heit selbst nach Darstellung des Klägers nicht. Seinem Schriftsatz vom 29.06.2022 umschreibt er es nämlich als „Freiheitsgebrauch, der spezifisch mit dem Gebrauch einer individuell absoluten Menge von Treibhausgasen" verknüpft sei und macht der Beklagten zum Vorwurf, durch übermäßige CO2-Emissionen sein, des Klägers, CO2-Budget mit aufzubrauchen. In seiner Klageschrift führt er dagegen aus, dass das Recht auf Erhalt treibhausgasbezogener Freiheit nicht gegen jeden geltend gemacht werden könne. Damit gesteht er selbst zu, dass das Recht auf treibhausgasbezogene Freiheit kein sonstiges Recht i.S.d. § 823 Abs. 1 BGB ist. Auch in dem Beschluss des BVerfG vom 24.03.2021 (1 BvR 2656/18, 1 BVR 78/20, 1 BvR 96/20, 1 BvR 288/20) findet die Argumentation des Klägers keine Stütze. Das BVerfG hat darin kein neues Grundrecht anerkannt und erst Recht kein sonstiges Recht i.S.d. § 823 Abs. 1 BGB. Vielmehr hat es sich darin damit begnügt, dem Gesetzgeber Handlungsanweisungen zu erteilen im Hinblick auf das Klimaschutzgesetz.

Anmerkung

Die Klage des Bio-Bauern gegen die VW-Gruppe am LG Detmold, die von Greenpeace unterstützt wird, ist ein Parallelverfahren zu einer weiteren Greenpeace-Klimaklage am LG Braunschweig. Die Klage erinnert hinsichtlich der Argumentation an die Shell-Klage aus den Niederlanden und gehört zu einer ganzen Reihe von Klimaklagen gegen deutsche Autohersteller (zum Status quo der Rspr. zum Klimaschutzrecht bereits KlimaRZ 2023 S. 140). Das Gericht hat im Vergleich zu den anderen bislang vorliegenden landgerichtlichen Urteilen einen eigenen Argumentationsansatz gewählt. Es hat die Abweisung der Klage vorrangig damit begründet, dass gerade nicht feststehe, dass die behauptete Beeinträchtigung des Eigentums und/oder der treibhausgasbezogenen Freiheit nur durch die Einstellung der Verbrennertechnologie beseitigt werden könne, weil es auch andere in Betracht kommende Antriebstechnologien (Wasserstoff oder Brennstoffzellen) gäbe und VW nicht vorgeschrieben werden könne, nur auf Elektroantrieb zu setzen.

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Internationale Beiträge

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Selected Legal and Practical Issues on the EU-Regulation on Deforestation-free Products

I. Introduction

Deforestation and forest degradation are taking place at an alarming rate, with an enormous impact on the loss of biodiversity. The Food and Agriculture Organization of the United Nations estimates that 420 million hectares of forest – about 10% of the world's remaining forests and an area larger than the European Union – have been lost worldwide between 1990 and 2020.[1] Deforestation and forest degradation increase alone accounts for 11% of greenhouse gas emissions through associated forest fires, permanently removing carbon sink capacities, decreasing climate change resilience of the affected area and substantially reducing its biodiversity. However, Biodiversity is the single largest nature-based opportunity for climate mitigation.

The consumption in the European Union is a considerable driver of deforestation and forest degradation on a global scale. In 2016, more than 60% of the world's cocoa and about 50% of its coffee went to Europe. The European Union is one of the largest importers of commodities linked to deforestation.[2]

That is why the European Parliament resolved in April 2023 the Regulation on making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation – so called „Regulation on deforest-free products" (in the following: „**EU-DR**"). The new regulation repeals the Regulation (EU) No 995/2010 laying down the obligations of operators who place timber and timbe products on the market (so called „Timber Regulation", in the following: „**EU-TR**").

The EU-DR is ambitious. It addresses in general seven commodities which are linked to deforestation. Also, in contrast to the EU-TR, it is no longer relevant whether the deforestation takes place in a legal or illegal way. The only relevant criterion is the actual destruction of a forest. This is supposed to prevent the creation of wrong incentives for producing countries, who might otherwise be tempted to lower environmental standards to facilitate the access of their products to the EU if only legality controls were established in the proposal.[3]

Based on the EU's experiences with the EU-TR, the EU-DR implements and improves the procedures created by the EU-TR.

1 FAO, Global Forest Resource Assessment 2020, p. XII, https://fmos.link/20023 (last accessed: 23.05.2023).

2 World Resources Institute: How a New EU Regulation Can Reduce Deforestation Globally, https://fmos.link/20024 (last accessed: 23.05.2023).

3 European Commission Proposal for a Regulation on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 from 17.11.2021, p. 11, https://fmos.link/20025 (last accessed: 23.05.2023).

The experience with the FLEGT Regulation[4] has also been taken into account. This regulation forms the basis for voluntary partnership agreements to ensure that only legally harvested timber from countries participating in this agreement is imported into the EU.[5]

II. The EU-DR as part of the European Green Deal

Furthermore, the EU-DR is part of the European Green Deal. The Deal is a new growth strategy from the year 2019 that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy. It establishes binding targets for the reduction of greenhouse gases. For 2030, the reduction target of gas emissions is at least 50% and aims towards 55% compared with 1990 levels.[6] The aim is climate neutrality by 2050.[7]

To reach these goals, the EU wants to focus on clean, affordable, and secure energy, and on sustainable and smart mobility. Additionally, the EU follows a from „Farm to Fork" Strategy, standing for a fair, healthy and environmentally friendly food system. A big part of the „green" future of the European union is also the element „Preserving and Restoring Ecosystems and Biodiversity".[8] In connection with these last two elements it was already announced that the Commission will take both regulatory and other measures to promote imported products and value chains that do not involve deforestation and forest degradation.

III. Overview of the Timeline (proposal, adoption etc.)

Having already been initiated in 2003 when the EU adopted the Action Plan Forest Law Enforcement, Governance and Trade („**FLEGT**"),[9] on 17 November 2021, the European Commission presented a legislative proposal that aims to reduce deforestation and forest degradation. On 6 December 2022 the Council and the European Parliament, together with the Commission, reached a preliminary agreement on the Commission proposal for a regulation on the prevention of deforestation.[10] The Parliament adopted the regulation on 19 April 2023. Now that the Council has in turn adopted the regulation, it will be published in the EU's Official Journal and enter into force 20 days later.[11]

IV. Outline of the Regulation's Content

This article will commence by explaining the scope and the definitions to provide an introduction to the extensive regulations. Then the essential general prohibition and the requirements that must be met for in scope commodities or products to be placed on the market will be presented. This will be followed by an overview of the obligations that will be imposed on the companies depending on the size of the company and its role on the market and on the country the material is coming from. Subsequently, the Member States' and competent authorities' powers and obligations will be presented, as well as the consequences of non-compliance. Lastly, an overview of the possibility to express substantiated concerns, access to justice as well as the implementation deadline will be given.

V. Subject Matter and Scope

The scope of the EU-DR covers seven relevant commodities and relevant products, Art. 1 EU-DR. In contrast to the company-based approach of the German LkSG (and also the upcoming EU Directive on Corporate Sustainability Due Diligence), the EU-DR pursues a purely product-related approach.[12]

Pursuant to Art. 2 no. 1 EU-DR '*relevant commodities*' means cattle, cocoa, coffee, oil palm, rubber, soya and wood. These commodities were chosen since recent research identified them as the largest share of Union-driven deforestation.[13] Also, wood was ultimately included as it was already covered by the EU-TR. Rubber was not yet included in the Commission's proposal of 17 November 2021. It was added later in the European Parliament legislative resolution of 19 April 2023. The relevant commodities could be expanded by maize after an evaluation two years after the date of entry into force of the EU-DR as provided for in Art. 34 para. 2 EU-DR.

