relevant commodity". For example, soap containing palm oil is not covered by the EUDR.

On the other hand, it is mandatory that a relevant article contains a relevant commodity to fall under the EUDR. The EUDR lists HS codes that also cover products that do not contain any relevant commodities. These are marked with the suffix "ex". For example, seating furniture is listed with the suffix "ex", so that only seating furniture made of wood and not seating furniture made of metal or other materials falls under the EUDR.

The use of the HS codes in Annex I corresponds to the internationally applicable HS nomenclature, which is known to companies. Companies should therefore be able to uniformly identify products across regulatory regimes.

2. Placing on the market and making available as the defining act

The EUDR differentiates between operators and traders in terms of addressees. Market operators within the meaning of Art. 4 EUDR are natural or legal persons who place relevant products on the market or export them in the course of their commercial activities. Placing on the market means the first making available of a relevant product on the Union market. A trader within the meaning of Art. 5 EUDR, on the other hand, is any person in the supply chain, with the exception of the operator, who makes relevant products available on the market in the course of his commercial activity. Making available on the market means any supply of a relevant product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge. The decisive criterion for distinguishing between the two groups of addressees is therefore the first making available of the product on the EU market.

II. Consequences

1. Prohibition according to Art. 3 EUDR

If the scope of application is established, the addressees are subject to the prohibition under Art. 3 EUDR. Accordingly, "relevant commodities" and "relevant products" may only be placed on the market, made available or exported from the EU if (1) they are deforestation-free, (2) they have been produced in accordance with the relevant legislation of the country of production and (3) they are covered by a due diligence statement. The central concept of deforestation-free means that products and commodities are not associated with certain forms of harmful impact on forests. This includes activities that lead to the destruction or degradation of forests. The legislator has deliberately defined this term broadly to enable comprehensive regulation (see recital 35).

2. Due Diligence Obligations

To ensure the implementation of the prohibition, operators and traders are subject to due diligence obligations in accordance with Art. 8 EUDR. According to this, the addressees must collect sufficient information to carry out a risk assessment and, based on the results, decide whether risk mitigation measures should be taken.

a) Collecting information

The information to be collected includes, for example, the geolocation data of all land on which the relevant commodities that the relevant product contains or under whose use it was manufactured were produced, as well as the time or period of production. Furthermore, the names, addresses and e-mail addresses of all direct suppliers must be collected (see Art. 9 para. 1 sentence 2 lit. e EUDR). The evidence supporting this information must be kept for a period of 5 years from the date of provision.

b) Risk assessment

The addressees are then obliged to carry out a risk assessment based on the information collected. The goal is to identify any risks that the relevant products are non-compliant; i.e. not deforestation-free and not produced in accordance with the relevant regulations of the producer country. In particular, the presence of forests in the country of production, the prevalence of deforestation or forest degradation in the country of production as well as the complexity of the relevant supply chain and the processing stage of the relevant products should be taken into account (see Art. 10 para. 2 EUDR).

c) Risk mitigation measures

If the assessment shows that there is a risk or a non-negligible risk that the relevant products are non-compliant, so-called risk mitigation procedures and measures must be taken. This includes, for example, requesting additional information or carrying out independent surveys or tests. For non-SMEs, Art. 11 para. 2 lit. a EUDR requires as risk mitigation measures the modeling of a risk management system and the appointment of a compliance officer.

d) Simplified due diligence obligations

According to Art. 13 EUDR, simplified due diligence obligations apply if the relevant products were produced in countries that have been assessed as "low risk" according to the three-tier country assessment system within the meaning of Art. 29 EUDR. In this case, however, the competent authority may require the addressees to provide documentation demonstrating that there is a negligible risk of circumvention of the EUDR and no mixing with products of unknown origin. Ultimately, this requires an analysis comparable to the risk analysis pursuant to Art. 10 EUDR. If the Council of the European Union adopts the short-term amendments proposed today, the simplified due diligence requirements of Art. 5 EUDR will apply to products originating from countries or parts thereof that present no risk.

3. Due diligence statement

In accordance with Art. 4 para. 1 and Art. 5 para. 1 EUDR, relevant products may only be placed on the market or made available if a due diligence statement has been submitted. The statement is submitted via an IT information system set up by the EU Commission (instructions for the statement). The statement must confirm that the due diligence obligations described above have been fulfilled. Annex II of the EUDR provides mandatory content for the due diligence statement. The due diligence statements can be viewed by downstream traders by entering the reference number. This



means that it is possible to adopt the information from the upstream supply chain. However, all companies in the supply chain are responsible for the accuracy of the information. In addition, according to Art. 4 Para. 5 EUDR, the addressees are obliged to update the information if they receive new information that there is a risk that a relevant product that they have already placed on the market does not comply with the EUDR. According to Art. 6 EUDR, it is possible to entrust authorised representatives with the transmission.

4. Special regulations for SMEs

For SMEs, the rules not only come into force later but are also less comprehensive. For the definition of SMEs, the EUDR refers to Art. 3 of Directive 2013/34/EU. According to this, medium-sized companies are those that do not exceed two of the following three thresholds: a balance sheet total of EUR 20 million, net revenue of EUR 40 million or an average number of employees of 250 in the financial year.

For SME traders, the central norm is Art. 5 para. 2 EUDR. According to this, they may only make relevant products available on the market if they have certain information on these products. In particular, they need the name, registered trade name or registered trademark, postal address, email address and, if available, an internet address of the operators or traders who have supplied the relevant products. They also need the reference number of the due diligence statements associated with these relevant products. SMEs must keep this information for five years.

SME operators are also privileged. The due diligence obligations to collect information, risk assessment and risk mitigation do not apply to them if a due diligence statement already exists for the product (see Art. 4 para. 8 sentence 1 EUDR); in this case, it is sufficient to provide the BMEL with the reference number of the due diligence statement at its request. If there is no due diligence statement for the product, the SME operator must fulfil the due diligence obligations in accordance with Art. 8 EUDR (see Art. 4 para. 8 sentence 2, para. 1 EUDR).

5. Sanctions

In the event of a breach of the EUDR, the company can be fined a maximum amount of at least 4 % of its total annual turnover in the EU. In addition to the confiscation of the relevant products and the revenue gained from a transaction with the relevant products, the competent authority can impose a temporary prohibition from placing or making available on the market or exporting relevant commodities and relevant products and exclude companies from public procurement processes for up to 12 months. The Federal Ministry of Food and Agriculture (BMEL) is responsible in this respect. Furthermore, the EU Commission will publish a list of companies that have violated the EUDR, mentioning them by name. The possible reputational damages resulting from such listing should not be underestimated.

III. Summary and need for action

The EUDR represents the EU's next step towards making trade in products more environmentally and climate-friendly through further ESG obligations. Specifically, the EUDR is intended to regulate and ultimately prevent trade in products that foster deforestation. The postponement of the date of application now gives companies a little more time to prepare for the new requirements. Meeting



the new compliance duties will require additional organisational and personnel resources. This also applies to SMEs, which may not yet have comprehensively analysed and documented their supply chains due to not being affected by the LKSG. For this reason, the delay granted should be used to carefully study Annex I of the EUDR to check whether their products are affected and to initiate the implementation of any obligations as quickly as possible.

We will be happy to advise you on any questions regarding the scope of application or implementation of the new regime.