As stated by Art. 2 no. 2 EU-DR, 'relevant product' means *„products listed in Annex I that contain, have been fed with or have been made using relevant commodities"*. However, Recital 40 states that used commodities and products that have completed their lifecycle and would otherwise be disposed of as waste within the meaning of Art. 3 point para. 1 of Directive 2008/98/EC shall not be covered by the EU-DR. Their recycling shall be encouraged. Thus, the distinction between waste and by-products will become even more relevant in future.

In economic terms, the EU-DR's scope is wide and challenging for entire global companies that act with the named commodities and relevant products. The EU-DR lays down rules for placing and making available relevant commodities and products on the European Union market as well as for exporting from the European Union. According to Art. 2 no. 16 EU-DR, placing on the market means the first making available of a relevant commodity or relevant product on the Union market. Pursuant to Art. 2 no. 18 EU-DR '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. It is thereby irrelevant whether the supply is paid or free of charge.

The regulation has two purposes. First, it shall minimise the Union's contribution to global deforestation and forest degradation,

4 Council Regulation (EC) No 2173/2005 on the establishment of A FLEGT licensing scheme for imports of timber into the European Community: https://fmos.link/20026 (last accessed: 23.05.2023).

5 EU Commission No 995/2010 from 17.11.2021, s.u. Fn. 3, p. 2.

6 Communication from the Commission to the EU Parliament, the Council, the European, Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM/2019/640 final, p. 2, https://fmos.link/20027 (last accessed: 23.05.2023).

7 EU Commission, COM/2019/640 final, s.u. Fn. 6, p. 4.

8 EU Commission, COM/2019/640 final, s.u. Fn. 6, p. 14.

9 The FLEGT tackles illegal logging and associated trade but it does not address deforestation as such. The two main components of the FLEGT Action Plan are the EU-TR and Voluntary Partnership Agreements (VPA) between the EU and timber producing countries.

10 EU Council, press release on 06.12.2022: https://fmos.link/20028; European Parliament, press release on 06.12.2022: https://fmos.link/20029; (both last accessed: 23.05.2023).

11 EU Commission, press release on 16.05.2023: https://fmos.link/20030 (last accessed: 23.05.2023).

12 Ruttloff/Wagner/Hahn, CB 2022 S. 64 (65).

13 According to Recital 38, palm oil has the biggest share with 34%, followed by soya (32,8%), wood (8,6%), cocoa (7,5%), coffee (7,0%), cattle (5,0%) and rubber (3,4%).

and thereby contribute to reducing global deforestation. Achieving these goals is not only desirable, but urgently necessary. According to Recital 8, the impact assessment of the EU-TR estimates that, without appropriate regulatory intervention, the Union's consumption and production of the seven commodities alone (cattle, cocoa, coffee, oil palm, soya, rubber and wood) would lead to approximately 248.000 hectares of deforestation per year by 2030. Secondly it aims to reduce the Union's contribution to greenhouse gas emissions and global biodiversity loss. This is against the background of the mentioned obligatory aim for climate-neutrality from the European Green Deal.

VI. Prohibition set up by the EU-DR

The central provision of the EU-DR is the prohibition of Art. 3 EU-DR. In principle, it is forbidden to place or make available or export any relevant commodity or relevant product on or from the European Union market. This is all the more true as the wording of the resolution has been reversed compared to the Commission's proposal. It used to read: „*Relevant goods and products may only be placed or made available on the Union market or exported from the Union market if all of the following conditions are met [...]*". However, the placing on the market is possible, if three conditions are met.

1. Deforestation-free

First, the product must be deforestation-free. Art. 2 no. 13 EU-DR defines the term 'deforestation-free'. It distinguishes between the relevant products related to relevant commodities and relevant products related to wood. In line with Recital 35, this definition should be sufficiently broad to cover deforestation and forest degradation, should provide legal clarity, and should be measurable on the basis of quantitative, objective and internationally recognised data.

It should be noted here that the scope of the EU-DR may be considerably expanded in the future. According to Art. 34 para 1. EU-DR, one year after the date of entry into force, the Commission shall present an impact assessment, accompanied, if appropriate, by a legislative proposal, to extend the scope of the EU-DR to include other wooded land that will be defined in Art. 2 no. 12 EU-DR. For example Brazil's Cerrado – the source of an estimated 65% of the EU's soya-related deforestation[14] – may then be included, too. From 2026, the EU-DR may thus cover other ecosystems with high biodiversity value or heavy carbon content.

Art. 2 no. 13 (a) EU-DR will be of particular importance for foodstuffs. In the case of a relevant products, it defines them to be deforestation free if they „*contain, have been fed with or have been made using, relevant commodities that were produced on land that has not been subject to deforestation after 31 December 2020*".

According to Art. No. 4 EU-DR, 'forest' „*means land spanning more than 0,5 hectares with trees higher than 5 meters and a canopy cover of more than 10%, or trees able to reach those thresholds in situ*". However, „*land that is predominantly under agricultural or urban land use*" is excluded. In compliance with Art. 2 no. 3 EU-DR, 'deforestation' „*means the conversion of forest to agricultural use, whether human-induced or not*".

However, regarding cattle, the EU-DR reduces the burden on cattle traders in accordance with Recital 39. It is sufficient to refer to the geographical location of each of the establishments where the cattle have been raised. It is not necessary to prove the geolocation information of the feed fed to the cattle.

In the case of relevant products according to Art. 2 no. 13 (b) EU-DR they are deforestation-free if they „*contain or have been made using wood, that the wood has been harvested from the forest without inducing forest degradation after 31 December 2020.*"

Pursuant to Art. 2 no. 7 EU-DR, 'forest degradation' „*means structural changes to forest cover, taking the form of the conversion of a primary forests or naturally regenerating forests into plantation forests or into other wooded land*". Alternatively, it also includes the conversion of primary forests into planted forests.

'Primary forests' are „*naturally regenerated forest of native tree species in which there are no clearly visible indications of human activities and in which the ecological processes are not significantly disturbed*", Art. 2 No. 8 EU-DR. Art. 2 no. 9 EU-DR defines naturally regenerating forests as forest predominantly composed of trees established through natural regeneration. The definitions of primary forests and naturally regenerating forests were added later.

Primary and naturally regenerating forests have in common that their unique biodiversity and structural features are endangered by intensive management. Furthermore, the European Environment Agency has noted that less than 5% of European forest areas are now considered to be undisturbed or natural.[15]

Primary forests are particularly worthy of protection. In the words of Recital 15, they are „unique and irreplaceable". Plantation forests and planted forests have a different biodiversity composition and provide different ecosystem services compared to primary and naturally regenerating forests.

2. Production in accordance with the relevant legislation of the country of production

As a second requirement, relevant commodities and relevant products must be produced in accordance with the relevant legislation of the country of production. The Commission's proposal of 17 November 2021 defined „relevant legislation of the country of production" as „the rules applicable in the country of production concerning the legal status of the area of production in terms of land use rights, environmental protection, third party rights and relevant trade and customs rules under the legal framework applicable in the country of production".

Other areas of law were added to this catalogue in the resolution of 19 April 2023, namely (c) forest-related rules, including forest management and biodiversity conservation, where directly related to wood harvesting; (e) labour rights; (f) human rights protected under international law; (g) the principle of free, prior and informed consent (FPIC), including as set out in the UN Declaration on the Rights of Indigenous Peoples; and

14 The Guardian on 05.01.2023, https://fmos.link/20031 (last accessed: 23.05.2023).

15 European Environment Agency (EEA), Biodiversity and forest ecosystems in Europe, https://fmos.link/20032 (last accessed: 23.05.2023).

(h) tax, anti-corruption. This was due to the partnership approach set out in Recital 29 and Art. 30 EU-DR.

This approach is not limited to specific countries. On the contrary, Recital 28 provides that the Union shall facilitate and promote cooperation with developing countries, in particular the least developed countries (LDCs). Where possible and appropriate, technical and financial assistance shall be provided. The Commission has pledged 1 billion € for this purpose.[16]

The Union and the Member States shall work towards partnerships with producer countries, at their request, and address global challenges while meeting local needs and paying attention to the challenges faced by smallholders.

The Commission shall therefore strengthen its support and incentives to improve governance and land tenure, strengthen law enforcement and promote sustainable forest management. That is why „forest-related legislation, including forest management and biodiversity", is specifically mentioned. The improvement of governance and law enforcement will be supported by the consideration of tax and anti-corruption legislation, mentioned in Art. 2 no. 40 (h) EU-DR.

In addition, the emphasis on human rights protected by international law in Art. 2 para. 40 (f) EU-DR shows that the European Union should continue to work with international organisations and bodies.

In Art. 2 no. 40 (g) Eu-DR the principle of free, prior and informed consent („**FPIC**"), including as set out in the UN Declaration on the Rights of Indigenous Peoples was added. The concept of FPIC of indigenous peoples has been developed over the years following the approval of the International Labour Organisation Indigenous and Tribal Peoples Convention, 1989 (No 169). It is reflected in the UN Declaration on the Protection of the Rights of Indigenous Peoples. It aims to serve as a safeguard to ensure that potential impacts on indigenous peoples are taken into account in the decision-making process of projects that affect them.

Respecting these does not only protect biodiversity and mitigates climate change, but also addresses related public interest concerns. According to Recital 57, indigenous people play a dual role in combating climate change. First, they usually resist the occupation and deforestation of the lands they have inhabited for generations; and second, some indigenous communities consider it as their responsibility to protect the forests in order to mitigate climate change. They have traditional knowledge of ecological and medical value, and very often offer a model of sustainable use of forest resources. This can contribute to in-situ conservation, in line with the UN Convention on Biological Diversity („**CBD**").

In line with the Commission's Communication of 22 June 2022 entitled „The power of trade partnerships: working together for green and equitable economic growth", labour rights have been included in Art. 2 no. 40 (e) EU-DR. The Commission is stepping up its cooperation with trading partners to promote compliance with international labour and environmental standards.

3. Due Diligence Statement

As a third and last requirement, relevant commodities and relevant products must be covered by a due diligence statement. The statement reminds of the principles of CE marking obligations and declarations of conformity.[17]

In accordance with Art. 4 para. 2 EU-DR, the due diligence statement must be submitted via the information system referred to in Art. 33 EU-DR *before* the products concerned are placed on the market or exported. By submitting the due diligence statement to the competent authorities, the operator assumes responsibility for the compliance of the product in question with Art. 3 EU-DR. They guarantee that no or only a negligible risk has been identified. 'Negligible risk' is defined in Art. 2. no. 26 EU-DR. It briefly means that there is no reason to be concerned that the goods or products do not comply with Art. 3 (a) or (b). The information to be included in the declaration is listed in Annex II of the EU-DR. The three duties of due diligence are listed in Art. 8 para. 2 EU-DR.

In case the declaration is missing, Art. 4 para. 4 (c) EU-DR prohibits the placing on the market or the export of the product in question.

VII. Information System

For the purpose of the EU-DR, the Commission shall, in accordance with Art. 33 EU-DR, establish, no later than 20 days after the entry into force of the EU-DR, and shall maintain thereafter, an information system containing the due diligence statements made available pursuant to Art. 4 para. 2 and their reference numbers.

Further important information saved in this system is the Economic Operators Registration and Identification („**EORI**") number and geolocation information.

VIII. Obligations of Responsible Actors

The Deforestation Regulation places obligations on a range of actors. These obligations are further differentiated according to the size of the actors as well as to the risk level of the relevant products and commodities, and the country of origin.

1. The Different Actors of the EU-DR

There are a number of actors to whom the EU-DR is addressed. Firstly, the typical actor to whom the obligations are tailored to is the 'operator'. Art. 2 no. 15 defines the 'operator' as *„any natural or legal person who, in the course of a commercial activity, places relevant products on the market or exports them"*, whereby „placing on the market" in this context mean *„the first making available of a relevant commodity or relevant product on the Union market"*, Art. 2 no. 16 EU-DR.

A secondary addressee is the 'trader'. According to Art. 2 no. 17 EU-DR, 'trader' *„means any person in the supply chain other than the operator who, in the course of a commercial activity, makes relevant products available on the market"*.

16 EU Commission, Questions and answers on new rules for deforestation-free products, Brussels, 17.11.2021, p. 4: https://fmos.link/20033 (last accessed: 23.05.2023).

17 Ruttloff/Wagner/Hahn, CB 2022 S. 64 (68).

Operators and traders have the right to appoint an authorized representative in accordance with Art. 6 EU-DR, that is any natural or legal person established in the Union and who has received a written mandate to act on the operator's or trader's behalf regarding the specified tasks regarding obligations under the EU-DR, Art. 2 no. 22 EU-DR.

Throughout the obligations imposed, the EU-DR distinguishes between actors who are natural persons or „micro, small or medium sized enterprises" („**SME**"), Art. 2 no. 30 EU-DR, and regular („**non-SME**") actors. SME-actors regularly have to comply with a significantly reduced set of obligations. In addition, operators who are natural persons or micro-enterprises may, in accordance with Art. 6 para. 3 EU-DR, „*mandate the next operator or trader further down the supply chain that is not a natural person or microenterprise to act as an authorized representative.*"

Lastly, Art. 7 EU-DR stipulates that where an operator established in a country outside the EU first places products on the market, the first actor established in the EU who makes them available is *deemed* to be an operator under the EU-DR.

2. Scope of the Obligations that Responsible Actors face

a) Operators

Subject to the conditions of the addressee terms explained above, Art. 4–7 EU-DR set out the obligations of the different actors. The general regime of obligations, which amounts to the observance of due diligence in relation to the prohibition of products produced with deforestation according to Art. 3 EU-DR are set out in Art. 8 EU-DR and concretized in Art. 9–12 EU-DR.

According to Art. 4 EU-DR, operators as the actors on whom the EU-DR focuses „*shall exercise due diligence in accordance with Art. 8 before placing relevant products on the market or exporting them, in order to prove that the relevant products comply with Art. 3.*"

Before placing products on the market, a due diligence statement must be submitted, and made available to the authorities, and a record of the statement must be kept for five years from the date of submission, Art. 4 paras. 2, 3 EU-DR, thereby assuming responsibility for the products' compliance with the prohibition of Art. 3, 4 para. 3 EU-DR.

Furthermore, operators are prohibited from placing products on the market that do not comply with Art. 3 EU-DR, if the due diligence has revealed a relevant risk of non-compliance or if the due diligence requirements have not been fulfilled, Art. 4 para. 4 EU-DR.

In order to assure that the authorities as well as other operators or traders have access to the information necessary to fulfill their duties, Art. 4 para. 5, 7 EU-DR imposes information obligations on the competent authorities as well as on operators and traders to whom the operators have supplied the product. Firstly, if they receive relevant information indicating that a product is non-compliant. Secondly, all relevant information to enable their downstream supply chain to demonstrate that due diligence has been exercised and that no or a negligible risk of non-compliance has been found.

Of particular practical relevance in this regard is the need to indicate the reference number of the due diligence statements as well as the possibility of complying by referring to a due diligence statement already submitted for a relevant product or parts thereof, Art. 4 para. 9 EU-DR. However, this does not release the operator from the responsibility of compliance of the relevant product when placing it on the market. According to Art. 4 para. 9 EU-DR, it only simplifies the formal process of proving that due diligence has been carried out.

Art. 4 para. 8 EU-DR deviates from this extensive regime of obligations with regard to SME operators by stipulating that they do not have to carry out due diligence for relevant products contained in or made from relevant products that have already been subject to due diligence pursuant to Art. 4 para. 1. It rather allows them to simply provide the statement reference number to the authorities. This will significantly reduce the burden on SME operators, as they willy only have to comply with Art. 4 para. 1 EU-DR if they themselves are operators making commodities available on the EU-market or other parts of products that have not yet been subject to due diligence.

If an operator who is a natural person or micro-enterprise has appointed an authorized representative in accordance with Art. 4 para. 3 EU-DR, the representative shall submit the due diligence statement according to Art. 4 para. 2 EU-DR on behalf of that operator. However, this does not mean that the first operator is not responsible for ensuring that the product in question complies with Art. 3 EU-DR, but must also provide the representative with all necessary information for the exercise of due diligence and compliance.

b) Traders

Even though traders are not the first to make relevant products available on the market, like operators, the legislator considered that they have „a significant influence on supply chains and playing an important role in ensuring that supply chains are deforestation-free", Recital 53. Therefore, Art. 5 EU-DR stipulates that non-SME traders are to be regarded as non-SME operators, and are therefore in parallel subject to Art. 3, 4, 6, 8–13, 16 paras. 8–11 and 18 EU-DR with regard to the relevant commodities and products.

On the other hand, SME traders are also subject to reduced responsibilities under Art. 5 paras. 2–6 EU-DR: They shall only make products available if they have the information required under Art. 3 EU-DR and they must collect and keep for five years certain information on their direct up- and downstream supply chain, Art. 5 paras. 3, 4 EU-DR. Furthermore, they must inform the competent authorities and the traders to whom they supplied the relevant product, if they obtain information suggesting non-compliance, Art. 5 para. 5 EU-DR, and provide all necessary assistance to the authorities to facilitate the performance of checks pursuant to Art. 18 and 19 EU-DR in accordance with Art. 5 para. 6 EU-DR.

This shows a significant difference in the importance and influence attributed to operators and traders, as although SME operators have reduced obligations, they still have to comply with due diligence requirements, in contrast to SME traders, who do not themselves have any direct individual responsibility under the EU-DR.

3. Content of the Obligations that Addressees face

The obligations of operators and traders as laid out above can be divided into the obligation not to provide products that do not comply with the prohibition of Art. 3 and exercising due diligence.

a) Establishment and Maintenance of Due Diligence Systems, Reporting and Record Keeping

Recital 49 states that „*On the basis of a systemic approach, operators should take the appropriate steps in order to ensure that the relevant products that they intend to place on the market comply with the deforestation-free and legality requirements of this Regulation. To that end, operators should establish and implement due diligence systems. Those due diligence systems should include three elements, namely information requirements, risk assessment and risk mitigation measures, complemented by reporting obligations.*"

In order to exercise due diligence in accordance with Art. 8 EU-DR, operators are required to establish and maintain a due diligence system as defined in Art. 12 para. 1. This stipulates obligations to review and, if necessary, update and to keep records of the updates made.

Non-SME operators must report publicly on their due diligence system as widely as possible on an annual basis. These duties can be fulfilled while reporting under other due diligence regimes established by EU legislation, Art. 12 para. 3 EU-DR. The content of these public reports are laid down in Art. 12 para. 4 EU-DR. Like other information, these reports must be kept for five years and made available to the competent authorities upon request, Art. 12 para. 5 EU-DR.

b) Due Diligence

Art. 8–11 EU-DR lay out the content of these due diligence obligations. Art. 8 para. 1 EU-DR first generally stipulates that „*operators shall exercise due diligence with regard to all relevant products supplied by each particular supplier.*" In accordance with Art. 8 para. 2 EU-DR, this shall include „*(a) the collection of information, data and documents needed to fulfil the requirements set out in Article 9; (b) risk assessment measures as referred to in Article 10; (c) risk mitigation measures as referred to in Article 11.*" These Articles contain detailed requirements for a due diligence system to be set up by operators.

aa) Information Requirements

Pursuant to Art. 9 para. 1 EU-DR, operators shall collect information, documents and data which demonstrate that the relevant product complies with Art. 3 EU-DR. To this end they must collect, organize and keep for five years the information required, with evidence, for each relevant product.

These include (a) description, trade name and type of the product, (b) the quantity, (c) the country of production and, where relevant, which part of it. Of particular note is (d) the geolocation of all plots of land on which the commodities contained or used were produced, and the date/time range of production. Recital 49 states that „*those geolocation coordinates that rely on timing, positioning and/or Earth observation could make use of space data and services delivered under the Union's Space programme (EGNOS/Galileo and Copernicus).*" As a consequence of plots of land used for production being linked to deforestation or forest degradation, any relevant commodities or products from those plots are non-compliant with Art. 3 EU-DR. As already stated for SME traders in Art. 5 paras. 3, 4 EU-DR, operators must also retain information (name, address, E-Mail address) of their suppliers and customers, (e) and (f). Finally, operators must keep „*adequately conclusive and verifiable information*" that the relevant products are deforestation-free and have been produced in accordance with the relevant legislation of the country of production, including in particular any arrangement conferring the right to use the land for production, (g) and (h).

At the moment, it is still unclear, what satisfies the requirements of „*adequately conclusive and verifiable information*"; the difficulty of determining the necessary level of information due to this indeterminate legal term will certainly be one of the main problems to be solved in the application of Art. 9 EU-DR. It will have to be further interpreted by the authorities and the courts when applying the EU-DR.

According to Art. 9 para. 2 EU-DR the competent authorities may request access to the information, documents and data collected in accordance with Art. 9 EU-DR.

bb) Risk Assessment

Based on the obligation of Art. 9 EU-DR to collect information, Art. 10 para. 1 EU-DR states that „*on the basis of that information and documentation, the operators shall carry out a risk assessment to establish whether there is a risk that the relevant products intended to be placed on the market or exported are non-compliant. Operators shall not place the relevant products on the market or export them, except where the risk assessment reveals no or only a negligible risk that the relevant products are non-compliant.*"

Subsequently, Art. 10 para. 2 EU-DR lists a number of criteria that are to be taken into account in the risk assessment. These include the following: the risk associated with the country of production or parts of it according to Art. 29 (a), the presence of forests (b), the presence of indigenous people and consultation and cooperation in good faith with them, as well as their claims to an area (c, d, e), the prevalence of deforestation/forest degradation as well as the concerns regarding e.g. corruption, human rights issues in the country of origin (f, h) the complexity of the supply chain and the risk of circumvention of the EU-DR (i, j), the source and reliability of the information (g), and substantiated concerns raised under Art. 31 EU-DR (s. below).

Operators must document and review their risk assessment at least once a year and, in parallel with Art. 10 para. 2 EU-DR, make it available to the competent authorities on request. Pursuant to Art. 10 para. 4 EU-DR, they must also be able to demonstrate that their risk assessment process is functioning in accordance with criteria set out in Art. 10 para. 2 EU-DR.

cc) Risk Mitigation

If, following the risk assessment referred to in Art. 10 EU-DR, the risk of non-compliance of the relevant products is found to be other than zero or negligible, the operator must take risk mitigation measures. These must be taken before placing the product on the

market or exporting them, Art. 11 para. 1 EU-DR. The measures must be adequate to reduce the risk of non-compliance with Art. 3 EU-DR to zero or a negligible risk., In accordance with Art. 11 para. 1 EU-DR, the measures may be, inter alia: *„(a) requiring additional information, data or documents; (b) carrying out independent surveys or audits; (c) taking other measures pertaining to information requirements set out in Article 9.“* Additionally, measures *„may also include supporting compliance with this Regulation by that operator's suppliers, in particular smallholders, through capacity building and investments.“* This is specifically mentioned as an option, since, as it can be seen from Recital 50, poverty is considered to be a root cause of deforestation. Therefore, e.g., paying a living wage to smallholder farmers, would help to reduce deforestation and forest degradation.

Operators must put in place adequate and proportionate policies, controls or procedures which, for non-SME operators, must include model risk management practices, reporting, record-keeping, internal control and compliance management, and the appointment of a compliance officer (a), in addition to (b) an independent audit function to review the internal mechanisms referred to in (a). Art. 11 para. 3 EU-DR, in conjunction with Art. 10 para. 4 EU-DR, establishes documentation and reporting requirements regarding the risk mitigation system and processes.

c) Modification of the Due Diligence Regime; Country Benchmarking System

As explained above, the EU-DR imposes different obligations depending on whether the addressee is an operator or trader, a SME or non-SME, a natural person or micro-enterprise. In addition, it further modifies the level of due diligence required of the operator by the country of production.

The aim of this „country benchmarking system“ is to make it easier for operators and authorities to fulfil their obligations, as well as, according to Recital 68, to provide *„an incentive for producer countries to increase the sustainability of their agricultural production systems and reduce their deforestation impact“*,. This is supposed to *„help to make supply chains more transparent and sustainable.“*, Recital 68.

aa) Country Benchmarking System, Assessment of Countries

The EU-DR, through its Art. 29, establishes a three-tier system that classifies Member States and third countries or parts thereof into low risk, standard-risk and high-risk countries. A high risk country, according to Art. 29 para. 1 (a) EU-DR is a country for which the assessment under Art. 29 para. 3 EU-DR indicates a high risk of deforestation or forest degradation (Art. 3 (a)), (b) low risk, where the violation of Art. 3 (a) is exceptional, and (c) standard-risk, if the country cannot be clearly assigned to either the first or the second category.

It is the Commission's task to carry out an objective and transparent assessment, based on the primary criteria of the *„(a) rate of deforestation and forest degradation; (b) rate of expansion of agriculture land for relevant commodities; (c) production trends of relevant commodities and of relevant products.“*, Art. 29 para. 3 EU-DR.

Furthermore, *„(a) information submitted by the country concerned, regional authorities concerned, operators, NGOs and third parties, including indigenous peoples, local communities and civil society organisations“*, agreements and other instruments between the country and the EU/member states as well as laws of the country addressing deforestation and forest degradation, if the country makes relevant data transparently available, may also be taken into account among other options, Art. 29 para. 4 EU-DR.

In order to ensure the transparency of the classification, the Commission should, according to Recital 68, make publicly available the data used for the benchmarking, the reasons for changes and the country's response. According to Art. 29 para. 5 EU-DR, the Commission shall engage in a dialogue with countries classified as high risk. Art. 29 para. 6–8 EU-DR obliges the Commission to formally notify the country and the competent authority of the classification decision, while giving them sufficient time to reply.

When the EU-DR will enter into force, all countries will be assigned a standard-level risk. Afterwards, the Commission will classify the countries no later than 18 months thereafter and will review and update it as necessary, Art. 29 para. 2 EU-DR.

bb) Differentiation of Obligations

Following the categorization into the three-tier system, Art. 13 EU-DR modifies the standard of due diligence, in order to reduce the cost and administrative burden of compliance, Recital 67.

Therefore, according to Art. 13 para. 1 EU-DR, if an operator has ensured that all relevant commodities and products have been produced in low-risk countries, it only has to fulfil the obligations of Art. 9 EU-DR and is exempted from those of Art. 10 and 11 EU-DR. To this end, they are still obliged to assess the complexity of the supply chain and the risk of circumvention of the EU-DR or mixing with products from unknown or high risk/standard-risk countries or parts thereof, Art. 13 para. 1 EU-DR. They must also provide the relevant information to the authorities upon request.

If relevant information indicates that a risk becomes available, e.g. through a well-founded substantiated concern (Art. 31 EU-DR), the operator must fulfil the obligations of Art. 10 and 11 EU-DR again and directly inform the authorities, Art. 13 para. 2 EU-DR.

IX. Member States and Competent Authorities' Powers and Obligations

1. Competent Authorities

The only competent authorities are those designated by the Member States in accordance with Art. 14 para. 1 EU-DR. There is no limit with regard to the number of designated authorities. Member States shall ensure that the competent authorities have adequate powers, functional independence and the resources to fulfil their obligations. No later than six months after the date of entry into force of the EU-DR, Member States shall inform the Commission of the names, addresses and contact details of the competent authorities. The Commission shall regularly update the list.

2. General tasks

a) The Member State and it's Authorities

Irrespective of the obligations of the authorities, they have two general tasks, as set out in Art. 15 para. 1 EU-DR, which aim at a successful implementation of the EU-DR.

First, they shall provide technical assistance and guidance to operators. They shall take into account the situation of SMEs, including micro-enterprises, and natural persons, in order to facilitate compliance with this Regulation, including with regard to the conversion of data from relevant systems, in order to identify the geolocation in the information system as referred to in Article 33.

Second, Member States shall facilitate the exchange and dissemination of relevant information, in particular to assist operators in the risk assessment referred to in Article 10. They may publish best practices on the implementation of the EU-DR. Therefore, operators and distributors should pay attention in the future when a best practice is published.

Furthermore, the competent authorities and the Commission shall continuously monitor and exchange information on any significant change in the pattern of trade of relevant products that may lead to the circumvention of this Regulation.

b) EU Commission

The Eu Commission shall also continuously monitor and exchange information on any significant change in the pattern of trade of relevant products that may lead to the circumvention of the EU-DR.

From a practical point of view, it is likely to be important that the Commission will issue relevant guidelines. Thus, the Commission shall issue clear and easily understandable guidelines for the compliance of operators and traders, in particular SMEs, in order to facilitate compliance with the EU-DR. For example, Recital 36 mandates the development of a guideline to clarify the interpretation of the term 'agricultural use', particularly in relation to the conversion of forest into land used for non-agricultural purposes.

Drawing up guidelines could also be considered to enable an effective implementation of the EU-DR, even in the case of overlaps with other EU legislation.

3. General Obligations

The competent authorities have the obligation to carry out checks within their territory to determine whether the relevant products which the operator or trader has placed or intends to place on the market, has made available or intends to make available on the market or has exported or intends to export comply with the EU-DR, in accordance with Art. 16 para. 1 EU-DR. The checks shall be carried out on the basis of an annual plan and at regular intervals, in accordance with Recital 70.

Of particular importance is the risk-based approach of the EU-DR. Risk criteria shall be identified in compliance with Art. 16 para. 3 EU-DR, based on an analysis of risks of non-compliance with the EU-DR. This shall take into account in particular the relevant commodities, the complexity and the length of the supply chains, including whether mixing of relevant products is involved, and the stage of processing of the relevant product, whether the plots of land concerned are adjacent to forests, the allocation of risk to countries or parts thereof in accordance with Article 29, paying particular attention to the situation of countries or parts thereof classified as high risk, the history of non-compliance with the EU-DR by operators or traders, the risks of circumvention, and any other relevant information.

A distinction shall be made between the annual inspections of those products which are or have been manufactured from relevant raw materials in a country of production or parts thereof classified as low or standard risk and those which originate from a high-risk country according to Art. 29 EU-DR. Fixed percentages of checks are prescribed. For low and standard risk, these depend on the number of operators who have placed or made available on the market or exported relevant products containing or manufactured using relevant commodities produced in a country of production or part thereof classified. For low-risk countries, the annual checks shall cover at least 1% of these operators, Art. 16 para. 10 EU-DR. For standard risk countries it must be 3% of the operators, Art. 16 para. 8 EU-DR.

For high-risk countries, at least 9% of the operators shall be checked. However, there is another important component here. In addition, also 9% of the quantity of each of the relevant products that contain or have been made using relevant commodities produced in a country or parts thereof must also be checked in accordance with Art. 16 para. 9 EU-DR. The quantified objectives of checks to be carried out by the competent authorities shall be met separately for each of the relevant commodities, they shall furthermore be calculated on the basis of the total number of operators who have placed or made available on the market or exported relevant products in the previous year and, where appropriate, on the basis of the quantity, Art. 16 para. 11 EU-DR. The Commission, when reviewing the Regulation in the future, is supposed to evaluate and identify appropriate quantified targets to ensure the enforcement in accordance with Recital 70.

It should be noted that operators shall only be considered as having been checked according to Art. 16 para 11 EU-DR if the competent authority has checked in accordance with Art. 18 para. 1 (a) and (b) EU-DR whether due diligence system is properly functioning in general and the obligations relating to the relevant products were verified.

4. Checks on Operators and Non-SME Traders

The EU-DR distinguishes between the control of operators and non-SME traders and the less extensive control of SME traders. In the case of operators and non-SME traders, the inspection generally includes the program of obligations set out in Art. 8 EU-DR. According to Art. 18 para. 1 (a) EU-DR, the proper functioning of the due diligence system shall be verified on the basis of documentation and records. This includes an examination of the risk assessment and risk mitigation procedures.

In addition, the obligations relating to the relevant products shall be fulfilled in compliance with Art. 18 para. 1 (b) EU-DR. This shall also be done by examining the documentation and records demonstrating that a specific relevant product which the operator has placed on the market, intends to place on the market or intends to export, or which the non-SME trader has

made available on the market or intends to make available on the market, complies with this Regulation, including, where appropriate, risk mitigation measures, and by examining the relevant due diligence declarations.

If the checks referred to in para. 1 have raised questions, the competent authority has four more far-reaching measures at its disposal under Art. 18 para. 2 EU-DR. The measures must only be appropriate. The competent authority may carry out an on-the-spot inspection of the relevant commodities or products in order to verify their conformity with the documentation used for exercising due diligence.

Besides, in the event of non-compliance of an operator or non-SME trader, the corrective measures taken in accordance with Art. 24 EU-DR may be verified.

The competent authority may also use all appropriate technical and scientific means to determine the exact place of production of the species, relevant commodity or relevant product. This may include anatomical, chemical or DNA analysis.

The competent authority may also use any adequate technical and scientific means to determine whether the relevant products are deforestation-free, including earth observation data, such as from the Copernicus program and tools, or from other publicly or privately available relevant sources. This is in the context of the establishment by the Commission of an EU Observatory, as set out in Recital 31 („**EU Observatory**"). The EU Observatory will monitor deforestation, forest degradation, changes in global forest cover and related drivers. It will contribute to the development of an early warning system. The system shall assist competent authorities, operators, traders and other relevant stakeholders in the early identification and reporting of possible deforestation and forest degradation activities, to avoid the need for such actions.

Finally, the competent authority may even carry out spot checks, including field audits, where appropriate in third countries, provided that those third countries agree, in cooperation with the administrative authorities of those third countries.

5. Checks on SME Traders

For the check on SME traders, the competent authorities shall, in accordance with Art. 19 para. 1 EU-DR, examine the documentation and records demonstrating compliance with Article 5 paras. 2, 3 and 4 EU-DR. These document and records shall provide information on the supply chain and might give rise to further research concerning the operators or traders to whom they have supplied the relevant products. Where these examinations have raised questions, checks on SME traders may also include, where appropriate, spot checks, including field audits, Art. 19 para. 2 EU-DR.

6. Immediate Action

In situations where relevant products present a high risk of non-compliance with Art. 3 EU-DR, the authorities have two options for immediate action at their disposal. They may either take immediate interim measures in accordance with Art. 23 EU-DR to suspend the placing or making available of those relevant products on the market in accordance with Art. 17 para. 2 (a) EU-DR or, in the case of relevant products entering or leaving the market, they can require the customs authorities to suspend the release for free circulation or export of those relevant products under Art. 26 para. 7 EU-DR.

The suspensions shall end within three working days or within 72 hours in the case of perishable relevant products, starting from the moment when the high risk of non-compliance is identified in the information system referred to in Art. 33 EU-DR. However, if the competent authorities conclude, on the basis of the results of the checks carried out within that period, that they require additional time to determine whether the relevant products comply with Article 3, they shall extend the period of suspension, by additional periods of three working days, by taking additional interim measures in accordance with Art. 23 EU-DR or, in the case of relevant products entering or leaving the market, by notifying the customs authorities of the need to maintain the suspension in accordance with Art. 26 para. 7 EU-DR.

7. Cooperation between Authorities and Powers of Customs Authorities

Taking into account the international nature of deforestation and forest degradation and related trade, Art. 21 EU-DR provides that the competent authorities shall cooperate with each other, with customs authorities of the Member States, with the Commission and with the administrative authorities of third countries. Good cooperation with third countries is essential, particularly when carrying out field audits. This cooperation shall be supported by the information system referred to in Art. 33 EU-DR and by administrative arrangements with the Commission concerning the transmission of information on investigations and the conduct of investigations.

Not only the designated authorities according to Art. 14 EU-DR are entrusted with the enforcement of the EU-DR, but also the custom authorities. As specified by Art. 2 no. 33 EU-DR, 'customs authorities' are defined by Art. 5 para. 1 of Regulation (EU) No 952/2013.[18] Art. 26 EU-DR entrusts them with the task of carrying out controls on the customs declarations lodged in respect of relevant products entering or leaving the market in accordance with Art. 46[19] and 48[20] of Regulation (EU) No 952/2013. it is important to note that Chapter VII of Regulation (EU) 2019/1020 on market surveillance and compliance of products does not apply to controls on relevant products en-

18 Art. 5 para. 1 of Regulation (EU) 952/2013 laying down the Union Customs Code: „customs authorities" means „the customs administrations of the Member States responsible for applying the customs legislation and any other authorities empowered under national law to apply certain customs legislation".

19 Article 46 of Regulation (EU) No 952/2013: „Risk management and customs controls 1. The customs authorities may carry out any customs controls they deem necessary. [...]"

20 Article 48 of Regulation (EU) No 952/2013: „Post-release control: For the purpose of customs controls, the customs authorities may verify the accuracy and completeness of the information given in a customs declaration, temporary storage declaration, entry summary declaration, exit summary declaration, re-export declaration or re-export notification, and the existence, authenticity, accuracy and validity of any supporting document and may examine the accounts of the declarant and other records relating to the operations in respect of the goods in question or to prior or subsequent commercial operations involving those goods after having released them. Those authorities may also examine such goods and/or take samples where it is still possible for them to do so. [...]"

tering the market in so far as the application and enforcement of this Regulation is concerned.

A regulation giving the custom authorities significant powers is Art. 29 para. 9 EU-DR, according to which the competent authorities shall notify the customs authorities accordingly and the customs authorities shall not allow the release for free circulation or export of that relevant product, if they conclude that a relevant product entering or leaving the market is non-compliant.

X. Consequences of Non-Compliance with the Obligations

1. Interim Measures

When potential non-compliance with the EU-DR has been detected on the basis of the examination of evidence or other relevant information, including information exchanged in accordance with Art. 21 EU-DR or substantiated concerns submitted under Art. 31 EU-DR, or on the checks referred to in Art. 18 and 19 EU-DR or on the identification of risks by the information system referred to in Art. 33 EU-DR, the competent authorities shall be able to take immediate interim measures.

These measures shall include the seizure of the relevant commodities or relevant products, or the suspension of the placing or making available on the market or the export of the relevant commodities or relevant products.

2. Measures in case of Non-Compliance

Art. 24 EU-DR addresses competent authorities as well as operators and traders. First, where competent authorities establish that an operator or trader has not complied with the EU-DR or that a relevant product placed or made available on the market or exported is non-compliant, *„they shall without delay require the operator or trader to take appropriate and proportionate corrective action to bring the non-compliance to an end within a specified and reasonable period of time.“* This request shall be without prejudice to the imposition of a penalty under Art. 25 EU-DR. One of the actual corrective measures must then be taken by the operator or trader in line with Art. 24 para. 2 EU-DR. There are four possible procedures. The mildest is the correction of any formal non-compliance, (a), in particular with the requirements of Chapter 2. In advance, they could prevent the relevant product from being placed or made available on the market or exported, (b). If it is too late for that, they shall withdraw or recall the relevant product immediately, (c). The final corrective action is *„donating the relevant product for charitable or public interest purposes or, if this is not possible, disposing of it in accordance with EU waste management legislation“*, (d). In the Commission's proposal of 17 November 2021, the corrective action „destroying the relevant commodity or product“ was foreseen without being subsidiary to the donation.[21] The replacement by disposing and the reference to EU waste management legislation is more than welcome from a sustainability perspective.

However, the violation is not fully addressed with the correction according to Art. 19 para. 2 EU-DR. The operator or trader shall still be required to address any shortcomings in the due diligence system in order to prevent the risk of further non-compliance with the EU-DR, Art. 24 para. 3 EU-DR.

If the operator or trader fails to take such corrective action within the time limit set by the competent authority or where non-compliance as referred to persists after that time limit, the competent authorities shall ensure application of the required corrective measure referred to in para. 2 by all means available to them under the law of the Member State concerned, as referred to in Art. 24 para. 4 EU-DR.

3. Penalties, Art. 25 EU-DR

The penalties applicable to infringements of the EU-DR by operators and traders are set at a national level. However, the EU-DR prescribes specific designations of consequences and a method of calculation.

The penalties will impose a financial burden on companies, which will become even more important as the sanctions for repeat offenders will be gradually increased. In addition, the fines will be in proportion to the environmental damage and the value of the relevant commodities or relevant products concerned, calculated in such way as to ensure that they effectively deprive those responsible of the economic benefits derived from their infringements.

In the case of a legal person, according to Art. 25 para. 2 (a) EU-DR the maximum amount of such a fine shall be at least 4% of the operator's or trader's total annual Union-wide turnover in the financial year preceding the fining decision, calculated in accordance with the method for calculating the aggregate turnover of undertakings set out in Art. 5 para. 1 of Council Regulation (EC) 139/20042, and shall be increased, where necessary, to exceed the potential economic benefit gained. This is particularly important in order to discourage large operators and traders, thus non-SMEs, from committing infringements of the EU-DR.[22]

The sanctions go further and now also include exclusion from public contracts for a maximum of twelve months as well as exclusion from public funding, Art. 25 para. 2 (d) EU-DR.[23]

Furthermore, pursuant to Recital 75 and Art. 25 para. 3 EU-DR, in order to increase the accountability of operators and traders, the Commission should publish on its website the list of final judgments against legal persons for infringements of this Regulation and the penalties imposed on them. This information may also help competent authorities, other operators and traders to carry out their risk assessments and increase the awareness of consumers and civil society with regard to operators and traders infringing the EU-DR.

XI. Substantiated Concerns

Control of compliance with the EU-DR is not reserved to the state alone. Rather, third parties with a sufficient interest shall have access to administrative or judicial procedures to review the legality of the decisions, acts or omissions of the competent authorities under the EU-DR. The only requirement is that the third party has submitted a substantiated concern in accordance with Article 31.

21 EU Commission No 995/2010 from 17.11.2021, s.u. Fn. 3, p. 47.
22 EU Commission No 995/2010 from 17.11.2021, s.u. Fn. 3, p. 17.
23 Stöbener de Mora, EuZW 2023 S. 203 (204).

Third parties can be any natural or legal person having a sufficient interest, as determined in accordance with the existing national systems of legal remedies, including where such persons meet the criteria, if any, laid down in the national law, including persons who have submitted a substantiated concern in accordance with Article 31. In Germany, for example, nature conservation associations could be recognised as having a sufficient interest under Sec. 3 of the Environmental Appeals Act.

Art. 31 EU-DR states that natural or legal persons may submit substantiated concerns to the competent authorities if they consider that one or more operators or traders are not complying with the Regulation. The definition in Art. 2 no. 31 EU-DR is further elaborated as a duly substantiated allegation based on objective and verifiable information regarding non-compliance with this Regulation which could require intervention by the competent authorities.

In line with Recital 70, these substantiated concerns should provide a basis for the competent authorities to carry out regular checks on operators and traders to verify that they are effectively complying with the obligations laid down in this Regulation.

Thus, Art. 16 para. 12 EU-DR provides that „*without prejudice to the ex-ante controls planned in accordance with paragraph 5 of this Article, competent authorities shall carry out controls in accordance with paragraph 1 of this Article when they obtain or are informed of relevant information, including on the basis of substantiated concerns raised by third parties under Article 31, concerning a possible infringement of this Regulation.*" Substantiated concerns can also be a trigger for the authority to take interim measures as per Art. 23 EU-DR.

The existence of substantiated concerns is not only relevant for the authorities. Before operators are allowed to place a relevant product on the market, they must already take into account substantiated concerns submitted under Art. 31 EU-DR during the risk assessment, Art. 10 para. l EU-DR.

According to Art. 4 para. 4 EU-DR, operators who obtain or are made aware of relevant new information, including substantiated concerns indicating that a relevant product that they have placed on the market is at risk of not complying with the EU-DR, shall immediately inform the competent authorities of the Member States in which they have placed the relevant product on the market, as well as traders to whom they supplied the relevant product. In the case of exports, the operators shall inform the competent authority of the Member State which is the country of production.

If the operator becomes aware of any relevant information, including substantiated concerns submitted under Art. 31 EU-DR indicating a risk that the relevant products do not comply with the EU-DR or that the EU-DR is being circumvented, the operator shall immediately communicate all relevant information to the competent authority. In addition, he shall fulfill all of the obligations laid down in Art. 10 and 11 EU-DR. He must therefore carry out the usual due diligence including the risk assessment (Art. 10 EU-DR) and the risk mitigation (Art. 11 EU-DR).

SME traders shall also provide information to the competent authorities of the Member States in which they have made the relevant product available on the market as well as traders to whom they have supplied the relevant product, if they obtain or are made aware of relevant new information, including substantiated concerns, that the relevant product is at risk of not complying with the EU-DR.

XII. Access to Justice

As Art. 32 EU-DR asserts, that „*any natural or legal person having a sufficient interest, [...] shall have access to administrative or judicial procedures to review the legality of the decisions, acts or failure to act of the competent authorities under this Regulation.*" The possibility to address justified concerns to the authorities does not exclude seeking legal protection by the courts, Art. 32 para. 1 EU-DR. Even so, national law which provides that all possible administrative redress procedures have to be exhausted are acceptable, Art. 32 para. 2 EU-DR. Recital 78 reiterates in this regard, that „*according to settled case law of the Court of Justice of the European Union, it is for the courts of the Member States to ensure judicial protection of a person's rights under Union law.*" In this regard „*Member States should ensure that the public, including natural or legal persons submitting substantiated concerns in accordance with this Regulation, has access to justice in line with [the Aarhus Convention].*"

XIII. Implementation Deadline

The EU-DR as a whole does not enter into force immediately upon its publication in the Official Journal of the European Union, but on the twentieth day following its publication, Art. 38 para. 1 EU-DR. However, subject to Art. 38 para. 3 EU-DR, Art. 3–13, 16–24, 26, 31 and 32 EU-DR, that is all articles concerning the prohibition and the obligations and powers of actors and authorities will only apply from 18 months after the entry into force of the EU-DR, in order to give the addressees of the EU-DR enough time to conform to their exigencies. Also, in accordance with Art. 38 para. 3 EU-DR the „grace period" for smaller enterprises is six months longer that the regular one according to Art. 38 para. 2 EU-DR, since „*for operators that by 31 December 2020 were established as micro-enterprises or small enterprises pursuant to Art. 3 para. 1 Directive 2013/34/EU*[24] *or Art. 3 para. 2 Directive 2013/34/EU*[25]*, respectively, the Articles referred to in paragraph 2 of this Article [38] shall apply [24 months after the entry into force of the EU-DR].*"

Furthermore, it should be noted that, pursuant to Art. 37 para. 1 EU-DR, the EU-DR will repeal the EU-TR with effect from the date of its application set out in Art. 38 para. 2 EU-DR, i.e. 18 months after the EU-DR's entry into force. However, according to Art. 37 para. 2 EU-DR, the EU-TR will remain valid for three more years after the date set out in Art. 38

24 Art. 3 para. 1 of the Directive 2013/34/EU: „In applying one or more of the options in Article 36, Member States shall define micro-undertakings as undertakings which on their balance sheet dates do not exceed the limits of at least two of the three following criteria: (a) balance sheet total: 350.000 €; (b) net turnover: 700.000 €; (c) average number of employees during the financial year: 10."

25 Art. 3 para. 2 of the Directive 2013/34/EU: „Small undertakings shall be undertakings which on their balance sheet dates do not exceed the limits of at least two of the three following criteria: (a) balance sheet total: 4 mio. €; (b) net turnover: 8 mio. €; (c) average number of employees during the financial year: 50. Member States may define thresholds exceeding the thresholds in points (a) and (b) of the first subparagraph. However, the thresholds shall not exceed 6 mio. € for the balance sheet total and 12 mio.€ for the net turnover."

para. 2 EU-DR, thus for a period of four and a half years after the EU-DR's entry into force, to timber and timber products as defined in Art. 2 (a) EU-TR which were produced before and placed on the market up to three years after the entry into force of the EU-DR. Timber and timber products as defined in Art. 2 (a) EU-TR which were produced before the EU-DR's entry into force but placed on the market from three years after the four-and-a-half-year threshold must comply with Art. 3 EU-DR, Art. 37 para. 3 EU-DR.

XIV. Conclusion and outlook

The EU Deforestation Regulation is a highly ambitious undertaking that significantly extends the responsibilities and obligations of economic actors in the EU market. They will have to set up a due diligence system and prepare to publicly report on these issues as well. As much is still unclear about how the EU-DR will be applied in practice, responsible actors under the EU-DR would be well advised to pay close attention to the Commission's guidelines and the best practices that will be published by the Member States' authorities.

Due to the additional effort and potential costs, the legislation has been much criticized by the regulated industries, for not including incentive mechanisms for farmers to produce sustainably in forest countries. Sustainable production tends to be more costly, and in order to brin small producers into the fold, financial incentives must be offered to switch to sustainable and deforestation-free production.[26]

This could lead to small farmers being pushed out of business or replaced by bigger conglomerates. Furthermore, producing countries had pointed out in advance that it would create hurdles for free trade and that it would impose extraterritorial application of EU law.[27]

On the other hand, NGOs have widely stated that the scope of the regulation is still not broad enough, and that it would be particularly desirable to include the financial sector, which is already a major contributor to deforestation.[28] Furthermore, the proposal does not yet provide a sufficient framework to ensure effective prosecution, including accessible ways of proving violations. The proposal limits the amount of fines to a maximum of 4% of the annual turnover of the economic operators and could be a relatively low deterrent, according to nature conservation organizations.

In this respect, it is likely that other ecosystems like other wooded land or other natural ecosystems such as grasslands or peatlands will be added, if the impact assessment shows this to be appropriate.[29] Additionally, other commodities like maize may be added as well.

Many aspects still have to be clarified by the authorities and the courts and will only become clearer as the EU-DR is applied and a more detailed understanding is developed.

In summary, there has been much debate on the EU-DR in advance, but only time will tell whether it will prove to be a valuable step towards the global protection of our natural resources and the mitigation of climate change, or simply a cumbersome addition to the paperwork that economic actors on the European Union market have to comply with.

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26 Brandt u.a. (Germanwatch e.V.): Assessing policy approaches to halt deforestation in EU agricultural supply chains, Feb. 2022, https://fmos.link/20034 (last accessed: 23.05.2023).

27 Stöbener de Mora, EuZW 2023 S. 203 (204).

28 According to Global Witness (Global Witness 2021), financial institutions based in EU countries and the United Kingdom generated higher revenues from investments in the largest deforestation operations than either the United States or China. International investment policies (specifically with relation to commodity production and trade) are causing deforestation pressure as well, often without receiving much attention. Global Canopy shows that 63% of the 150 assessed financial companies do not have any deforestation policies and 81% (122/150) have not published a deforestation policy covering all four high-risk commodity groups, https://fmos.link/20035 (last accessed: 23.05.2023).

29 Then, the following ecosystems would be included according to Stockholm Environment Institute, Trase's research: three quarters of the Cerrado (79 mio. ha) and a third of the Chaco (32 mio. ha) unprotected. It would also exclude 76% of the Pantanal (9.2 mio. ha) and 74% of the Pampa (6.6 mio. ha), EU urged to widen deforestation law: https://fmos.link/20036 (last accessed: 23.05.2023).